Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [x] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [x] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [ ] Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X		14X		18X		22X		26X		30X	
	12X		16X		20X		24X	✓	28X		32X

DIARY FOR OCTOBER.

1. Monday .... Last day for notice of Examination in Chancery, Hamilton and Brockville. County Court and Surrogate Court Terms begin.
2. Tuesday........ Chancery Examination Term, London and Belleville, begins.
6. Saturday........ County Court and Surrogate Court Term ends.
7. SUNDAY....... *18th Sunday after Trinity.*
8. Monday........ Toronto Fall Assizes. Last day for notice of Examination in Chancery, Barrie and Ottawa.
9. Tuesday........ Chancery Examination Term, Brantford and Kingston, begins
14. SUNDAY...... *19th Sunday after Trinity.*
15. Monday........ Last day for notice of Examin in Chancery, Barrie & Ottawa.
16. Tuesday........ Chancery Examination Term, Hamilton and Brockville, begins.
21. SUNDAY...... *20th Sunday after Trinity.*
22. Monday...... Last day for notice of Examination in Chancery, Goderich & Cornwall.
23. Tuesday........ Chancery Examination Term, Barrie and Ottawa, commences.
28. SUNDAY...... *21st Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

OCTOBER, 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.*

BILLS OF SALE, &c.

Description of Chattels intended to be conveyed, &c.

As our law now stands, every sale, as well as every mortgage of goods and chattels, not accompanied by an immediate delivery and an actual and continued change of possession of the goods and chattels sold or mortgaged, must be in writing; and that writing is required to be a conveyance, under the provisions of the act entituled "An Act respecting mortgages and sales of personal property." (Consol. Stat. U. C. cap. 45, p. 452.)

Every conveyance under the act, whether for the sale or the mortgage of goods and chattels, is required "to contain such full and sufficient description thereof, that the same may be thereby readily and easily known and distinguished." (Sec. 6.) Each word of this clause is pregnant with meaning, and yet it is most difficult in practice to give effect to the meaning intended.

It is not only necessary that the description should be *full* and *sufficient*, but it must be *such* a full and sufficient description that the goods and chattels intended to be conveyed may be *thereby* readily and easily *known* and distinguished.

Had the requirement been merely that the description should be "full," much difficulty would have been experienced in giving a proper definition of the word as applied to the description of goods and chattels in a written document; but when the description must not only be full, but so full that the goods and chattels may be thereby readily and easily known and distinguished, the difficulty is increased. The idea conveyed in the word "full," is generally that of quantity; but in order that the particular quantity of articles may be *known* and *distinguished*, we must have not simply quantity but quality, and not simply quantity and quality but in many cases nature and value in addition.

Let us take an example. Suppose goods and chattels to be described as "10,000 feet of lumber." Certainly we have quantity, but in what manner is this quantity of lumlumber to be readily ("easily" we take to mean the same thing, and therefore drop it) known and distinguished? How can we distinguish it from other lumber without describing its quality?

Inasmuch as the *nature* of the commodity, namely, lumber is described, we are able to distinguish it from all other commodities of a different kind, but the question arises how are we to distinguish it from all other commodities of a like kind? *Id certum est quod certum reddi potest.* If a reference to locality were in the description some of the difficulty would disappear. Suppose the description to be "10,000 feet of white lumber in the lumber yard of C. D., on the north side of King Street, in the City of Toronto." In this case any one in doubt as to the actual lumber conveyed could by an examination of the article itself the better enable himself to know it and so distinguish it from other lumber of a like kind. Even if this were done however there would be still uncertainty. It is quite as difficult to distinguish one plank from another as to distinguish one log from another even by personal inspection. We are driven to the conclusion that no positive rule can be laid down as to the correct interpretation of the enactment in question. All that can be done is in every instance to describe the articles intended to be conveyed

with the greatest possible certainty, and this cannot better be done than by a use of *locality, nature, value, quantity* and *quality*.

Let us now bring under review such decisions of the courts as tend to aid in the construction of the enactment which we have made the subject of these remarks.

1.—"All and singular his (the assignor's) stock-in-trade, wares, merchandize, goods, chattels, and effects whatsoever belonging to him, and *now being in and about his warehouse on Yonge Street and Wellington Street in the City of Toronto*, and all his household furniture, goods, chattels and effects whatsoever, (the personal apparel of himself and family excepted), *now being in and about his dwelling house and premises on Wellington Street aforesaid*, and all bonds, bills, and securities for money, leases for years, Provincial Insurance stock, Northern Railroad stock, mortgages, trust *and other property, personal estate and effects whatsoever and wheresoever belonging, due or owing to him the said party of the first part.*" (*Harris et al* v. *The Commercial Bank*, 16 U. C. Q. B., 437). As to this description, it was held, that the stock-in-trade and household furniture showing locality was sufficient, but that nothing passed under the words "and all other property, personal estate and effects whatsoever and wheresoever." In delivering judgment, the Chief Justice of Upper Canada said:

"Does it, in the first place, contain a sufficiently particular description of the goods, as required by the fourth clause of the act? I cannot say that, if any one were at any time to see in another place any of the goods which at the date of this assignment were 'in and about McDonell's warehouse, in Yonge street and Wellington street,' he would be able readily and easily to distinguish them from other goods, or from the goods of other parties, so as to know, by means of the description given in this deed, that the particular goods in question had been transferred by this assignment. But at the same time, I confess I do not find it easy to understand how a stock of goods in a shop, or furniture in a dwelling house, are to be otherwise described than as they have been in this case, unless by taking a minute list of every article; and even that would not enable us to distinguish such articles from others of the same kind, unless there happened to be something peculiar about the thing by which it could be identified, as you might enable people to identify living animals, by age, and size, and peculiar marks.

"I think we must hold that the goods in and about the particular warehouse, and the furniture, &c., in and about the dwelling house on Wellington street, are sufficiently described, so as to admit them to pass.

"I do not take the fourth clause to require a particular description of bonds, bills and accounts, or of railway stocks, and things of that kind; but as to that clause in the deed which professes to assign 'all other personal estate and effects whatsoever and wheresoever' belonging to the grantor, I do not consider that any goods and chattels can pass under that form of words, for otherwise we should be giving no force or meaning whatever to the fourth clause of the act."

2.—"All and singular the stock-in-trade, wares, merchandize, household goods, furniture, (not saying *where*), implements, chattels, goods, debts, sum and sums of money, books of account, notes, and other things due and owing to him Wilson, and all his personal estate whatsoever and wheresoever, and all his estate and interest therein." (*Howell* v. *McFarlane*, 16 U. C., Q. B., 469). As to this description the Court, though unnecessary to determine the point, expressed a strong opinion against its sufficiency. Nothing could be more general. It will be observed that it wants even the redeeming element of *locality*.

3.—"All and singular the stock-in-trade of the said R. D. Wilson, situate on Ontario Street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years leases, securities for money." (*Wilson* v. *Kerr et al*, 17 U. C., Q. B. 168.) It was held as to this description that the goods and chattels were not sufficiently described by stating them to be situated on Ontario Street, without saying that they were *in the shop or on the premises of the assignor situate on that street*, and as to anything other than the stock-in-trade it was held that there was really *no description at all.* In the first place, then, the description as to the stock-in-trade was held to be insufficient because of the want of locality (house, shop, &c.), and as to the remainder of the articles intended to be conveyed, because there was really neither quantity, quality or value. We cannot do better than quote some of the instructive remarks of Mr. Justice Burns in delivering judgment:

"According to the wording of the deed the case presents two questions; first, with respect to the *stock in trade*, and next, with respect to *all other goods, chattels, furniture, household effects, horses, cattle, and also all bonds*, &c. The latter cannot be held a compliance with the provision that they are so to be described, that the same may be thereby readily and easily known and distinguished. Where all or any of these things then were, or were to be found, the deed is silent. Of course it could not be expected that every chair or table must be so described that by reading the description in the deed a person could go and identify them, but surely the legislature meant something when the enactment was made. If it would be inconvenient to describe each article or each set of articles, either as to numbers or quantities, marks, or otherwise, that they might be known, yet a description by locality might be given which would enable a person to go with the deed in his hands and point out the goods transferred. No one, however, on reading this deed, could possibly say that any of these *other* things mentioned, could either be readily or easily known or distinguished. *Quoad* these things the plaintiff's case must, I think, fail.

"Then with regard to the stock in trade. This is a term very well known in bankruptcy matters, and I should find no fault with that expression if we had further information to tell us what it was that was assigned. There is an attempt in this to give information as to locality, but it is very vague. The deed simply says, the stock in trade situate on Ontario street, in the town of Stratford. What part of the street we are to look for it the deed does not tell us. Further, we are not informed what description of stock in trade it is; there is nothing on the face of the deed to give us the slightest idea whether it was the stock in trade of a dry goods dealer, a grocer, a distiller, a brewer, or of any kind of business which the assign-

ors carried on. The deed is singularly silent with respect to any information from which a person reading it might even draw an inference, except that the assignor is himself described to be a merchant. Without that term used in describing him we should not know what he was; but will that do from which to draw an inference that the stock in trade assigned was that of a merchant? It does not appear to me that that would be a compliance with the act of Parliament. The term merchant with reference to the business carried on, is as convertible as that of stock in trade. The proper definition of the term is applicable to one who traffics or carries on trade with foreign countries, as an exporter or importer. The popular usage of the expression is to apply it to any trader, or one who deals in the purchase of goods. There are wheat merchants, timber merchants, lumber merchants, and a thousand others, as well as a dealer in cottons, calicoes and what not. I do not see that we are helped at all in finding out what the stock in trade was by being told that the assignor was a merchant. To be sure we discover it by reference to the evidence; but the question is, whether this information should not exist on the face of the deed. The statute says it shall contain such efficient and full description thereof, &c. It does not appear to me this deed does contain such efficient description as that any one can possibly say what the stock in trade was that was transferred. If we had been told in what house it was, or on what premises the same might be found, that perhaps might have helped, but here we are told the stock in trade will be found on the street in Stratford. To take this literally the public would have the opportunity of helping itself, or the corporation might complain of a nuisance. I think we should scarcely look for the goods upon the street, but the parties might have told us better where to find them."

The case was subsequently carried into appeal, and the decision of the court below as to the insufficiency of the description was confirmed. Draper, C. J., in delivering the judgment of the Court of Error and Appeal, is reported as follows:

"As to all other property, except the real estate, the only description is, 'all his other goods, chattels, furniture, household effects, horses and cattle, and also bonds, bills, notes, choses in action, terms of years leases, securities for money.'

"What the statute requires is, '*such efficient and full description*' of the 'goods and chattels' sold or mortgaged, that the same 'may be thereby readily and easily known and distinguished.' The first part of the sentence above quoted, commencing 'all his other goods,' &c., contains no other description of the matters intended to be conveyed, except that they were '*his*,' the assignor's. The residue of the sentence is not, except by inference, even as precise as the first part: it purports to convey 'all bonds,' &c., not even saying in words whose the bonds were.

"If the words of the act have any meaning, this can never be held to be an efficient or full description of goods or chattels. No locality is given, no description, except the *nomen generalissimum*, which will include any and every description of goods, hardware or groceries, dry goods or liquors. The words 'furniture and household effects,' if more definite, cannot help in this case, because the question as to them is disposed of on a ground which admits they may have been sufficiently described, and as to horses and cattle there is the general description, but nothing particular, no marks, colour, or other individual characteristic. What description more *general* could have been used? or how can this be deemed efficient or full?

"As to the bonds, &c., there is nothing by which one bond can be distinguished from another, neither name of obligor, date, sum, or other thing secured by a condition, if there were a condition. As to bills and notes, the character in which the assignor holds them, whether as drawer or payee or endorsee, the sums, whether due or not; in short, not a particular which would distinguish is given, and such is the case with regard to each of the other kinds of property mentioned."

4.—"All the goods, chattels, furniture, and household stuff therein particularly mentioned and expressed, that is to say, seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, *and being in his dwelling house*. All the lumber and logs *in and about the saw mill and premises* of the said grantor; and all the blacksmith's tools *now in the possession* of the said party of the first part; six cows, and four stoves:" (*Rose* v. *Scott*, 17 U. C., Q. B. 385.) In this case the court, in conformity with *Harris et al* v. *The Commercial Bank*, held that the household furniture, lumber and logs were sufficiently described, but that the horses, lumber waggons, carriage, pleasure sleigh, blacksmith's tools, cows, and stoves were not sufficiently described. The court said: "If Mr. Fraser owned more of any such articles of property than the number set down in the deed, it would be impossible to tell which of the class were intended to be assigned." As to the blacksmith's tools, the Chief Justice said:

"We have hesitated in respect to the blacksmith's tools, because the mortgagor does say of them 'all the blacksmith's tools now in possession of the said party of the first part;' but on consideration that is not more particular than saying 'all his blacksmith's tools,' not describing them as those which he commonly used, or which he had in any particular place; and if that description be good, then an assignment of all a man's flour or pork, or cattle, would be equally good, and would include all that the assignor had of the article, for he must be regarded as being in possession of all the tools that he owned of which no one was holding possession against him. This would seem to be treating the act as meaning nothing, for there is really nothing specific in such a description."

5. "All and singular the stock in trade, wares, merchandize, fixtures, goods, chattels, and effects of him, the said Roberts, *situate or being on or upon the shop, store and premises connected therewith*, now in the occupation of the said Roberts, *situated in the village of Oakville;* and all other the goods, chattels, and personal property *whatsoever of him*, the said Roberts, *wheresoever situated;* and all the books, money, bills, bonds, mortgages, and choses in action whatsoever, either at law or in equity, of him, the said Roberts:" (*Hutchinson* v. *Roberts*, 7 U. C., C. P. 470.) The sufficiency of this description was doubted, though the decision of the case turned on another point. So far, however as the Chief Justice spoke of the description, we shall quote his language:

"If the claimant's right depended altogether upon the assignment as an effectual instrument under the statute, I should require further time for consideration before I could hold that a full and effectual description of the goods intended to be conveyed is given by such words as 'all my stock-in-trade, goods, wares, and merchandise in my store situate at,' &c. I cannot

at present see that an instrument so drawn would contain a *full* and *efficient* description of such goods. It appears to me the statute must mean that by reading the instrument itself, or at most aided by a schedule attached to it, such a description should be obtained as to convey to the reader, at least a knowledge of the general character of what was meant to pass, whether it was flour or whiskey, ploughs or penknives, an assortment of millinery or a quantity of cables and anchors.

"Under such an assignment it would be indispensable to make an inventory, to take the stock in order to know the nature, quantity, quality, and value of the goods assigned; and I confess I feel it difficult to hold that in the absence of these four elements how a description can be called full and sufficient. All that can be said is, that the case falls within the maxim, *id certum est quod certum reddi potest;* but that was the law before the statute; and we must suppose that the legislature intended to require a greater degree of certainty than might have sufficed before."

6. "All and singular the goods, chattels, furniture, and household stuff now in Swords' Hotel, Toronto, *or* particularly mentioned and expressed in a certain schedule, marked A, hereunder written or hereunto annexed; and also all debts, dues, notes, and demands due to the said Swords, and all books relating thereto:" (*Kingston* v. *Chapman*, 9 U. C., C. P. 13.) The sheriff seized, on an execution against Swords, subsequent to the date of assignment, certain goods and chattels which were in Swords' Hotel at the time of the assignment, but not mentioned in the schedule annexed to the assignment; and the court held that the sheriff was justified in so doing.

These are all the decisions, pertinent to our enquiry, that we have been able to collect. They all have, more or less, relation to the first decided case of *Harris et al* v. *The Commercial Bank.* In that case a general description of the stock in trade and household furniture, with exact locality, was held to be sufficient. The Court of Queen's Bench, in subsequent cases, has upheld that decision, but refused, as in *Rose* v. *Scott,* to extend its operation. The Court of Common Pleas, without expressly doubting the authority of *Harris et al* v. *The Commercial Bank,* shows, so far as we understand the cases of *Hutchison* v. *Roberts, Kingston* v. *Chapman,* a reluctance in adopting it. So long, however, as the decision of *Harris et al* v. *The Commercial Bank* remains unreversed, we presume it must be looked upon as the law.

The meaning of the Legislature to be gathered from the reading of one whole act is, that in all cases, whether of mortgages or sales, there shall be either an actual, immediate or continued change of possession, or that the assignment shall be made in conformity with the act. The object, where the assignment purports to be in conformity with the act, is to enable third parties to ascertain what is intended to be assigned. If there has been an actual delivery, followed by an actual and continued change of possession, the assignment need not comply with the provisions of the act. If good at common law, the title will pass, whether the statute has been complied with or not. (See *Hutchison* v. *Roberts,* 7 U. C., C. P. 470.)

CODIFICATION AND CONSOLIDATION.

We republish, from the *Solicitor's Journal,* an article headed "Codification of Law in America." The writer of it contrasts the success of legislators in America in the work of consolidation and codification, as compared with the little done in that direction by the legislators of England. He does not omit to point out what Canada has done in consolidating its public general statutes, applicable to the whole Province, and to the upper section of it.

So far as the writer of this article argues in favor of consolidation, we coincide with him; but when he advocates codification of the law of England, we must be allowed to say that in our humble opinion he advocates an impossibility. The law of England consists of two parts—the *lex scripta* and *lex nonscripta.* Codification of the *lex scripta* or statute law is possible, but codification of the *lex nonscripta* or common law is, we think, for all practical purposes, impossible, and that the attempt would be imprudent.

The principles of the common law are not to be collected and engraved on the statute book by any body of men. The elasticity of the common law is its great feature; and if ever deprived of that, to be confined in the four sides of a page of the statute book, the result will be not only unsatisfactory, but most pernicious. Before the Legislature of England attempt a codification of the common law—that is, to make the *lex nonscripta lex scripta*—let them give to England, if possible or deemed advisable, a written constitution. The latter would be infinitely more feasible than the former, and the one without the other would be a hopeless incongruity.

The Legislature of Canada are endeavoring to codify the laws of Lower Canada, which, as to civil rights, are the French laws before the Revolution, and as to criminal rights the law of England. The experiment is most costly, but may be in the end successful; because the substratum does not consist of the common law of England, but of the elements of the Code Napoleon, and the code of Louisiana its duplicate. There is something in the common law of England that eludes the grasp of a mere law-moulder, and there is something in the people that causes them to adhere as strongly to their old common law, with all its uncertainty, as to their constitution, which, though unwritten, is the admiration of the world.

We shall watch the experiment as regards Lower Canada with much interest. In that section of the Province we sincerely hope that it will be successful. The profession there, with the strange mixture of French and English

laws, find themselves in an endless state of perplexity. When the profession complain of such a matter, the cause of complaint must be so general, and so deep-rooted, as to affect every man, woman and child living under the laws. One result of a codification of the laws of Lower Canada, though imperfect, will be the assimilation of the laws of Upper and Lower Canada, and so far as Canada is concerned, a great national boon. At present, the laws of Lower Canada as to civil rights, differ as widely from those of Upper Canada, as the laws of Louisiana from those of New York, or, in fact, as the laws of France differ from those of England.

We happen to know that the codification of the laws of New York, so far as it has proceeded, is met with the censure of some very eminent public and legal men in that State. They find only uncertainty where certainty was fondly expected. They miss all old land marks of every kind, and are left to grope about in darkness and in doubt. More than one practitioner in that State has expressed to us his hearty disapprobation of what has been done, and his well-founded fears concerning what is to be done. In Massachusetts, we believe that the codification of the Common Law, as a whole, will never be attempted. That State has the report of her own gifted Story against the practicability of such a measure. (See Story's Miscellaneous Writings, 698.)

JUDICIAL STATISTICS.

We devote in this number more than ordinary space to some well-timed observations, from the *Law Times*, on Judicial Statistics. We are not yet in Upper Canada sufficiently alive to the importance of judicial statistics as aids to sound legislation. In Lower Canada there is a statute intitled "An Act to provide for Annual Statistical Returns of Judicial matters" (23 Vic., cap. 58). It appears to be an elaborate and comprehensive measure, and if properly carried into effect, will be productive of much good. We do hope that the Attorney General for Upper Canada will see fit to add a measure as to judicial statistics to the many useful law reforms, of which he is the author, in Upper Canada. The machinery need not be very complicated. Let each clerk or other officer concerned in the issue of judicial process, or other legal procedure, make periodical returns, in a given form, to some one public officer, whose duty it shall be to digest the mass and make it public, or ready for publication, at stated intervals. This is the machinery of the Lower Canada Act. The forms given appear to be numerous and practical. Mr. Cartier, the Attorney General for Lower Canada, deserves great credit for this bold and comprehensive enactment.

2

WARNINGS.

Our contemporary the *Legal Intelligencer*, of Philadelphia, in a late number, addressed some strong common sense remarks to its professional readers, which we copy under the above heading.

The advice is directed against the sin of members of our profession applying to their own use money of their clients. Though we are proud to say that in Upper Canada this evil is much less frequent than in other countries, still we must admit that it is the rock upon which many a fair reputation is split and destroyed.

The enormity of the evil in England has given rise to grave inquiries as to its cause, with a view, if possible, to its entire extirpation.

The temptation to evil to which members of the legal profession are subjected is much greater than in any other profession or calling among men. But the greater the temptation the greater the necessity of refusing to yield to its slightest approach. To parley with conscience on the eve of such a temptation is to yield the citadel of conscience an easy prey to the enemy.

The great secret of avoiding scandal and ruin in such matters is to pay over promptly, and, in the case of trust moneys, to keep them as distinct as possible from one's own. In Upper Canada, members of the profession are little troubled with trust moneys, but every member of the profession is more or less concerned in the collection of money for clients. To all such we say,—do not allow the money of your clients to stick to your hands one moment longer than necessary. Pay it over at the earliest minute, and thus preserve your reputation and acquit your conscience. To make any use whatever of the money of a client, without his knowledge and against his consent, is, morally speaking, to steal it. No member of the profession would like to be branded as a thief, but every man who contravenes the strict standard of morality in this respect is nothing less than we have described.

LEGAL DESPATCH.

The Lord Chancellor, in his review of the law reforms of the session of the Imperial Parliament just closed, among other things said as follows:

"It used to be said that Chancery suits never came to an end. As a specimen of the despatch with which business is now done, let me mention a single case, one in which the Westminster Palace Hotel Company was concerned. That joint-stock company have an hotel, part of which was let to Sir C. Wood, the Secretary of State for India, for the purpose of conversion into a Government office for a time. That arrangement was objected to by certain of the shareholders, and on the 10th May in the present year a bill was filed by which this Chancery suit was begun. The cause was heard before Vice-Chancellor Page Wood on the 31st of the same

month, and a decision given in favor of the defendants. There was an appeal from that judgment to the Lords Justices, which was heard on the 11th June. The Lords Justices were divided, and, therefore, the decision of the Vice-Chancellor remained undisturbed. There was then an appeal to the House of Lords, which came on to be heard on Monday, the 6th August. It was heard on that day, and on the 7th (or the very next day) it was finally disposed of. Thus the entire litigation was begun and ended between the 17th May and the 7th August of the same year. That state of facts, I think, scarcely justifies complaint of the tardiness of judicial proceedings.

EX PARTE PUBLICATIONS OF LEGAL PROCEEDINGS.

In Upper Canada there is nothing more common than for an insurance company, when sued on a policy of insurance, to print and publish what they are pleased to describe as "a report of the proceedings," and to spread copies of this report broad-cast throughout the Province. Of course if the publication be *bonâ fide*, and be after the final determination of the suit, there may not be much objection to it; but when, as has happened more than once, a second trial has become necessary, the publication between the first and second trial is open to much animadversion. No company or other litigant has a right, during the pendency of a suit, by publications or otherwise, to attempt to prejudice the public mind against the opposing litigant. On this branch of the law we refer to *Coleman* v. *West Hartlepool Harbour and Railway Company*, in other columns. The case will be read with much interest, as being a decision most important to the due administration of justice.

CODIFICATION OF LAW IN AMERICA.

(*From the Solicitors' Journal.*)

In a review of the New York political code, which will be found in a recent number of this Journal, we took occasion to give some account of the progress of the codification of the law in that State. The principle of codification is making great advances throughout all the United States of America, and is likely in a short time to supersede entirely the piecemeal manner of legislation of the old world. The subject, therefore, seems well worthy of some further consideration.

The constitutional law of all the States has, as a matter of necessity, been laid out in the form of a written code; but many of them have also made great progress towards a like systematic arrangement of their civil law. The State of Lousiana has administered its civil and criminal law under the authority of a code for the last thirty years; and, according to the opinion of the judges, with a very beneficial result. The State of New York, the leading State of the Union, commenced operations upon its statute law, and a consolidated, revised, and, to a certain extent, codified edition of the statutes came into force in 1830. It is now engaged on a complete codification of the whole body of the law of the State, including both the common law and the statute law, with the view of establishing its whole law in the form of one statutory code. The codes of civil and criminal procedure have already been completed, and are now in force. The remainder of the law is to be comprised in three codes, to be called respectively the political code, the civil code, and the penal code. The political code has been published, and presented to the Legislature; and the civil and penal codes are promised shortly.

The important State of Massachusetts has also, since the year 1835, enjoyed the benefit of a revised code of statutes. After the lapse of twenty years, the subsequent legislation of that State had so accumulated as to require incorporation with the code; and a commission was appointed for that purpose, the result of whose labours has just been enacted, under the title of "The General Statutes of the Commonwealth of Massachusetts, 1860." Most of the other States of the Union have, we believe, attained a like advanced stage in the simplification of their laws.

A movement is now being made to apply the same process to the statutes at large of the Federal Union, which have hitherto been left in the raw and undigested state in which they were originally passed. It is felt to be a great and unnecessary grievance that the statutes of the Union should fill eleven large octavo volumes, seven of which only contain public statutes, the rest being filled with private acts and treaties. It is calculated that with proper revision and consolidation the public laws in force could be reduced to two volumes of a reasonable size. The senate of the United States have recently agreed to a resolution "for the appointment of a commissioner to revise the public statutes; to simplify their language; to correct their incongruities; to supply their deficiencies; to arrange them in order; to reduce them to one connected text; and to report them thus improved to Congress for its final action, to the end that the public statutes, which all are presumed to know, may be in such form as to be more within the apprehension of all!"

It may also be here noticed that the Legislature of Canada has just completed a consolidated statute book in two parts. The one containing the public general statutes which apply to the whole province of Canada, and the other containing those which apply exclusively to Upper Canada. This new statute book has become law too recently to allow of much experience of its operation; but it presents a very simple and convenient appearance. The Canadian statutes are not merely consolidated, but also revised and classified. They are arranged under general titles according to the subject matter; and are accompanied with a copious index of the particular topics referred to.

It thus appears that amongst the States of America, the revision and consolidation of statute law is an accomplished fact. Their revised editions of statutes have in all cases worked with the greatest ease and efficiency. The solution of the more difficult problem of the codification of the common law is still pending. The civil code of Louisiana, the law of which State is derived from French sources, is for the most part a republication of Roman law; but the law of New York, and of most of the States, being of English origin, cannot be codified without reducing into a fixed and regular form all the principles and maxims of the common law. The shortly expected civil code of New York will therefore be looked for with the greatest interest, comprising, as it must, all the fundamental principles and varied developments of the common law.

It may be regarded as the crucial experiment of the capability of the common law to be registered in the form of a written code. If successful, it will doubtless be imitated and adopted in all States of the Union whose laws are of the same origin. It is said that there is at present an inclination in those States to prefer the system of the Roman law, the capacity of which for codification has been so well established; but it is probable that no state which has lived under, and been accustomed to the free spirit of the former law, would exchange it for the latter, even though it may combine the additional advantages of a code.

The progress of law amendment in the new world is calculated to give rise to much serious reflection in the English mind. England has hitherto maintained a pre-eminence in all matters relating to practical law and legislation. Alone of all modern nations, she has known how to render the highest development of law consistent with the largest degree of in-

dividual liberty. Her laws have commended themselves by their intrinsic excellence to the voluntary acceptance of the most active, energetic, and freest race of men which the world has known. The Anglo-Saxon race has everywhere carried with it its birthright of English law; and from the most remote parts of the earth has continued to look to England for the progressive extension of that law in the paths of equity and justice. The effect of an available code of English common law would entirely obviate this dependence on the law of the mother country. It would sever the connection of the common law with its original source, and establish it on an entirely new and independent foundation. The code which was found useful for one colony would soon be adopted by others. Every independent colony would be ruled by its sep- -ate statute-book. It would no longer draw its current of law from the fountain head, but would, for the future, depend on its own resources for the maintenance and advancement of its laws. Our colonies, have lost the connecting link which has hitherto preserved a unity in their institutions, might be expected to diverge rapidly into every variety of form characterized by the divers peculiarities arising from local position, climate, manners, and occupations. It is vain, however, to speculate on the important changes which might thus be wrought by the development of distinct nationalities, in the future destinies of the world; we desire rather to revert to the prospect of our affairs at home.

Notwithstanding the undoubtedly great influence which we have long exerted through our laws on those of all States colonized from this country, the present state of our law is not such as can be regarded with complacency, or, as is calculated to attract imitation. Indeed, it may be reasonably suggested that the state of complication in which our laws have become latterly involved, forms the principal motive of other states to rid themselves of an influence which is found to be more burdensome than beneficial. The volumes and statutes in which our laws have to be sought, accumulate so rapidly that the later generations of lawyers appear in danger of being overwhelmed with the richness of their inheritance, and have been accused of renouncing in idleness and despair at once the burdens and the blessings of their birthright. Mr. Hallam has thus represented the difficulties of our position:—"We accumulate statute upon statute, and precedent upon precedent, till no industry can acquire, nor any intellect digest, the mass of learning that grows upon the panting student; and our jurisprudence seems not unlikely to be simplified in the worst and least honourable manner, a tacit agreement of ignorance amongst its professors." Every-one familiar with the administration of our law will admit the truth of this description of its state, though he will probably reject the imputation on its professors as a calumny. Infinite labour, learning, and talent has been successfully expended in digesting and arranging the mass of materials, and adapting it for practical purposes. Our practical text-books are surprising monuments of accumulated industry, and it is no exaggeration to say, that without their aid, the traditionary mode of administering the English law in its present advanced state would be impossible.

It is, indeed, full time that the Legislature of this country was awakened to a sense of the important duty of promulgating the law in an intelligible and accessible form, a duty second only to that of providing laws sound and efficient in substance. The progress made in the simplification of the law in America naturally leads us to consider what would be the prospects of success of similar attempts in England.

At the outset, there appear such important differences between the political condition of England, and that of any of the States of the Union, that the complete conversion of the law of those States into the form of codes, even if successful, would form a very imperfect measure of comparison for a similar undertaking in this country. The process applied to our constitutional law seems altogether out of the question; it would amount to a complete revolution. The essential principle on which the sanction of the whole of that law depends is the authority of precedent. The terms constitutional and unconstitutional in the United States refer to the strict letter of the written code. With us they are understood to point to an accordance with the old established and customary modes of proceeding. A distinction is thus made between the strictness of formal law, and the practice of the constitution. For instance, it is said to be unconstitutional for the House of Lords to refuse to pass a Bill repealing a tax; though their strict right to do so in point of form cannot be disputed. Hence, to establish our constitutional law on a fixed written basis would subvert the constitution itself. The Parliamentary history of England is our text book of constitutional law; and it would be found impossible to embody the instruction and experience of ten centuries in the few pages of a written code.

The other branches of our law are more amenable to the process. It has long been recognized that our statute book requires both a reduction in bulk and a simplification in matter. Here the "Revised Statutes" produced by numerous States of America prove beyond all question that there is no inherent obstacle to render such a work impossible. Their statutes are in all respects similar in matter and style to those of this country. The difference of the work is one only of degree; the greater bulk of our statute book demanding greater toil, longer time, and more money for its compression. The difference in the quantities of these necessary elements required in the two cases might even be calculated with some exactness, on the supposition that the machinery employed in the two cases was equally simple and effective. But in truth the costly and cumbrous commissions for consolidating the statute law, which have been found so useless and unmanageable in England, present the greatest contrast with the simple instruments employed for that purpose in America. The general plan there adopted has been to intrust the whole work to the unrestricted discretion and exertions of three commissioners, selected for their knowledge of law, who have in all cases been able in a short time to report a perfect result of their labours. The machinery which has operated so successfully upon the statute law in America is well worth the attention and study of our law reformers in all its details; for it seems most probable that the whole secret of the success in that country, and the failure in this, will be found to consist in the difference in the manner of setting to work.

In matters of social and economical policy, codification seems peculiarly appropriate. In such matters, our modern consolidated statutes already supply us with something equivalent to a code; and it may be doubted whether they could be made abbrievated or simplified without a sacrifice of completeness or perspicuity.

In one point there appears a precise resemblance between codification in the United States and in England. In civil rights the common law of England applies to both countries, and being independent of the country, and of the complicity of its institutions, the magnitude of the task of codifying its principles in each case would be equal. Indeed, the difficulty of such task may reasonably be thought greater in America than here. Our common law has been described as a mixture of the laws and customs of the Romans, Picts, Saxons, Danes, and Normans; but an additional element is infused by the genius and wants of the American people. The codification of the common law as it appears in America, has, as we have seen, been attempted in the State of New York, and we shall look forward to the appearance of the civil code of that State with the greatest interest, as a fair test of applicability of the process of codification to our own common law institutions.

The great experiment of codification now in progress in America, cannot, indeed, fail to be an object of attention to every one who feels any concern in the progress of law and civilisation. The philosophical lawyer will observe with interest the effort of a free people to apply to their living laws the same process which a former age of the world was success-

fully imposed by a despotic emperor upon a body of settled law from which the vital self-creating spirit had departed; and will naturally be induced to speculate on the important consequences which would result in the present state of the world from a compact and serviceable code of English common law. The practical law reformer will observe with attention the mode of carrying out such a project, and the various steps taken in the progress of it; watching carefully their effective bearing results, and above all will examine minutely the details of the machinery by which it is proposed to accomplish so vast a design.

JUDICIAL STATISTICS.

(*From the Law Times.*)

Only those whose daily duty it is to deal with Law Reform by suggestion and criticism can rightly appreciate the importance of Judicial Statistics. During the eighteen years that we have been recording the progress of the Law and the Lawyers, scarcely a week has passed without discovering the need for some positive facts by which to support the plans it has been our business to propose or promote. Hence it was that we so pertinaciously urged the demand for the statistics of the law and its administration in this country. Foreign Governments had long ago recognised their utility; but here they had been utterly neglected, and it was impossible to test the excellence of reform accomplished by any better evidence than conjecture. In devising his great projects of Law Reform, Lord Brougham early experienced the same deficiency of information, and with him to discover a defect was always to make an endeavour to remove it. Successive governments were appealed to, but in vain; sometimes he was met with promises, sometimes with objections. At length he took the question into his own hands, and framed an elaborate Bill, which was submitted to the house of Lords, to compel the collection of a complete series of Judicial Statistics in the forms prescribed by the schedule. This brought matters to a crisis. The government was compelled either to adopt Lord Brougham's Bill, or to undertake the task themselves. They preferred the latter alternative, and having resolved so to do, it is but fair to say that they fulfilled their promise. They sought for the best man for an office requiring great intelligence, and they found the very man for the purpose in Mr. Redgrave. His work was confided to him, we believe, with no other instructions than to do it in the best manner, and with all the aid that the Government offices could give to him. Mr. Redgrave commenced his labors three years ago. All was new to him. He had to learn what information was required, and where it was to be found. The first report was consequently defective in some important particulars. The second introduced many improvements, from Mr. Redgrave's own experience or suggested by others, and he has been ever desirous to receive and ready to adopt the practical hints of those who were engaged in the work of legislation. The third year of his labours has produced a third report, improving upon its predecessor as that was an improvement on the first. His own experience and the suggestions of others have been employed, and the result is a collection of figures relating to the law and its administration, now almost perfect, from which already much useful and still more curious knowledge is to be extracted, but the value of which, for the purposes of legislation, will grow year by year, for it is only by comparisons, extended over considerable periods of time, that the results of changes in the law can be ascertained.

As in the two former years, it is our purpose to bring the most interesting of these results under the notice of our readers, and we prefer to do so in the form of a series of articles, rather than in a mere reprint of the report, because it will be instructive to comment upon the facts as we go along, and indicate such lessons as they may appear to teach. The true value of statistics lies not so much in the mere figures as in the recognition of the facts which those figures indicate.

The business of the three Superior Courts of Common Law may be thus stated:

	Q. B.	C. P.	Ex.	Total.
Writs of Summons	27,851	21,445	36,974	86,270
Appearances entered	8,241	6,312	9,209	23,762
Entered for trial	1,219	782	1,208	3,389
Actually tried	—	—	—	1,939
Of these were—				
Defended	358	280	327	965
Undefended	21	64	82	167
Withdrawn and struck out	384	278	375	1,037
Judgments	10,687	6,943	14,188	31,819
Executions	7,414	5,114	10,350	22,878
Motions for new trial	170	154	207	581
Other special motions	199	222	220	641
Causes referred to Masters	265	84	201	550
Amount of fees	£22,519	£12,964	£28,418	£68,902

The Registrar notes that there was a decrease in the amount of litigation to the extent of 16·5 per cent. on a comparison of writs of summons issued during the last and preceding year.

It will be observed that the same singular inequality prevails in the number of actions brought in the several courts. Still the Exchequer is favored by the Profession, and still the Common Pleas is avoided. It is a wonderful instance of the effect of prejudice long lingering after the cause of it is removed. The preference for the Exchequer arose long ago, when the costs were taxed in that court on a more liberal scale than in the other courts. No such reason exists now, or has existed for many years, and yet by mere force of habit the attorneys continue to flock thither. So the Common Pleas still suffers from the aversion to it felt by the Profession when its Bar was monopolised by the Serjeants, and consequently the choice of counsel restricted and the costs increased. This objection has long ceased; but yet the prejudice lingers, and the court is still shunned without reason.

Nearly three-fourths of the actions brought are settled without an appearance being entered—only one in nineteen is entered for trial; only one in eighty is actually tried. As about one in three proceeds to judgment, it may be presumed that nearly two or three are settled in the preliminary stages; but it is *remarkable that more than one-half of the judgments* issue in executions.

The most startling fact, however, if it be true—and we cannot but suspect some mistake in the returns—is that motions for new trials follow in one-fourth the cases tried; the total of trials being 1939, and the motions for new trial 531. If this be correctly stated, how can any man dare assert that juries and judges, so fallible in civil causes that one-fourth of their decisions should be disputed, are infallible in criminal cases, and require no revision?

The number of cases tried on each of the circuits was as follows:

Home	277	Western	135
Midland	120	South Wales	33
Norfolk	49	North Wales	35
Oxford	143	Lancashire, C. P.	235
Northern	132	Durham, C. P.	30

It appears from this that the business is more equally distributed among the circuits than is commonly supposed. Who would have thought that the Northern Circuit, to which counsel throng, actually produces less civil business than the Western or the Oxford Circuit; and that the Midland is more profitable than either?

The results of trials are shown by the following figures :

	Q. B.	C. P.	Ex.	N.P.	Total.
Verdicts for plaintiff	248	244	281	673	1445
Do. subject to special case	6	5	6	13	30
Do. by consent with refer-	28	11	9	71	119
Do. for defendant	71	59	68	145	343
Jury discharged without verdict	7	12	6	3	28
Juror witudrawn	10	4	11	43	68
Nonsuit	10	8	28	34	80
Stet processus, record withdrawn, &c	—	1	—	128	129

Thus it will be seen that the plaintiff obtains the verdict in nearly four cases out of five. This is as might have been anticipated: for the plaintiff being the moving party in litigation, the presumption is that he would not resort to it without at least having the apparent right on his side; whereas defendants resist from pride, obstinacy, unwillingness to recognise unpleasant and inconvenient truths, and other weakness of human nature. But it would be as well for all who contemplate defending an action to know that the chances are just five to one against them.

The Registrar remarks the singular preferences for particular courts, and still more singular cause of them ; but he observes also that, although there is so great a difference in the number of writs, the proportions largely decline in the more onerous business, and are again almost equalised ; thus, although the writs of summons are in the Q. B. 32·3, in the C. P. 24·8, and in the Ex. 42·9, per cent., in the causes tried the proportions are Q. B. 35·5, C. P. 30·4, Ex. 36·1 per cent.

There are no means for obtaining the sums for which suits were commenced in the Superior Courts; but the following were the amounts for which verdicts were obtained :

Above £5000		11	£300 and above	£200	68
£5000 and above	3000	6	200 " "	200	149
3000 " "	2000	6	100 " "	50	232
2000 " "	1000	22	50 " "	20	378
1000 " "	500	52	20 and under		341
500 " "	300	56			

Total amount recovered	£324,388
Without reference	116,443
With reference	54,680

The executions by writ of *fi. fa.* were 14,052; by *ca. sa.*, 8,142; by writ of possession, 583 ; by *elegit*, 42; by *exegi facias*, 53 ; by *capias utlagatum*, 6.

The *New Trials* appear thus :

Refused	30	35	38	103
Rules Nisi granted	75	54	96	225
Rules absolute	30	35	22	96
Rules discharged	25	28	51	104
Court divided	1	2	—	3

Thus only 2 per cent of all the actions brought are tried by a jury, and it may be assumed that these represent very nearly the number in which there was any question really in dispute between the parties.

The remainder are merely proceedings for enforcing undisputed claims and rights.

We shall return to these valuable papers frequently during the vacation.

JUDICIAL STATISTICS.

The large number of suits commenced in the Superior Courts of Common Law, and what became of them up to trial and execution, was shown in the last paper on the subject. Of all this multitude only a few were remanets at the end of each term, and of these few at least one-third were made such by consent or other reasons than want of time to try. It is not necessary to copy the figures as given for each quarter ; it will suffice to state that on December 31 the only remanets were as follows :

Queen's Bench—	
By consent	20
By injunction or decree	8
For want of time to try	48
Common Pleas—	
By consent	11
By injunction or decree	5
For want of time to try	...
Exchequer—	
By consent	9
By injunction or decree	...
For want of time to try	2

We pass now to the business of the Court of Error. There were

Proceedings of the Court of Error—	
Notices and writs of error	34
Set down for argument	32
Writs affirmed	11
Writs reversed	2
Remanets	5
Appeals from the Court in banco—	
Notices of appeal	44
Set down for argument	20
Affirmed	14
Reversed	4
Remanets	5

It will be seen from this that in half the cases in which parties under the first flush of disappointment at defeat give notice of appeal, their courage oozes away, or more prudent counsels prevail before the time comes for setting them down for argument. And even after this process of elimination only one judgment in four is reversed on the hearing. The solicitor may therefore calculate the chances of appeal as four toone against him, and he ought so to inform his client.

The amounts paid to the Suitors' Fund by the several courts are thus stated :—

	£	s.	d.
Paid in during the year by—			
Queen's Bench	45,963	17	4
Common Pleas	24,252	17	11
Exchequer	40,433	7	4
Total	£110,650	2	7
Paid out during the year—			
Queen's Bench	44,963	7	5
Common Pleas	22,598	13	3
Exchequer	44,724	13	3
Total	£112,286	13	11
Fees levied by the masters—			
In the year 1859	58,902	1	0
Disbursed for salaries, &c	38,057	7	10
Balance	£20,844	13	2

On the first of January 1859 the Suitors' Fund amounted to 38, 659*l.*, and this steadily increasing as compensation charges die out.

In addition to the above there is the business in chambers, now not the least part of the labour of the judges. Here, too, the Exchequer exhibits the largest amount of business. We present the totals, without specifying the courts :

Summonses	41,315
Common orders	34,024
Special orders	10,846
Certificates, special cases, special verdicts trials, &c	2,085
Affidavits, affirmations, &c	28,300
Affidavits filed	17,636
Approbations for taking affidavits or special bail	582
Acknowledgments by married women	542
Office copies (number of folios)	10,667
Recognizances	62

Writs of Error	1
Bail	55
Committals	257
Exhibits before judge	4,147
Producing judge's notes	123
Bills of exceptions signed by judge	2
Attendances in any court on subpœna	38
Attendance as a commissioner to take affidavits	53
Reports on private Bills	4
Attendances by counsel (each side)	3,545
Appointment of Commissioners	853
Admissions	360
Justification of bail	1
Summons and order to try issue before sheriff	3

We turn now to the statistics of the County Courts. During the year 1859 there were—

Plaints entered, 714,323.

Of these 373,657, or about one-half, were determined, 988 with a jury, and 372,690 without a jury.

Thus in one case only in 372 was a jury demanded, although it was at the option of either party to have obtained this boasted privilege, had the actual litigants the same regard for it as theoretical writers and orators. No amount of rhetorical flourish can explain away the fact that where an option is given to the litigants, only one in 370 choses to submit his cause to a jury rather than to a judge. What better test of public estimation can there be than this? In truth, a jury *is* the very worst contrivance for the settlement of a dispute, although it is the very best contrivance for the trial of a criminal charge; and the instinct of the suitors in this particular coincides with the judgment of common sense.

Now comes another curious fact. Out of the 373,657 cases determined, no less than 355,707 issued in favour of the plaintiffs, and only 17,950 in favour of the defendants; and of these 8,861 or one-half, were by way of non-suit.

Thus, in the County Courts, the chances are 25 to 1 against the defendant.

The total sum for which plaints were laid, was 1,754,271*l.*; of which 851,732*l.* was given to the plaintiffs by judgment on the original hearing; the costs upon the proceedings being 37,628*l.*, and the fees received, 215,623*l.*

Executions against the goods were issued in 98,589 cases, but of all this number only 3,776 proceeded to actual sale; that is to say, in but one case in 180 was sale under execution necessary.

The judgment-summonses, issued where defendants do not obey the order for payment, and preliminary to commitment, were 118,873. Half of these appear to have attained their object without more, for only 55,982 were heard. These hearings resulted in 27,284 warrants of commitment, or just half the cases heard. But the mere order for commitment seems to have produced its desired result in two cases out of three, for only 9003 were actually committed.

At this point we again pause.

WARNINGS.

The profession in England has been recently shocked by an extraordinary case of professional misconduct on the part of a Mr. Evans—an eminent London barrister. It appears, from the report of the proceedings of Court of Bankruptcy, held before Mr. Commissioner Goulburn, that an application was made on behalf of Mrs. Caroline Payne, a creditor of Evans for 16,000*l.*, and by five other creditors, to prevent the issuing of a certificate of bankruptcy to the defaulter. Their counsel, in introducing the application, stated that Evans had been guilty of as gross a series of frauds as were ever brought before the court. Without any capital of his own, the bankrupt had speculated in building to the extent of 20,000*l.*, upon the money of his clients with which he was intrusted. By the exercise of certain influences over Mrs. Payne, he got himself appointed trustee over property valued at 20,000*l.*, He then sold out consols, and left the estate damaged to that amount, besides transmitting to his client an obligation to appear in nine or ten Chancery suits.

A number of labouring men had been defrauded of their little earnings, and were thrown upon the world without a shilling to bless them. In one transaction, the bankrupt had actually cut the seal from a deed, the effect of which was to commit a gross fraud to the amount of 700*l.*, by making himself the first instead of the second mortgagee.

It is believed in England that such crimes, on the part of solicitors, are increasing, and the legal journals have directed of late, their serious attention to the cause, and to the remedy of the mischief.

It is not a little remarkable, that many of these fraudulent failures have been on the part of practitioners of the highest professional and social standing—men whose reputations have always stood at "high-water mark," and in whom the community have had the most unbounded confidence. Mr. Buckle and the school of positive philosophers, would, perhaps, say that this peculiar form of social disorder is governed by a certain, fixed law, which it would be folly to attempt to countervail. It would seem that moral diseases, like physical, are sometimes epidemic. Suddenly the community is aroused by the story of some such case as the one we have just alluded to, and before the wonderment ceases, another, and still another, are brought to light. Countries, separated by mountains or oceans, are contemporaneously afflicted by similar enormities, as if the Spirit of Evil were bent upon some peculiar mission against the hearts and consciences of men. Whatever the philosophy of them may be, the instances of professional delinquency that have happened of late in England and in our own community, should not be permitted to be forgotten, without a reference to the moral that may be drawn from their history. If the record—the sad and secret record—of each case were spread before us as it is before the All-Seeing Eye, we should doubtlessly find that temptation began its work slowly and gradually—that resistance to its encroachments was, at first, powerfully and manfully made, but that, after each submission to its influence, the effort of resistance became feebler and feebler, until at last, a breach effected in the ramparts of conscience and morality, the whole moral man was at the mercy of opportunity and avarice.

He who accounts himself the bravest and the strongest may fall the lowest. Circumstances, over which he can have no control, may suddenly present themselves, when nothing but a life-long devotion to principle and the sternest sense of integrity will enable him to resist temptation; and if many of those, who have gone down to dishonoured graves, covered with infamy and the reproach of defrauded victims, or who are now lost to themselves and to society, wandering through the world for a hiding place and a refuge, were permitted to speak to us, with what burning emphasis they would utter the pregnant words—*avoid—fly from temptation.*

There are two rules, for the government of his professional conduct, that every young lawyer ought to adopt, and invariably obey. First, he should never permit his client's money to remain longer in his possession than may be absolutely necessary; and secondly, he should keep every dollar that may come to his possession in a fiduciary capacity, separate and distinct from his own. Money, or the representatives of money that do not belong to him, should be sacred. They should be put far from him, that he may never be able, even for one moment, to look upon them as his own. A separate bank-account, or drawer, or pocket-book, would have saved many a reputation. It is the habit, we have been told, of a gentleman of our own bar, of great eminence—whose name it would scarcely be good taste to mention—immediately upon the receipt of money belonging to a client, to inform him of the fact. His practice is—adopted, too, early in life, upon the example and counsel of his own preceptor—not to permit the sun to set without writing and mailing a letter to the client, whose money

has come into his possession. We would earnestly recommend this plan to our younger professional readers, and would urge them to adopt it. If the habit were once formed, it would be as difficult to break through it, as it would be, for one who grown gray in loose and careless business conduct, to acquire this precious habit of accuracy and care in relation to the property of clients.

We inculcate the most rigid and iron exactness in the administration of property that comes to you professionally, and is not your own. You owe it, primarily, to yourself; you owe secondarily, to the profession you are a member of. The reputation of the whole body of lawyers suffers with that of every brother. That word "*brother*," so often used in our public intercourse, has great significance in this connexion. We are members of one family—our brother's sins are surely visited upon our head. Confidence in any of us once impaired, faith in the integrity and honor of our brotherhood is invariably shaken—however slightly, still shaken. The utmost sedulousness and particularity in guarding others' property can never be useless, or without its good effect; for as the habit of looking carelessly and callously upon your client's money—of making use of it when there cannot be the possibility of a doubt that every farthing of it will be returned—often leads in the end, under peculiarly tempting circumstances, to positive fraud, so the other extreme of conduct will engender a strong and resolute moral purpose which no temptation, however powerful, will be able to destroy or affect. Thus only is the remark of Tennyson true, that man is "*master of his fate.* —*From the Philadelphia Legal Intelligencer.*

LEGAL CONFLICT.

Many have been the attempts of ingenious conveyancers to evade the Mortmain Act; but all have failed, because the courts have persisted in construing the law according to its spirit and intention, and not by the strict letter. The latest endeavour will be found in a case of extreme importance and interest, *Jefferies* v. *Alexander*, 2 L. T. Rep. N.S. 748, in which the H. of L. once more rescued the law from defeat. The attempt was extremely ingenious. The donor executed an indenture purporting to be made between himself and certain trustees, who, however did not know of it, or of the existence of the deed until after his death. The deed, which was not enrolled as required by the Mortmain Act, and contained no power of revocation, witnessed that B. covenanted that his executors should, within twelve months after his death, subject to his debts and to any legacies and annuities given or to be given by any will or deed of the covenantor, invest £60,000, and pay the annual proceeds for the behoof of certain poor persons. The legacies and debts were of trifling amount, and the bulk of the assets consisted of mortgages of freehold and copyhold land, which formed the only fund out of which the £60,000 could be paid. This deed he kept in his own possession until his death.

The question was, whether this constituted a charge payable upon the chattels real of the covenantor, there being no other assets from which payment could be made?

The difficulty of the question thus raised may be gathered from the division of opinion among the judges. The case was first heard by the M. R., who held it to be a gift of incumbrances affecting the realty. But the Lords Justices, and Erle and Wightman, JJ., who had been called in to their aid, reversed this decision. In the House of Lords the question was twice argued; the law lords present on the first occasion having been equally divided. On the second hearing six of the common law judges were present, and were likewise equally divided; but of the five law lords present three were of opinion that it was a charge upon the realty, and it was ultimately so determined, exhibiting most remarkable conflict of opinion.

For its being a charge upon the realty, were the Master of the Rolls, the Lord Chancellor, Lords St. Leonards and Kingsdown, and Blackburn, Willes and Williams, JJ.

Against its being such a charge, were the Lords Justices, Erle, C.J. and Wightman, J., Lords Cranworth and Wensleydale, and Pollock, C.B., Wilde, B., and Byles, J.—*Law Times.*

THE CONFESSIONAL.

(*From the Jurist.*)

At the Spring Assizes of Durham, in the present year, a case arose involving a moot and rather difficult point in the law of evidence, which has attracted considerable attention, and given rise to a bill in Parliament by Sir G. Bowyer. We allude to the case of *Reg.* v. *Hay*, where the question arose as to whether, and how far, a Roman Catholic clergyman is privileged from being compelled to disclose, in a court of justice, matters confided to him by a penitent in confession. It was said at the time that Hill, J., denied the existence of the privilege, and committed the priest for contempt of Court for refusing to make the disclosure. A report of the case has now appeared in the recently published part of the Reports of Messrs. Foster & Finlason, (*Reg.* v. *Hay*, 2 Fost. & F. 4,) which puts the matter in a very different light, and the report is accompanied by a learned note by the latter gentleman. The case is as follows:—

William Hay was indicted for stealing a watch. An inspector of police stated, that from information he received he went to the house of the Rev. John Kelly, a Roman Catholic priest, from whom he received a watch, which the prosecutor identified as his. The Rev. Mr. Kelly was then called, and objected to take the oath, saying, "As a minister of the Catholic Church, I object to the part that states that I shall tell the *whole* truth." Hill, J., said—"The meaning of the oath is this: it is the whole truth touching the trial which you are asked—which you legitimately, according to law, can be asked. If anything is asked of you in the witness-box which the law says ought not be asked, you would be entitled to say, 'I object to answer that question,' and the law would sustain the objection. You can, therefore, have no objection, as a loyal subject, and in duty to the laws of the country, to answer the whole truth touching the case which may be lawfully asked. Therefore you must be *sworn.*" The witness was then sworn, and deposed that he received the watch produced; and on being asked from whom, answered, "I received it in connexion with the confessional."

His Lordship.—"*You are not asked at present to disclose anything stated to you in the confessional;* you are asked a simple fact—from whom did you receive that watch which you gave to the policeman?"

Witness.—"The reply to that question would implicate the person who gave me the watch; therefore I cannot answer it. If I answered it, my suspension for life would be the necessary consequence. I should be violating the laws of the church, as well as the natural laws."

His Lordship.—"I have already told you plainly I cannot enter into this question. All I can say is, you are bound to answer, 'From whom did you receive that watch?' On the ground I have stated to you, *you are not asked to disclose anything that a penitent may have said to you in the confessional.* That you are not asked to disclose; but you are asked to disclose from whom you received stolen property. Do you answer it, or do you not?"

"Witness saying he really could not, was adjudged guilty of contempt of Court, and committed accordingly.

Previous to this case it was the common opinion that a confession to a clergyman of any denomination was not privileged from disclosure; for which several cases were usually relied on, especially *Rex* v. *Gilham*, (1 Moo. C. C. 186), which we cannot help thinking has been much misunderstood. With respect to Roman Catholic clergymen in particular, the right

was expressly denied by the Irish Master of the Rolls in 1802, in a case of *Butler* v. *Moore*, (McNally's Ev. 253). The authorities on this subject will be found on the treatises on Evidence. Now, in the case before us, Hill, J., draws a marked distinction between what is disclosed to the priest in confession, and any act done by or to him in consequence of that confession; holding the former privileged but the latter not. As, however, Hill, J., does not assign any reasons for his decision, Mr. Finlason, in the note in question, proceeds to assign reasons, for him, some of which seem sound, while others are open to much question.

Mr. Finlason begins by assuming, we believe rightly, that, previous to the Reformation, confessions to a priest were protected from disclosure, except perhaps when the matters disclosed amounted to high treason. This privilege, he contends, applied only to *sacramental* confession, accompanied by sacramental absolution. He then argues that the privilege, not having been taken away by any statute, necessarily subsists still, so far as regards clergymen of the Church of Rome, and also those of the Church of England. On this latter subject, however, it will be better to let him speak his own language:—"Although it is a common idea that the Church of England denies that confession is a sacrament, that is an error; for the answer in the Catechism as to the number of the sacraments, 'two only [as] generally necessary to salvation,' does not amount to a statement that there are only two sacraments; nor even that only two are ever necessary to salvation, but that only two are generally so. And it has been held, that, according to our law, marriage is a sacrament, (*Richards* v. *Dorey*, Willes, 622); and it seems, from some decisions, to follow that confirmation is so." We much regret that Mr. Finlason has not given these latter decisions; for the former part of the above sentence will not bear much examination. In *Richards* v. *Dorey* the question was, whether a custom, that every man inhabiting one parish, who marries by license in another, shall pay a fee to the rector of the first, as if the marriage had been solemnised there, is good. The Court, consisting of Willes, C. J., Abney, Burnett, and Birch, JJ., held that it was not; and Abney, J., says, "Marriage is a sacrament, and therefore no fee ought ought to be paid for it." For this proposition he refers to six authorities, the two first of which —Lyndw. Prov., and a canon, A.D. 1222—were before the Reformation; and the rest are as follows:—*Anderson* v. *Walker*, (Lutw. 1030), where a prohibition was awarded to the Ecclesiastical Court, in which a party was libelled for not paying a fee for *baptism*, according to an alleged custom in a certain parish; *Topsall* v. *Ferrers*, (Hob. 175), where it was held that custom in a parish that a passenger dying there should pay *burial* fees there, though buried elsewhere, is void; *Burdeaux* v. *Dr. Lancaster*, (12 Mod. 171; 1 Salk. 332), where it was held that by the common law no fees are due for *baptism*; and *The Dean and Chapter of Exeter's case*, (1 Salk 334), that by the common law no fees are due for *burials*—a frail foundation for the assertion that "it has been held that marriage is a sacrament;" and, indeed, to be consistent in their argument, Abney, J., and Mr. Finlason must contend that "burial" is so too. The language of the Church Catechism, to which Mr. Finlason refers, we should have thought sufficiently explicit on the subject; but the Twenty-fifth Article of the Church of England puts the matter beyond question, for it says, "There are two sacraments ordained of Christ our Lord in the Gospel; that is to say, Baptism and the Supper of the Lord. Those five commonly called sacraments—that is to say, Confirmation, Penance, Orders, *Matrimony*, and Extreme Unction—are *not* to be counted for sacraments of the Gospel." There are some other theological matters in this note, into which we deem it needless to enter.

If Mr. Finlason is right in his notion, that the privilege from disclosure arises solely from the sacramental character of the confession, it follows, as an inevitable consequence, that a confession to a dissenting minister of any persuasion is not protected; and where the confession is made to a clergyman of the Church of England, the Court, before deciding the question of privilege, must determine the the theological one, whether confession in the Church of England is necessarily *sacramental*. For our own parts, without undertaking to say positively what the law *is* upon the general subject, we cannot help thinking that a good suggestion is to be found in the following provision in one of the statutes of New York:—"No minister of the Gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." It is a maxim of law—"Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest." In early times, when no religion but the Roman Catholic was tolerated by law, it was only with respect to the ministers of that religion that questions of this nature could present themselves. But at the present day, when all forms of Christianity are tolerated by law, and it is a well-known principle of them all that there are cases in which the spiritual advice of a minister of religion may properly be sought, the above maxim indicates that it should be allowed freely, and with safety to both parties, without entering into a theological inquiry as to the consequences which, in the eye of that particular creed, may be supposed to follow from it.

In the latter part of his note Mr. Finlason refers to some analogous cases of privilege which seem to support the ruling of Hill, J. To these may be added, that it has frequently been held, that although, when a prisoner has made a confession after an illegal inducement to confess has been held out to him, the confession is inadmissible, yet any discovery made in consequence of that confession—*e. g.* the finding of stolen goods —is perfectly admissible.

The judgment of Hill, J., on the first objection made by the witness in *Reg* v. *Hay*, is also worthy of notice, as it may serve to remove a difficulty with respect to the form of [illegible]h administered in our courts of justice which has frequently presented itself to the minds of well-intentioned, but ignorant or unreflecting persons. Such parties labour under the impression that the oath binds them to tell everything—all they know, have heard, believe, think, or conjecture—respecting the matters in dispute. Not so—it only requires that the "evidence" which they give "shall be the truth, the whole truth, and nothing but the truth." Now, the question as to what is legal evidence it determined by the judge, not the witness, who is, therefore, only bound to speak the truth with relation to all matters which the judge adjudicates to be legal evidence in the cause.

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

OFFICERS AND SUITORS.

SEIZURE UNDER EXECUTION IN THE DIVISION COURTS.

(*Continued from page 203.*)

The 176th section of the Division Court Act enables a landlord, where his tenants goods are taken on execution under process of the court, to place in the hands of the bailiff making the levy his claim for rent in arrear, not exceeding in any case a year's rent. And section 177 directs that in case of any such claim being made, "the bailiff

making the levy shall *distrain* as well for the amount of the rent" claimed and costs, as the money he is directed to levy under the warrant, and section 178 provides what costs shall be charged "for every additional *distress* for rent in arrear."

The exemption act relates only to goods seized under process of execution. The words of section 4 are: "the following chattels are exempt from seizure *under any writ, out of any court whatever* in this Province," &c.; and the 151st section of the Division Court Act as altered by the act of last session is to the same effect.

Now under a distress by a landlord for rent in arrear, the goods mentioned would be liable to be distrained, and the question arises, would a bailiff of a Division Court, after making a levy under a writ of execution upon the premises leased by a defendant, and on receiving after such levy, a claim for rent from the landlord of such premises in proper form under the 176th section of the act, be justified in distraining the chattels exempted under section 4 of the act of last session, to satisfy the rent so claimed? Our opinion is that he would. The bailiff's authority in distraining for the rent is *not the writ of execution* but the written *claim* made *by the landlord.* Indeed, such claim is only another name for an ordinary landlord's warrant. The 180th section of the D. C. Act provides in effect, that the landlord's claim shall be first paid, and postpones the judgment creditor. And there seems to us nothing in any of these enactments that takes away the right of general distress which the landlord undoubtedly has in the ordinary way in cases where the bailiff levies under execution.

Replevin in the Division Courts.

(*Continued from page 205.*)

We gave in our last issue a sketch of the usual proceedings and course of a Replevin suit, and a correspondent furnished us with the two most necessary forms to be used by the officers of Division Courts, or suitors, which we also published.

We will now advert to cases which would take officers out of the ordinary routine of proceedings in suits of this nature, and which although of rare occurrence are nevertheless necessary to be understood.

After the bailiff has replevied the property, or such portion of it as he can find, he must then and not before serve a copy of the writ on the defendant, personally, if he can be found; but if not, by leaving the copy at his usual or last place of abode, with his wife or some other grown person, *being a member of his household or an inmate of the house wherein he resided.* It will be observed that personal service is not absolutely necessary, but care should be taken where the service is not personal to ascertain that the person to whom the writ is given comes within the description given above in italics and in the words of the Statute.

If the property or any portion thereof be concealed or secured in any dwelling house or building or enclosure of the defendant, or of any other person holding it for him, the bailiff should publicly, or in presence of two or more persons, demand from the defendant or other owner or occupant of the premises a deliverance to him of the property to be replevied, and if it be not delivered to him within twenty-four hours after such demand he may break open such house, building or enclosure, for the purpose of replevying such property, or any part thereof; or if the property be concealed about *the person* or on the premises of the defendant, or of any person holding the same for him, a like demand can be made, and if not complied with he may search and examine the person and premises of the defendant or of such other person.

The Statute does not say that the demand should be in writing, but it would be advisable that it should be so, especially in the instance where it was intended in the event of non-compliance therewith to break open any house or building. The bailiff should keep a copy of such notice, and the property claimed or the portion thereof secured or concealed ought to be specified therein.

There is a distinction made between cases where property is secured or concealed in a house, and where it is known to be on the person or premises of the defendant or other person holding it for him. In the first instance, 24 hours must elapse after demand made before any further action can be taken, whereas in the second a search may be instituted if the demand is not at once complied with—that is within a reasonable time. Great care should be taken by the bailiff in either of such cases to satisfy himself that the property was so concealed or secured, as he would not by any means be justified in availing himself of the powers conferred on him by the statute without good reason for doing so, and too much caution cannot be exercised in dealing with such matters.

Before the act of last session it was not necessary to obtain a judge's order in any instance before issuing a writ of replevin, but the cases in which it may now be issued without such order are made the exceptions, and we now come to refer to them.

The form of affidavit given in the last number is that to be used on application to the judge, but where it is necessary for the protection or security of the claimant to obtain the writ without a judge's order it must be stated in the affidavit, in addition to any general facts as set forth in the form given before, "that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order the delay would materially prejudice the just rights of the claimant in respect to the property."

The only other exception to the rule is where the property was distrained for rent or damage feasant, "in which case the writ of replevin may issue without an order if the affidavit states" (in addition to the general facts as before) "that the property was distrained and taken under color of a distress for rent or damage feasant;" and the writ issued in such case shall state "that the defendant hath taken and unjustly detains the property under color of a distress for rent or damage feasant (as the case may be)."

Where the writ thus issues without an order, the claimant is not entitled to obtain possession of the property replevied, but it must remain in the custody of the bailiff until he (the claimant) obtains an order from the judge to have it delivered to him. The bailiff, before parting with the pro-

perty, should obtain this order, or if only a copy of it was given him, should take care to see the original and satisfy himself that all was right.

If within 14 days from the time of his taking possession of the property and serving the defendant with a copy of the writ as before mentioned the claimant does not obtain and serve him with a judge's order, directing him how the property is to be disposed of, he may re-deliver it to the defendant—but this provision does not apply in case of a distress for rent or damage feasant.

We have now given the substance of the acts relating to Replevin, so far as they apply to Division Courts, under the late act, and an outline of the duties which Clerks and Bailiffs will have to perform in relation to this new and important jurisdiction of these Courts. We will probably again recur to the subject, as we are conscious of having by no means exhausted it, and in the meantime we would be glad to hear from any officer of Division Courts who may have any information to ask for or suggestions to make on the subject.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—I have been very much troubled by Clerks in other Counties not making regular returns of summonses sent to them for service, sometimes they are sent after the Court, and quite recently I received a couple of summonses two days after the Court at which they were returnable, although from the time the affidavit of service by the Bailiff was made they could have reached me at least five days before the Court.

Is the Clerk in these cases entitled to the fees?

Your obedient servant, M.

[It is the duty of Clerks receiving foreign summonses to return them promptly when served, and in the case put, not only is the Clerk in default not entitled to the fees, but he and his sureties would be liable in an action by plaintiff (the party injured) to make up in damages for the injury sustained by the delay. Moreover this is such a breach of duty as the judge would feel bound to notice, and if the plaintiff made a proper representation of the facts no doubt summary and effectual redress could be obtained.—EDS. L. J.]

To the Editors of the Law Journal.

Milton, 18th August, 1860.

GENTLEMEN,—The attention you bestow, and the information afforded from time to time, on the subject of Division Court practice, though the columns of the "*Law Journal*" deserve the acknowledgments of all connected with such courts; I observe in the number for the current month, some practical information and remarks, on the extension of protection afforded to chattels of defendants under execution, by an act of the last session, a very important alteration indeed, amounting almost to an exemption, nearly tantamount to the "snuffing out" of Division Courts.

With your permission, I beg to make a few remarks, with a view to elicit your opinion on the present position, and future prospects of Division Courts. Whether or not the opinion and remarks I am about to make are justified by the facts of the case, as well as to elicit practical remarks on the subject from others, your correspondents.

With deference, I would state as my opinion, that, *under existing arrangements*, Division Courts, as an institution, will, before two years are past, have faded out, and, it may possibly be better for the country at large if it should be the case; I hope my brother Clerks will not think I speak treason in saying so. I have always differed from those who have advocated the abolition of these Courts, on principle, as well as policy, because I could not see with them, that the courts were the *cause*, (as the abolitionists have alleged) of the credit system, which has done so much injury to the province; but, I always considered them as the *consequence* of the credit system—therefore, at the worst a "necessary evil" consequent upon the extent of indebtedness which the credit system had forced upon the country, but under the present law for protecting the defendants goods from execution, it is a question with me, if one-tenth part of the debts likely to become Division Court suits can be collected: under which circumstances the efficiency of such court to collect debts is so seriously affected, as virtually to amount to their abolition; and I only give expression to the opinion of our Legislators as contained in the act of last session, when I venture a conditional opinion to this effect, or, if you will, I make a virtue of necessity.

"A burnt child dreads the fire." I cannot think there will be a tithe of the indebtedness in the country which existed four years ago, and this is what has fed Division Courts, and made the revenue of some few Clerks, say, those of cities and large towns, sufficiently plethoric to excite the indignation of those desiring the abolition of the courts: this evil has corrected itself to a great extent, and it is likely to be kept within safe and much circumscribed bounds for the future. This state of things coupled with the reservation under execution will have the effect of producing the result I have ventured to anticipate, unless some wholesome and important amendments are introduced in the interim. Two years hence Division Courts will be numbered among "the things that were," and the officers thereof will have to say will Othello, "*our occupation is gone.*" If a mode of collecting small debts is to exist, let it be as efficient as possible, but, it appears to be the intention of the Legislature that small amounts shall not be recoverable by law, though we have nominally a small debts court. As matters now stand, if Division Courts are to exist, I think their jurisdiction should be extended, making the maximum amount collectable through them at least $150, and the minimum say $40, with an amended tariff of fees to suit such extension, and the item of a "counsel fee" added to the tarriff. This, I think, would be an alteration suitable to the extension of protection accorded by the recent Act, and at the same time preserve the efficiency and integrity of Division Courts, which, as things now are, we cannot expect. In the meantime, I do not see how the present staff of Clerks and Bailiffs can manage to hold on to their present positions—we shall have to submit to a reduction of our numbers: it is certain that, in many Divisions, the income is so much reduced as to make it a very insufficient return for the responsible nature of the duties which the position involves, and, better would it be, that a smaller number of officers receive a fair and decent remuneration, than that, say, three fourths of the whole should receive a pittance, so small, as to discourage any good business man from entering upon such employment; in which view of the case, I think, the number of Divisions in each county should be reduced, reduce the number of officers, by extending the area of each Division, thereby ensuring to each incumbent something like an equivalent for the attention given to, and the responsibility assumed in the duties of their respective offices, for in the present and prospective position of the country taken in connection with the alteration in the law before mentioned, the incomes of Clerks and Bailiffs are, and will be reduced so much that, unless other and additional occupations can be obtained, the position of either will not be worth the acceptance of men fitted for the duties.

Submitting these few observations to your consideration,

I remain, Gentlemen, respectfully yours,

JOHN HOLGATE,
Clerk 1st Div. Court, Halton.

[We cannot agree in the gloomy anticipations of our correspondent, and the remedy he proposes we fear would not answer, nevertheless there is a good deal to be said on both sides, and we shall not at present commit ourselves to any decided opinion.

Just now we prefer to allow our correspondents to speak, and would be glad to hear the opinions of other officers on the subject. There has from the first been a *mis-move* in establishing too many divisions in each County, owing we believe more to the eagerness to multiply offices than to any urgent demand from the general public. It may not be too late to rectify this evil—at all events it may be arrested.

We threw out the suggestion whether a criminal jurisdiction for summary convictions might not with great advantage to the public be conferred on Division Courts, and if we are rightly informed some measure of the kind was either introduced or spoken of last session.

Now is the time to discuss the matter—will our friends favor us with their views?—Eds. L. J.)

To the Editors of the Law Journal.

Warwich, 16th Sept., 1860.

Gentlemen,—May I request you will give your opinion whether a bailiff is entitled to mileage on an execution which he has to return *nulla bona?* There appears to be different opinions on the subject. If they are not, it is a great hardship that they should travel several miles for nothing, especially since the exemption law is in force, which makes half the executions to be returned "No goods."

I remain, Gentlemen,
Your obedient Servant,
James F. Elliot,
Clerk 2nd Div. Court Co. Lambton.

[Our correspondent will find his question answered in the negative more than once before in this journal.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

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

Scott v. The Trustees of Union School Section No. 1, in Burgess, and No. 2, in Bathurst.

School trustees—Execution against—Sale of school house.

Held, that land conveyed to school trustees for the purpose of a school, could not be sold under execution against them on a judgment obtained for the money due for building the school house.

Ejectment for half an acre of land of the rear part of No. 12, in the 10th concession of Burgess.

At the trial at Perth, before *Richards*, J., a deed from John Allan to defendants, dated 17th June, 1856, was put in and execution admitted.

This deed was made between the said John Allan of the first part, Ann Allan, his wife, of the second part, and the trustees of the united school sections No 1, of the Township of Burgess North, and No. 2, of the Township of Bathurst, both in the County of Lanark and province aforesaid, of the third part; and by it, in consideration of 5s., the said John Allan conveyed to the said parties of the third part and their successors in office for ever, the land in question, "in trust for the use of a common school in and for the united school sections No. 1, of the Township of Burgess North, and No. 2, of the Township of Bathurst, both in the County of Lanark, and Province of Canada aforesaid. Provided always, and it is the true intent and meaning of these presents, and of the parties hereto, that if the said above described lands and premises shall at any time hereafter cease to be used for common school purposes for the space of three years at any one time, then and in that case the same shall immediately revert to the said party of the first part, his heirs and assigns, and he, she, or they shall and may enter in and upon, and the same shall and may occupy and enjoy, as fully to all intents and purposes as if these presents never had been made; the said trustees or their successors in office being allowed to remove any building or erections thereon before the expiration of said three years." Then followed the usual covenants for title, and bar of dower.

A judgment in favour of the plaintiff against defendants, entered in the Common Pleas on the 15th March, 1858, for £171 2s. 2d., was also admitted, and the issuing and return of execution against goods; and writs of *fi. fa.* and *ven. ex.* against lands were produced, and a deed from James Thompson, sheriff, to the plaintiff of the *locus in quo*, dated the 5th of September, 1859.

It was objected that the interest of defendants under the deed to them was not one that could be seized and sold under a *fi. fa.* against lands, and a verdict was taken for the plaintiff, subject to the opinion of the court on that point.

Richards, Q. C., for the plaintiff.

Deacon, contra, cited *Simpson* v. *Carr*, 5 U. C. Q. B. 326; *Doe Hull* v. *Greenhill*, 4 B. & Al. 684; *Roe* v. *Peggie*, 4 Dougl. 309; *Scott* v. *Scholey*, 8 East, 467; *Baxter* v. *Brown*, 7 M. & Gr. 198; Hill on Trustees, 239; Grant on Corporations, 511, 512.

The statutes bearing upon the question are referred to in the judgments.

Robinson, C. J.—The plaintiff having a claim upon the defendants, the school trustees, for building a school house for their union section, obtained against them in the Court of Common Pleas an execution thereupon for £171 2s. 2d., and taking out a writ against the lands of the trustees of the said school section had the site of their school house and the house itself sold at sheriff's sale, and the plaintiff in the action bought it at the sale for £50, and on the 5th day of September, 1859, the sheriff made a deed to him of the land.

The judgment and execution were against the trustees in their corporate name.

A copy of a deed, dated the 17th of June, 1856, by which John Allan and his wife conveyed the site of the school house to the trustees of the united school section, "*and to their successors in office*," is given in the case stated, from which it will be seen that the trustees (that is, for the time being) were to hold the land in trust for the use of a common school in and for the united school sections.

The first question is, whether the land was subject to be sold, as it was, to satisfy Scott's debt, due to him by the trustees for building the school house, as it is admitted by the parties? I think it was not so liable.

The school trustees are a board for taking care of and managing (among other duties) the school house in which the common schools are to be kept for the benefit of the inhabitants. They are in the light, I think, of trustees for the inhabitants as regards the school houses and the sites on which they are built. If they were individuals against whom a judgment had been entered for a debt due by them jointly, any property which they held as trustees for others could not be sold to satisfy the judgment.

The case was argued as if the question were rather whether the property could not be sold under the 10th section of the Statute of Frauds, 29 Car. II., ch. 3, but that is a provision applying only to judgments against persons *for whom lands, &c.*, are held by others in trust, that is, upon a naked trust for their benefit, when no special confidence is reposed in the trustee, but he is merely to pay over the rents and profits to the *cestui que trust* against whom the judgment has been rendered. This is clearly no case of that kind. The inhabitants of the school division are the *cestuis que trust* in the case. The defendants are not in that position.

But it is argued, and not unreasonably, that the debt in this case being due to the plaintiff for building the school house which he desires should be seized in execution, it is not unjust that he should be able to seize the building in execution to pay the debt. If we look, however, to the extent to which such a claim might be pushed in similar cases, we should see the embarrassment that would ensue.

In this case, to say nothing of the site, the school house itself cost £150 or more, and the whole has been bid off by the plaintiff

for £50. The school acts appear to have made special provision for raising by assessment the moneys necessary for *building school houses*, as well as for defraying other school charges, and in some cases the trustees are made personally liable, so that we cannot conclude that there is no remedy in the power of the plaintiff but seizing and selling a property held in trust for the inhabitants of the section, and given by the donor upon the express condition that it should never be used for other than school purposes.

I refer to the statutes 13 & 14 Vic., ch. 48, sec. 12, sub-secs. 3, 4, 7, 9, 16, and sec. 18, sub-sec. 1; also, to 16 Vic., ch. 185, secs. 6 & 17.

In my opinion, a verdict should be entered for the defendants.

BURNS, J.—The question presented by this case is one of great public importance, for if the school houses and lands thereto attached throughout the province are liable to be sold upon execution at the suit of any one who has obtained a judgment against the corporation for a debt due, the same principle should hold good against the corporations of counties and cities, and we should have creditors claiming to sell the public court houses and gaols upon writs of execution. I have been unable to find any direct authority upon the subject either one way or the other in England, but I think the history of the proceedings of Mr. Robert Hennings Parr against the Corporation of Poole does throw some light upon the question. Upon the passing of the statute 5 & 6 W., IV., ch. 76, the Municipal Corporation Act, Mr. Parr was dismissed from his office of town clerk of the town and county of Poole. He claimed compensation, and the corporation awarded him £4,500, for which the corporation gave a bond payable by instalments out of the funds of the borough. The payments not being all made he brought an action against the corporation and recovered judgment by default, and upon the judgment he caused an *elegit* to be extended, and thereupon brought an action of ejectment to recover a piece of land used as a meat market, together with the Guild-hall and other erections and buildings thereon, then used and occupied by the corporation for the public purposes of the town. Previous to this some of the rate-payers filed an information to restrain the town council from paying Mr. Parr, and to test the legality of imposing a rate for the purpose; and Mr. Parr also applied to the Court of Queen's Bench for a mandamus against the mayor, aldermen and councillors of the town, to compel them to impose a rate to pay the demand. In the ejectment a rule for judgment was obtained unless the persons in possession should appear and plead. On behalf of the mayor, aldermen and councillors an application was made to the court to be permitted to defend without confessing possession, and the ground of asking to defend was that the Guild-hall was the *only* place in which they had been accustomed to transact the public business, and that the sessions for the borough were held in the Guild-hall, and the same was used by the justices for public purposes only. Lord *Denman*, in giving judgment upon the application, said the court was not called upon in that stage of the proceedings to decide whether their property, applicable to public purposes only, was liable to be taken in execution; but he said the court wished to be understood as not giving any countenance to the supposition that corporate property, though applied to public purposes, was protected from the lawful claims of persons having demands upon the corporation. See *The Attorney-General* v. *Corporation of Poole* (2 Keen 190, 4 M. & Cr. 17,) *Regina* v. *Ledgard* (1 Q. B. 619), *Parr* v. *The Attorney-General* (8 Cl. & F. 409 and 6 Jur. 245), *Doe Parr* v. *Roe*, (1 Q. B. 700).

It will be observed in Parr's case that there was other property, such as the meat-market, and other erections and buildings besides the Guild-hall, which latter was used for public purposes and the courts, for which the action was brought, and the defendants sought to defend the action inasmuch as the Guild-hall was used for those purposes.

In the case before us it is the school house and the land belonging to it used for the purposes of the school which has been sold, and we are called upon to say whether that can legally be done. The statute 13 & 14 Vic., ch. 48, sec. 12, sub sec. 3, enables the trustees to acquire and hold as a corporation, by any title whatsoever, any land for common school purposes until the power should be taken away or modified, and to apply the same according to the terms of acquiring or receiving them. By the terms of the conveyance to the trustees of the land in question it was to be held in trust for the use of a common school for the united sections; provided, and it was, as the instrument expresses it, the true intent and meaning of the deed of conveyance, that if the premises should at any time cease to be used for common school purposes for the space of three years, then the said premises should revert to the grantor. Now, if the plaintiff can be at liberty to sell the premises upon his judgment and execution, and buy it, and then can dispossess the trustees, so that the same can no longer be used for common school purposes, the plaintiff's act can neither be beneficial to himself nor the corporation. But independent of the terms upon which this particular school house and premises are held, I think it is against public policy to permit the public property of this description to be sold upon execution.

By the 7th sub-section of the section of the act quoted, it is the duty of the trustees to provide for the salaries of teachers and all other expenses of the school in such manner as the majority of freeholders or householders of the section may desire; and if the sums be insufficient to defray all the expenses, the trustees shall have authority to assess and cause to be collected any additional rate in order to pay the balance.

It is not for us in this action to point out to the plaintiff what remedy he may have in order to procure payment of the debt for which he recovered judgment against the corporation, or indeed to say whether he has any remedy. It is admitted that the debt due the plaintiff was for building the school house, and in such case we see that for the erection of the school house, the 6th section of 16 Vic., ch. 185, enables the trustees to assess the section for that purpose. The 16th sub-section of section 12 of 13 & 14 Vic., ch. 48, enacts that in case any of the trustees shall wilfully neglect or refuse to exercise such powers as are vested in them for the fulfilment of any contract or agreement made by them, they shall be personally responsible for the fulfilment of such contract or agreement.

Looking at the whole of the school acts, and the objects and intents for which the same have been enacted, and the duties imposed upon the trustees with regard to the fulfilling of contracts made by them, and the power given them enabling them to do so, the liability and responsibility cast upon them individually if they neglect to perform their duty, I think the effect is to create these corporations for public beneficial and charitable purposes, and that the property should be held and administered for the ends and purposes for which it was given and held.

It is sufficient to hold, in this action of ejectment, to recover the school house, that it is contrary to public policy to hold that property which is held for such purposes as this can be sold upon execution against the corporation. The corporation possibly may hold property the uses of which would be for the public, or the profits of which might be appropriated to the maintenance of the school, and which it would be right to hold might be sold upon execution, but that is different from selling the school house itself, which is as much in daily use for the children of the section as the court house is for the holding of the courts, or the prisons for confining prisoners of the counties, and I apprehend it could not possibly be held that these latter are liable to be sold upon execution.

I think the *postea* should therefore be given to the defendants.

McLEAN, J. concurred.

Judgment for defendants.

THE CHIEF SUPERINTENDENT OF SCHOOLS (*Appellant*).

IN THE MATTER BETWEEN WILLIAM MILNE (*Plaintiff*) AND GEORGE H. SYLVESTER, PHILLIP WIDEMAN, AND ROBERT JOHNSON, TRUSTEES OF UNION SCHOOL SECTION NO. 2, IN WHITCHURCH, AND NO. 7, IN MARKHAM (*Defendants*).

Suit by teacher against trustees—Reference to arbitration—Appeal.

Where an action in the Division Court by a school teacher against the trustees was referred to arbitration by order of the judge, with the consent of the parties. *Held*, that the decision of the arbitrator could not be appealed from under the 16 Vic., ch 185, sec. 24.

Remarks as to the defendants remedy by prohibition.

APPEAL from the second Division Court of the United Counties of York and Peel.

The plaintiff was engaged as teacher in the above school section (of which the defendants are trustees) from the 3rd of January to

the 18th of February, 1859, at £85 per annum. About the first day of February, 1859, a cheque was given him by the local superintendent of Whitchurch, on the order of the trustees, and he endorsed it to Sylvester. After his dismissal he brought an action in the above Division Court against Sylvester for the amount of the cheque. At the trial it was objected that Sylvester could not be made individually responsible, as he was only one of the trustees, and had received no consideration. The judge then asked if the other trustees would be added as defendants, to which they agreed. Some objection being made to the legality of trying the case before the judge, and the clauses of the School Acts relating to arbitration between trustees and teachers being spoken of, the judge overruled the objections, and after some discussion endorsed on the summons the following order: "Ordered to be referred to the award and final determination of the Rev. J. S. Hill, to decide the matters of difference, as well as this suit between the parties. By consent." The clerk of the court afterwards drew up an order of reference, which directed that the award when made might be entered as the judgment in the cause; and the award having been made in favour of the plaintiff, he endorsed on the summons: "By award of Rev. Mr. Hill, judgment for plaintiff for £25, with costs, ordered to be paid in twenty days.

The appellant, treating this as a decision within the 16 Vic., ch. 185, sec. 24, appealed from the judgment, on the following and other grounds: 1. That the court below had no jurisdiction in the matter. 2 That even if it had, the award (now entered as judgment) is bad, being against the trustees individually, and also against parties whose responsibility was not proved. 3. That the contract with the teacher was not under the corporate seal.

Hodgins for the appeal. *Cameron*, Q. C., contra.

Burns, J., delivered the judgment of the Court.

We do not think this is an appealable matter under the 24th section of 16 Vic., ch. 185. That section contemplates that there may exist cases triable in the Division Court against and between superintendents, trustees, teachers, and others acting under the provisions of the Common School Acts; and to provide for uniformity of decision an appeal to either of the superior courts of law is given to the chief superintendent of schools. When the appeal is properly initiated, the judge of the Division Court is to certify under his hand the summons and statement of claim, and other proceedings in the case, together with the evidence and his own judgment thereon, and all objections made thereto. Now, instead of doing this, the judge in this instance certifies to the summons and statement of claim, and the proceedings to refer the matter to arbitration, with the judgment of the arbitrator, and without any evidence whatever. The legislature never meant that this court should be an appellant court from the determination of an arbitrator appointed by the judge of the Division Court. For all that appears upon the face of the summons and statement of claim in the Division Court, the case would seem to be that of one of an ordinary character. The judge had, under 4th section of 16 Vic. ch. 177, power, with the consent of both parties to the suit, to refer the matters in dispute in the suit between the parties, as also matters not in the suit, to arbitration, in such matters as he might think reasonable and just. The section provides that the award shall be entered as the judgment, and shall be as binding as if given by the judge. This case seems to have been a case of that kind, from the endorsement made by the judge on the summons of the reference by consent, the award of the arbitrator, and the judgment entered upon the award. A case of that kind is not one contemplated by the 24th section of the School Act of 1853, that is, chapter 185 of 16 Vic.

If the case in the Division Court was of that nature that it came under the provisions of the 17th section of the School Act of 1850, as amended by the 15th section of 16 Vic. ch. 185, so that the remedy was by arbitration, and that no action should be brought in any court of law or equity to enforce the claim, then the defendants' remedy would have been to have applied to the superior courts for a prohibition. The only thing to be said against such a course would be that, perhaps, before the defendants could have applied for and obtained the writ of prohibition, the case might be tried and disposed of in the Division Court in the meantime. We do not seem to have as speedy a remedy in that respect as they have in England, certainly, but still I do not think it is any argument against the course to say that there may be delay. The act in England, 12 & 13 Vic. ch. 109, gives parties a speedy means of obtaining the writ, and if the writ be improperly or improvidently issued, the courts have power to set aside the writ. See *In re Baddeley* v. *Denton* (4 Ex. 508). If the defendants appeared to the matter, by reason of want of jurisdiction, the judge might of the writ of summons, and contested the right of the judge to try course try that question and give judgment upon it, and if he should decide wrongly in respect to it, I should, at present, be inclined to say that judgment would then be an appealable matter under the 24 section of ch. 185. But if it were not so, I still think the case would be one to apply to the superior courts for a writ of prohibition, for in such case the defendants would not be submitting to or acquiescing in the judge entertaining the suit because he had jurisdiction. I should say the defendants might, in an application after judgment, take the opinion of a court of superior jurisdiction whether the inferior had jurisdiction. The point was raised in the case of *Roberts* v. *Humbly*, (3 M. & W. 120,) but was not necessary to be decided, for the want of jurisdiction was apparent upon the face of the proceedings. Baron Parke said, if it had been necessary he should have wished to consider whether a party is to be bound by the judgment of an inferior court, where he has had no opportunity to dispute its jurisdiction. Alderson, Baron, however, said he thought the court had a right to interfere, and even to grant the writ of prohibition after execution, and he says, all the cases where it has been held otherwise have turned on the acquiescence of the party. The passages quoted from 2 Coke's Inst., 602, I think are decisive on the point, and reason is in favour of it.

In the present case, however, I have not adverted to the rights of the defendants, with any view of encouraging them to try the experiment of applying for a prohibition. If they did make the application they might be met with the answer that they had given their consent to a reference of all matters in the suit, as well as all other matters, and under the section alluded to in the Division Court Act of 1853, the judge had the power to make such a reference.

The case, so far as we have now to deal with it upon this appeal of the chief superintendent of schools, is clearly not one coming within the meaning of the provisions giving an appeal to this court, and therefore must be dismissed.

Appeal dismissed.

IN CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Charles Watts v. William Little, John Hunter, Joseph Loney, and Henry Kirkland.
Charles Watts v. Joseph Loney and Henry Kirkland.

Amendment—Terms—Setting aside judgment in ejectment—Terms.

Upon the application of plaintiff, the following amendments were allowed by a judge in chambers, upon terms of paying costs. 1st. The insertion in a judgment roll of the date of its entry. 2nd. The insertion in the roll of the amount of taxed costs in the cause. 3rd. The insertion in the roll of the aggregate amount of debt and costs recovered in the cause. 4th. The statement in a *fi fa.* lands of the true amount of debt and costs, an amount being therein erroneously stated. 5th. A similar amendment in a ven. ex. lands and *fi. fa.* residue.

Where, in an action of ejectment, defendant was a few minutes too late in the entry of appearance to the writ, and afterwards promptly applied to set aside the judgment, upon an affidavit of merits, showing the merits in detail, the application was allowed, upon the terms of entry of appearance and payment of costs within a month, otherwise summons to be discharged.

Where the summons to shew cause why the judgment in ejectment should not be set aside was discharged with costs, and leave granted to make a second application for the same purpose, the second summons was made absolute, only on the terms of paying the costs of the judgment, and of both applications.

(Chambers, 31st August, 1860.)

The first of these causes was an action of ejectment, brought to cover possession of a parcel of land in the township of Burford; and judgment was entered for want of an appearance.

The defendant, Joseph Loney, advised with an attorney (Mr. D. G. Miller) who thought he had no defence at law, but seemed to think that he might maintain his possession by the aid of a court of equity, in restraining proceedings at law; and so he

delayed entering appearance to this action of ejectment, but at the last moment made up his mind to enter an appearance, and sent the proper instructions to his agent at Brantford.

The agent went on the last day, and found that judgment by default had been signed about five minutes before he reached the office.

Then defendants' attorney moved to set aside the judgment by default, on an affidavit of merits, upon the usual terms of paying costs. The merits he shewed were these: That defendant had been owner of this land, and was still in possession of it: that plaintiff claimed title as purchaser from one Daniel Murphy, vendee of the sheriff of the county of Brant, under an execution against the lands of defendant and one Kirkland, at the suit of the said Daniel Murphy: that that was a judgment in the Queen's Bench for about £40 damages and costs, the true debt being about £17; but at the sheriff's sale the land was bid off by one Alfred Watts for £10: that the sale was brought about by a fraudulent collusion between the plaintiff, Murphy, and the sheriff of Brant; and that there were various irregularities in the proceedings by execution for sale of the land, which irregularities were specified.

On shewing cause against the summons to set aside the judgment by default in the ejectment, on which a writ of *hab. fac. pos.* had been issued, but was not executed, the plaintiff shewed that he claimed not only under the sheriff's sale in Murphy's judgment —which sheriff's sale was made on 31st January, 1860—but also as purchaser from Alfred Watts (son of plaintiff) who was vendee of the sheriff of the county of Brant, at a sale by the sheriff made on 7th February, 1860, upon a *fi. fa.* on a judgment obtained by this plaintiff, Charles Watts, against defendant, Joseph Loney, and Kirkland.

Upon this cause being shewn (the debt in this judgment being £500 and upwards, and obtained by confession) Mr. Justice Richards, before whom the summons to set aside the judgment in ejectment was heard, discharged the summons with costs, but allowed defendant, Joseph Loney, to renew his application to set aside the judgment, if he could shew any merits as against plaintiff claiming under this double chain of title.

The second application was heard before the Chief Justice of Upper Canada: the defendant, however, not having paid the costs of the first application.

The judge (Burns, J.) who granted the latter summons, granted at the same time a summons in the second-named cause, on the application of the plaintiff, Charles Watts, on the defendants, Joseph Loney and Henry Kirkland, in the case of Charles Watts against them, to satisfy the judgments in which case the land was sold, to shew cause why the judgment roll in that cause should not be amended as of the day when the judgment was entered.

1st. By inserting in the roll the date of the entry of said judgment, viz., 14th May, 1857.

2nd. By filling up the blanks left in the roll for that purpose, the sum of £3 15s. 5d., the amount of taxed costs.

3rd. And also filling in the aggregate amount of damages and costs, being £1003 15s. 5d.; which sum was in the roll left blank.

4th. To amend the *fi. fa.* against goods, by making it correspond with the judgment and præcipe; and directing the writ to the sheriff of the county of Brant, instead of the sheriff of Wentworth (to whom it was erroneously directed.)

5th. To amend the *fi. fa.* against lands in the same manner—the same error having been committed in it.

6th. To amend the said writ against lands, by inserting £1,003 15s. 5d., instead of £3003 15s. 5d., erroneously inserted therein.

7th. To amend a similar error in the writ of *venditioni exponas* against lands, and *fi. fa.* for residue.

8th. And to amend any other errors or imperfections in any of the said proceedings, arising from the mistake or oversight of the officer of the court.

The defendant, Joseph Loney, besides relying on these errors, or some of them, as rendering the sheriff's sale invalid, under which the plaintiff, Charles Watts, claimed, filed an affidavit also, in which it was sworn that he believed that the judgment debt of Charles Watts was satisfied before the sale—by a chattel mortgage which defendants had given to him of all their stock in trade, and their goods—and by assignment of a mortgage made by a third party to defendants. And he shewed that while these applications were pending, that he had filed a bill in Chancery against the plaintiff to compel him to account for what he received under a power of sale given to him in the chattel mortgage.

Carroll, for defendants, among other things, contended that the judgment was satisfied before the land was sold under it, and produced a verified copy of a bill filed in the court of Chancery against plaintiffs at the suit of defendants.

Harrison, contra, cited Har. C. L. P. A. 131, note *a*, 605; *Tay* v. *Hall*, 18 L. J. Q. B. 13; Chit Forms, 7 Edn., 478, and 9 Edn., 1461; *Wright* v. *Landell*, Tay. U. C. R. 416; *Edson* v. *Hogadone*, R. & Dig. "Amendment," III. 14; *Doe d. Spafford* v. *Brown et al*, 3 U. C. O. S., 92; *Doe d. Boulton* v. *Ferguson*, 5 U. C. Q. B., 515.

ROBINSON, C. J.—As to the summons obtained by the plaintiff for amending. The accumulation of errors in the judgment and subsequent proceedings in the case of Charles Watts against Loney and Kirkland, is something quite surprising and unaccountable; so great indeed as to make one hesitate to exercise a discretion in amending proceedings which may be called a mass of mistakes. And I must at least take care not to incur the risk of possible injury to any third party by curing such defects.

I allow the 2, 3, 6 & 7 amendments asked for, which will cure the imperfections in the judgment of omitting to shew the amount of the taxed costs, and the aggregate amount of damages and costs; and will also correct the errors in stating the amount in the *fi. fa.* against lands, and in the *venditioni exponas* and *fi. fa.* for residue to be £3003 15s. 5d., instead of £1003 15s. 5d., as the amount will stand in the judgment roll when amended.

In all these amendments there is something to amend by: the errors are apparent, and no one, as it appears to me, can be injured by them.

I grant the first amendment moved for, of inserting in the judgment roll the day when the judgment was entered, which was very heedlessly left blank; though I have some hesitation in doing so, from an apprehension that it may possibly lead to inconvenience or loss, from the effect it may have in regard to the time of land being bound by the judgment.

I decline to allow the writs of execution to be amended by now addressing them to the sheriff of Brant, instead of Wentworth, after the sheriff of Brant has acted upon them without authority. The plaintiff, however, has my permission to apply to the court for those amendments. (*a*) I do not feel clear in allowing them.

If the title of the purchaser will not be affected by the irregularities in the writs against goods and against lands, which founded the *venditioni exponas* and *fi. fa.* for residue on which the sale took place, then the refusal to allow the amendment will not signify. If, on the other hand, there is in those extraordinary errors, anything fatal to the title, under the circumstance of the plaintiff on the writs being himself the purchaser at sheriff's sale, then I am not satisfied that I could properly make such amendments.

The amendments which I allow are to be made on payment of costs.

Then as to the defendants' application to set aside the judgment by default, on the affidavit of merits; and, of course, on the common terms of paying costs of the judgment, and execution issued upon it, and the costs of opposing the application. It is to be observed, on the one hand, that in the bill which the defendant has filed in Chancery, and which he has himself brought before us, in order to shew that he is in earnest in seeking a remedy on the ground of the judgment being satisfied before the land was sold upon it, the defendant himself has stated that he has no defence at law to the ejectment; and I confess I am much inclined to believe that his attorney thought so, and on that account omitted to appear to the writ till he was too late to save his time.

If one could clearly see this, certainly it would be a strong argument against interfering with the judgment. But Mr. Miller's affidavit states the case somewhat differently; and besides, when the defendants' appearance was in fact taken to the proper office only a few minutes after the judgment was signed, it would be too rigid, I think, to refuse to allow an opportunity of defence,

(*a*) Subsequently upon the application of the Plaintiff to the full court, these amendments were also allowed, (*Watts* v. *Loney et al*,) C.P., T.T., 1860.—EDS. L.J.

when the application was made so promptly after the judgment, and a trial has not been lost.

I shall make the summons to set aside the judgment absolute on condition of paying costs, viz., the costs of the judgment and proceedings upon it; the costs of opposing the first summons, which was discharged with costs; and the costs of opposing this summons. And unless these costs shall be paid, and appearance entered, within one month, then this summons to be discharged with costs.

Harvey Terry v. James W. Comstock.

Consol. Stats. U. C, cap. 22 sec. 31, p. 191—Arrest—Application for discharge—Intention to quit Canada.

Where defendant made application under and pursuant to sec. 31 of Consol. Stats U. C. cap. 22, to be discharged out of custody, on the ground that when arrested he had no intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose; and it appeared that the debt for which he was arrested had been created through fraud; that he had no more ties in Canada than anywhere else, where he would not be criminally responsible for his acts of fraud—the application was refused.

(Chambers, 13th January, 1860)

This was a summons calling upon plaintiff, among other things, to shew cause why the writ of capias issued in this cause, the arrest of the defendant thereunder, and all proceedings subsequent thereto should not be set aside, on the ground that both the plaintiff and defendant were, at the time of the issue of the writ, citizens of a foreign country; or why the arrest should not be set aside, and the defendant altogether discharged from custody, on the ground that the defendant had not, either at the time of the making of the affidavit to arrest the issue of the writ of capias thereon, or the arrest of the defendant thereunder, any intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose.

The affidavit of plaintiff, on which defendant was arrested, stated that on 2nd July, 1849, defendant applied to him for a loan of $3,950, security to be given by a bill of exchange at six days, on a Mr. Haggard, of Buffalo, and on warehouse receipts for 600 barrels of flour and 3,000 bushels of wheat: that defendant, in order to put Haggard in funds to meet the bill, had agreed to consign to him flour to the amount of the bill: that before the bill matured, defendant called upon plaintiff and said he would not consign the flour as he could do better with it, but would be sure, notwithstanding, to meet the bill: that when the bill matured, defendant paid to plaintiff $1,000, and offered a bill of exchange, drawn at thirty days, for $3,000, upon a Mr. King, of Buffalo, to whom he said he had consigned flour to that amount—the warehouse receipts to be held by the plaintiff in the meantime: that King had no flour consigned to him by plaintiff, and in consequence the draft for $3,000 was protested: that, on enquiry, plaintiff discovered that there were not in warehouse either the 600 barrels of flour or the 3,000 bushels of wheat called for by the warehouse receipts: that defendant had committed a gross fraud on the plaintiff: that on the 29th August he absconded from Milwaukie to defraud the plaintiff, and to avoid being arrested for fraud: that on the 28th October plaintiff had recovered judgment against defendant for the amount of his said debt: that, for the reasons aforesaid, "he verily believed that the said James W. Comstock will quit Canada, unless forthwith apprehended."

Corroboratory affidavits were filed by Mr. Haggard and others mentioned in the plaintiff's affidavit.

The defendant filed an affidavit, in which he swore that both himself and plaintiff were citizens of a foreign state; in general terms denying the alleged frauds: and alleged that in Milwaukee it is customary for merchants to advance money at usurious rates on fraudulent warehouse receipts, and to threaten criminal prosecution in the event of refusal to pay the usurious rates. Other affidavits, made by Hon. Cicero Comstock, a member of the Senate of the United States and a brother of defendant, and by Patrick George Norris, his attorney, were filed by the defendant. In the former, the alleged law of the State of Wisconsin as to fraudulent warehouse receipts, was fully stated; and in the latter, certain facts were adduced to show that the defendant never had any intention to quit Canada, knowing, as he did, that if he returned to the United States he would be prosecuted criminally.

Various affidavits were filed by plaintiff in reply, corroborating the affidavits of plaintiff, and strongly denying that it is the custom in Milwaukie, as alleged by defendant, for commercial men there to advance money on fraudulent warehouse receipts.

The contents of the affidavits, both of plaintiff and defendant, are in other particulars more fully noticed in the judgment of the court.

Harrison, for defendant, as to both plaintiff and defendant being citizens of a foreign state, cited *Cozens* v. *Ritchie*, Dra. Rep. 176; *Rayner* v. *Hamilton*, M. T. 2 Vic. M.S.; R. & H. Dig. "Arrest," IV. 2; *Frear* v. *Ferguson*, 2. U.C. Cham. R. 144; *Brett* v. *Smith*, 1 U. C. Prac R. 309; *Romberg* v. *Steenbock et al*, *Ib.* 200; *Blumenthal* v. *Solomon*, 2 U.C. Prac. R. 51; but relied rather on the second ground of the application, viz., for the discharge of the defendant, on the ground that when arrested he was not about to quit Canada for the purposes sworn, or for any purpose. As to this he cited Consol. Stat. U.C. cap. 22, sec. 31 p. 191; *Talbot* v. *Bulkeley*, 16 M. & W. 196; *Bullock* v. *Jenkins*, 1 L.M. & P. 645; *Pegler* v. *Hislop*, 1 Ex. 437; *Burness* v. *Guiranoorch*, 4 Ex. 520; *Stammers* v. *Hughes*, 18 C. B. 527; *Hargreaves* v. *Hayes*, 5 El. & B. 272; *Robinson* v. *Gardiner*, 7 Dowl. P.C. 716; *Walker* v. *Lamb*, *Ib.* 131; *Gibbons*. *Spalding*, 11 M. & W. 191.

J. B. Read, *contra*.

Draper, C. J.—In this application to set aside the defendant's arrest, and discharge him from custody, the only point for decision is raised on this objection—that the defendant had not, at the time of the granting the order, the issuing of the capias, or the making of the arrest, any intention of quitting the Province of Canada with intention to defraud.

It was not pressed upon me to review the decision of the learned judge who made the order for the arrest, upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. The application was based entirely on the new matter disclosed upon affidavits. Had the former course been taken, I should have referred the matter to the full court.

It is, however, necessary to refer to those affidavits, in order to apply the affidavits filed on this application.

The plaintiff discloses a gross fraud in obtaining an advance of money on the security of a bill of exchange and two warehouse receipts, the bill drawn at Milwaukie, in the State of Wisconsin, where the plaintiff and defendant both resided at the time, on a party in Buffalo, by whom acceptance and payment were refused; and the warehouse receipts, purporting to represent the defendant to be possessed of a large quantity of flour and oats, which he had not. The defendant absconded from Milwaukie about the time the bill matured, and came to London, in this Province, and the plaintiff recovered judgment against him there, but no satisfaction.

The plaintiff swears that he belie ed the defendant had with him a large sum of money, of which he defrauded plaintiff and other creditors in the State of Wisconsin: that plaintiff only resided in London for the purpose of avoiding plaintiff and other creditors: and that "defendant will abscond from Canada the moment he learns that plaintiff has discovered his residence." This affidavit is strongly corroborated, in material parts, by affidavits of other parties.

The defendant's own affidavit does not deny any fact alleged by the plaintiff as to his indebtedness. It goes further, and shows that, by the laws of the State of Wisconsin, the giving such warehouse receipts, where there is no such property in the giver's possession as the receipts represent, is a criminal offence, subjecting the offender to not less than one nor more than two years' imprisonment in the States' prison. It further avers that the defendant left Milwaukie and came to London, not to defraud plaintiff—which intention is wholly denied — but to avoid criminal prosecution: that defendant left real estate which he valued at four thousand dollars, and personal property valued by him at sixteen hundred and twenty-five dollars, in the city of Milwaukie; that all the money he brought with him was two hundred and six dollars: that he would not leave the Province, as he knows he would be arrested on these warehouse receipts if he returned to the United States: that a few days before his arrest he was told by a police officer that the plaintiff had gone to Toronto to get a judge's order for his arrest, but he told the officer he would remain at London, whether the plaintiff got the order or not. He also stated that it was a common thing among business men in

Milwaukie, and plaintiff knew it, to give such warehouse receipts in violation of the law. The Honorable Cicero Comstock, a member of the Senate of Wisconsin, and a brother of defendant, confirmed this latter statement. The defendant's attorney swears that some days previous to the arrest, the defendant told him what he had heard from the police officer, and that he (defendant) had made up his mind to remain in the city of London, as he knew he would be arrested on a criminal prosecution if he returned to the United States.

The plaintiff filed affidavits in reply, showing that defendant had been indicted in the State of Wisconsin for this fraud—(the indictment charges the offence to have been "wilfully, feloniously, and fraudulently committed:") that defendant had obtained several thousand dollars from various banks or parties, not long before he absconded, sums amounting to $30,000, which are under his control, if he did not bring them with him to Canada. That his personal property left behind sold for about $730, and his real estate was not worth, above incumbrances, over $1,500. These affidavits also deny the existence of such a system of giving fraudulent receipts, as is sworn to by defendant and his brother.

I am glad that I can, with a conviction that I am acting in the true spirit of our law, refuse this application.

The defendant's ground of application amounts to little, if anything, more than this: I dare not go back to the United States, lest I should be arrested for feloniously defrauding the plaintiff, and, therefore, I can have no intention of leaving Canada. In the face of this, he denies an intention of defrauding plaintiff, in the first instance, and, to excuse himself, charges the mercantile community, of which he lately formed a member, of commonly practising a similar fraud.

The defendant apparently has been some months in this Province without any property which is visible or tangible, and without any occupation. There is nothing of that sort to lead to the idea that he may not leave Canada at any moment. But he has found, or at least believes he has found, an asylum against the criminal justice of his own country, and relies on his desire to escape that peril as proof that he has no intention to quit Canada.

With the fact of his indebtedness clearly established; of its being created through fraud; of his having fled to avoid the consequences; and of his having no ties in this Province, any more than anywhere else, where he would not be criminally responsible for the acts detailed—all before me, I feel warranted in saying that there is "good and probable cause for concluding that defendant, unless apprehended, would quit Canada to defraud plaintiff;" and I therefore discharge this summons.

NOTE.—When judgment in this case was delivered, owing to its peculiar facts, which might not again arise, it was not deemed necessary to publish the decision. But as it has been in subsequent cases often referred to, it is now published.—EDS. L. J.

V. C. WOOD'S COURT.

(*From the Law Times.*)

COLEMAN V. WEST HARTLEPOOL HARBOUR AND RAILWAY COMPANY.

Injunction—Publication of proceedings in a cause during progress.

A party to a suit has no right during the progress of it to publish any statement of the proceeding which may prejudice the mind of the public against his opponents.

It is a strong *prima facie* presumption that such a narrative, published by a party to the suit, cannot be an impartial representation of such proceedings.

The court will restain a party from publishing or offering for sale during the progress of a suit, any pamphlet or book containing unfair statements of the proceedings in such suit.

[July 19 and 31, August 1, 1860.]

This was a bill filed by the plaintiff on behalf of himself and all the other shareholders, except the defendants, against the West Hartlepool Harbour and Railway Company, to restain them from purchasing steam-vessels for the purposes of marine traffic, or purchasing collieries, or interests in collieries, in making loans, or in any other way exceeding the powers which had been conferred upon them by their Act of Parliament, and for an account of moneys so improperly expended.

The cause being at issue, the parties had proceeded to take their evidence. During the progress of the examination taken before the examiner, and on the 19th July, 1860, the plaintiff caused the following advertisement to be inserted in the *Times* newspaper: "To the share and debenture holders of the West Hartlepool Harbour and Railway Company. I have just published a reply to the proceedings of a meeting of proprietors held at West Hartlepool on the 28th June last, which may be had of King, Parliament-street (and other places, naming them), and at all booksellers," and was subscribed "B. Coleman, —— street, London." A copy of the pamphlet had been purchased by the defendants, and was duly verified. It professed to be "printed for and published by B. Coleman." It was, as the advertisement had stated, a reply to the proceedings of a meeting held at West Hartlepool on the 28th June, and was addressed to the share and debenture holders of the company. It began by stating that proceedings in Chancery were pending in consequence of an over issue of debentures, and mentioned the decision of the Lords Justices in *Pooley* v. *The Athenæum Company*. It stated that it was proved that the bonds of the company were absolutely worthless in the hands of *bona fide* holders. Then the writer, addressing himself to a speech made by a Mr. Jackson (the chairman of the meeting and of the company), who had said: "He (the plaintiff) is not alone in this matter; there is a conspiracy behind—a conspiracy is a very difficult thing to make out—but that conspiracy is drawing to light; Mr. Coleman himself (the plaintiff) has been examined upon oath. His statements are in writing, and whether they will be published will depend upon himself. But they are there." The writer of the pamphlet then, addressing himself to that, says: "It is true that Mr. Jackson obtained an entire day to examine me, as he was entitled to do by my affidavit, when his counsel found my answers so unpalatable and damaging to Mr. Jackson, that he abandoned his task in an hour. I was asked a great many irrelevant questions, which my counsel advised me I need not answer; but, as I had nothing to conceal, I did not avail myself of the privilege; and, as Mr. Jackson says, my answers are there in writing—that is, they are recorded in the Chancery proceedings, and he is bold in his falsehood, in the confidence that I cannot reply at once to him without prejudicing my position with the V. C., whose opinion has been already elicited upon the complaint of Mr. Jackson, as to my last pamphlet, on the imprudence of publishing anything on the subject pending the suit. But Mr. Jackson is mistaken, for, as he has now given me the opportunity, and has made it my duty to put forward the truth, I am determined not to allow his lies to pass current even for a day. You shall, therefore, know the nature of Mr. Jackson's interrogatories and my replies on the occasion of my examination." The plaintiff then went on to give a digest of the questions and answers, and concluded by stating a conversation which had taken place between the counsel and the witness as to a third party, reflecting upon the chraracter of Mr. Jackson, which it is unnecessary to detail.

An interim order had been obtained by the defendants on the 19th July, to restrain the further publication of the pamphlet, and a motion in the following terms was now made:—That the plaintiff, his solicitors, servants, agents and workmen, might be restrained from printing, publishing, or offering for sale, a book or pamphlet called "A reply to the Proceedings of a Meeting held at West Hartlepool on the 28th of June, 1860, addressed to the Share and Debenture Holders of the West Hartlepool Harbour and Railway Company;" or for printing, publishing, composing, or offering for sale, during the progress of this suit, any book or pamphlet containing any report or account of any of the proceedings in this suit, or from making public or communicating to any person not a party to this suit any information that he may acquire by reason of such proceedings, touching the matters in dispute in this suit, or from distributing any printed copies of his bill of complaint in this suit to persons other than parties to this suit, or that the plaintiff may stand committed for a contempt, &c.

The latter part of the notice of motion referred to a fact which was not denied, that a considerable number of copies of the printed bill in the cause had been distributed in various parts of the locality of West Hartlepool, which was attempted to be justified by the plaintiff's solicitor as being a means of obtaining evidence in support of the plaintiff's case in that district.

Sir H. Cairns, Q.C., *R. A. Hawkins*, and *H. R. Farrer* (*Rolt*, Q.C., with them) in support of the motion. The publication was injurious to all persons interested in the well-being of the company

Public policy required that proceedings in a cause during its progress should not be made public. The distribution of the pamphlet, in addition to 100 copies of the plaintiff's own printed bill in the cause, in the neighbourhood of the *locus in quo*, was prejudicial to the interests of justice, and an improper mode of obtaining evidence, which was the excuse on the other side. They relied on the judgment of Lord Hardwicke in *Anon.* 2 Atk. 469; *Anon.* 2 *Ves. Sen.*; *Williams* v. *The Prince of Wales Company*, 25 Beav. 338; *Brooks* v. *Evans*, before Stuart, V.C., July 21, 1860.

Giffard, Q.C. and *Hobhouse*, contra, contended that the course of proceeding with respect to the publication of trials and other judicial proceedings was completely altered since the time of Lord Hardwicke; that no ground of public policy was opposed to the publication of such proceedings, and that the present was a true and fair representation of what had really taken place. At all events the defendants's conduct at the meeting of the shareholders had challenged the plaintiff to state the facts he had published, which was simply a reply to the statements made at such meeting. The party moving was bound to show an obstruction of the course of justice, the attempt to do which had here manifestly failed. As to the distribution of the plaintiff's printed bill, the allegations and charges in it were not offensive, but only to the effect that the company had exceeded their powers, and no jury would consider such allegations a libel. They asked to dismiss the motion with costs. They cited *Fleming* v. *Newton*, 1 H. L. Cas. 363; *The King* v. *Stockdale*, 3 Ex. Rep. 256; *Ex parte Jones*, 15 Ves. 237; *Duke of Manchester's* case, V. C. W., not reported.

The defendant's counsel was not called upon to reply.

The VICE-CHANCELLOR said:—I have already expressed my dissatisfaction at the mode of proceeding adopted by the party applying for this injunction, by saying that I would not call upon the other side to make any answer as to the costs of the motion, considering, as I do, that he has provoked a good deal of this which is now before me, as far as he is individually concerned. The present motion I consider one of importance to the public, as far as regards the administration of justice, and I cannot agree with the view which has been urged as to the third branch of the reasons assigned by Lord Hardwicke, in considering a publication of this description a contempt, namely, that its tending to prejudice mankind against one of the parties litigant is a question at all confined to the parties. According to that view, if one party is guilty of suborning witnesses, the other side may be guilty of the same practice. Could that be supposed not to affect the administration of justice? I apprehend, if the one party endeavours to prejudice the public in any way against the other litigant party, there is not the slightest justification for the other party doing the same; and this court, in the administration of justice, always takes care that neither party shall do it. Now, as to the course of conduct which has been pursued in this case, I say this for the sake of both sides, who seem to have conducted this matter quite unbecoming men of sense. If this should be repeated I shall certainly commit one or the other of these parties. Now, as regards the publication of this pamphlet, what I have to consider is whether there is or is not in it any unfair and improper publication of the proceedings in this court. I quite agree with the respondent's counsel in thinking that the present times are very different from those of Lord Hardwicke, and that the present feeling and the general judgment of mankind as to what is or is not proper to be published are exceedingly different to what they were at that time. That may at once be conceded; but at the same time, even as regards the publicity of proceedings in courts of justice, and when it is a question between parties who are not litigant, but between one of the parties litigant and the publisher of a newspaper for instance; even as between those parties the court in these days recognising in the highest possible degree the importance of the public being duly and fairly informed of all that takes place, yet does take care that there shall only be such proper information published in a fair and reasonable manner. I mean that courts of justice, in giving directions to a jury as to the ultimate result in that which is or is not a fair publication, always leaves it for the consideration of such jury, whether or not an independent, or supposed to be independent, person who has published a narrative of proceedings of a court of justice has published them in a fair and reasonable manner, being anxious to inform the public—or whether there is evidence of malice in the mode in which the report was framed. Now this court, in dealing between litigants, takes care that the litigants shall not, by such foolish attempts as appear to me to have been made on both sides here, create public prejudice each against his opponent in the progress of the litigation which ought to be conducted with all proper calmness and discretion; and for the purpose of eliciting truth. I have to look at this pamphlet to see whether, regard being had to the mode in which the statements are made as to the matters that are going on before the court, there is that fair legitimate mode of stating them that the court would require, or any jury would require with reference to the case of an alleged libel in the publication of the proceedings before a court of justice. Indeed, that view was suggested in the argument by the respondent's counsel, and it was stated that if I looked at this publication I should find that Mr. Coleman rightly abstained from attending the meeting because he might not be able to command his language as he could command his pen, and that if I looked attentively at his pamphlet I should find all that was stated was stated with the same degree of impartiality that would occur in a narrative of a litigation between parties in any public newspaper. I cannot concur in this view. What do I find in the 23rd page of this pamplet? I find first, that there is a narrative of the plaintiff Coleman's own cross-examination. That narrative I certainly feel he was strongly tempted to put forward by such a speech at the meeting as was referred to, in which allusion was made to what Mr. Coleman had said. He adds: "His statements are in writing, and whether they will be published depends upon himself." As far as regards Mr. Coleman, there cannot be the slightest ground for complaining that he has published his own cross-examination. But Mr. Coleman proceeds further; he gives what he conceives to be a fair narrative I suppose, and with all the due command he can exercise over his feeling when sitting down to write, instead of appearing in public to speak, he gives what he supposes to be a fair narrative of his opponent's cross-examination; and that narrative contains these words: "Since that period Mr. Jackson has been under examination himself for a day and a half, and has yet twenty days more, fixed for the 21st and 22nd inst. He did not tell the meeting that, but leaves me to make it public too; I suppose I can do this in a few words." This is his narrative of Mr. Jackson's examination: "He fenced with and avoided almost every question that was put to him. He could not recollect names nor dates; could not give figures with reference to the books, had not brought the books, though ordered to do so by the court, because he had not charge of them; could not say who had the ledger or any other particular book: the books were in the safe at the offices of the company, &c., &c., and on the whole, I say it advisedly, that a more evasive and self-evidently false exhibition it is not possible to conceive." This is a gentleman's calm moment, in which he writes this paragraph I have just read; and this is supposed to be a fair narrative of a gentleman's cross-examination. Now if he had published the whole cross-examination, and had left the public to judge of that, there might have been something to be said for it; but a man certainly has no right during the administration of justice to attempt to prejudice the mind of mankind, as Lord Hardwicke expresses it, against his opponent by giving his version of the cross-examination. It had been urged that the party moving might have shown that it was a garbled version, which was denied. But, in my opinion, it is garbled, because it professes to state the effect, and not the whole, and passes judgment, without giving that which was said, or which would enable anybody to judge whether Coleman has legitimately formed a fair judgment upon that subject or not. With reference to the distribution of the copies of the printed bill, the plaintiff's solicitor justifies himself in circulating the printed bill in this case—forty more seem to have been printed than is ordinarily requisite, according to his own statement—by saying he wished to acquire evidence upon the subject, and this he thought the best and readiest mode of doing so, by circulating the printed bills. I think this by no means a common mode of obtaining evidence—sending printed bills as it were broadcast to different solicitors in the country to know if evidence could be got up to support the case of the plaintiff. The plaintiff himself has nothing whatever to do with that part of the case. What the solicitor says, in his view, was that it was necessary to

procure a large amount of evidence, that a large mass of evidence was to be procured over the whole district. That may be so, but is it not of importance that mankind should not be prejudiced, that all those numerous witnesses which may be called upon to give evidence should not be biased by *ex parte* allegations? I cannot see on the face of things that any very important matter of evidence will be brought forward except the books and documents of the company, for they will disclose what seems to be the principal facts in the case. But assuming that view to be correct, that numerous witnesses are wanted from all parts of the adjoining district, are those gentlemen who are wanted as witnesses to have put into their hands a pamphlet containing a statement that the principal defendant is one who conducts himself throughout evasively on his cross-examination, and makes a false exhibition of himself with regard to all the testimony he adduces? Surely that cannot be a mode in which justice can be properly administered, or a course of proceeding which this court ought to allow to be pursued by one of the litigating parties. With regard to another observation made by the respondent's counsel, nobody feels more sensibly than myself the advantage of having a fair publication of all that takes place in a court of justice; but I make this observation, that whenever one of the litigants is the party making the statement, that is a very strong *prima facie* presumption against its being at all fair, and that in any case in which a litigant makes a publication, it is exceedingly different from that which a newspaper reporter would publish simply in the discharge of what was his duty. Such a case is widely different; I am not aware that any case precisely like this has occurred before, but I had no hesitation in granting the interim order for the injunction in the first instance, because I was aware of what the course of all the courts at all times has been with reference to keeping its proceedings pure from this false description of excitement, which would tend to bring witnesses into the witness-box, with their imaginations coloured and prejudiced by *ex parte* statements sent and circulated among them by one of the litigant parties, and consequently it is a case in which one ought to prevent any such undue use being made of the proceedings of the court. The case referred to in the H. of L. (*Fleming* v. *Newton*) came from Scotland, and is a very different one from the present. It was the case of a registery in Scotland of a promissory note; which appears to be somewhat like the case of the register or book which is kept in this country, and published by some person, containing all the judgments that are registered against individuals; and I believe that there has been no application made to the court to restrain this latter publication. This is, however, very different from a publication, by one of two litigants, of a certain portion of the proceedings which he thinks may tend to create a prejudice against his opponent. In this case, I am bound to say the plaintiff has had great provocation, and for that reason I did not wish to hear his counsel on the subject of costs. I think the calling a meeting of the shareholders to consider the course of conduct pursued by the plaintiff as affecting the company, and especially coupled with very intemperate and improper resolutions passed on that occasion, was not the way in which a question of this kind should be considered. It would quite be legitimate to call together the shareholders to consider a bill filed on behalf of himself and the other shareholders. The simple form would have been to have called a meeting to consider the propriety of that bill, and to express their opinion thereon. That would have been perfectly legitimate, because it is a bill filed on behalf of himself and all the other shareholders, and the directors might seriously wish to be advised as to whether or not the other shareholders concurred, and if they did, there would have been a greater inducement to take a different view from what they would take for their defence under other circumstances. But when we read this speech at the meeting, bearing in mind also the fact that the speaker is challenged as being the instigator of the newspaper articles, and that he contents himself by simply saying that he did not write them, and looking to the language that he has used, and especially as regards that species of invitation as to a portion of the proceedings, which he rather suggests that the plaintiff would not wish to have published, I cannot be surprised that the plaintiff should be betrayed into a course of conduct which I think not right for the preservation of the due administration of justice. Therefore, in making the order I am about to make, I do not direct any costs to be paid by the plaintiff, hoping in future the parties will conduct their litigation like other reasonable men, and as other suitors in this court they will leave the cause to be conducted by their legal advisers on both sides, and abstain from making speeches and publishing pamphlets, or anything that may tend to excitement. I think the proper order to be made will be the following:—That an injunction be awarded to restrain the plaintiff, his solicitors, servants, agents and workmen, from publishing so much of the pamphlet marked A in the affidavit of Ralph Ward Jackson mentioned (stating the objectionable passages), and from publishing or offering for sale, during the progress of this suit, any book or pamphlet containing statements of the proceedings in this suit; and also from making public any of such proceedings otherwise than in the due course of the prosecution of this suit until the hearing of this cause, or until the further order of this court.

SUPREME COURT OF PENNSYLVANIA.

(*From the Pittsburgh Legal Journal.*)

BONBAKER V. OKESON.

Nothing short of an agreement to give time, which binds the creditor, and prevents his bringing suit, will discharge a surety.

Such an agreement cannot be inferred from declarations, made by a creditor to a surety, to the effect that he considered the debtor possessed of property sufficient to discharge the liability, that he either had given or would give him time, that the debtor would pay the debt, and that he did not want the surety any longer.

The duty of determining the meaning of words used in conversation, and what the parties intended to express by them, devolves upon the jury and not upon the Court.

ERROR to the Court of Common Pleas of Juniata Co. Opinion by STRONG, J.—The original liability of Okeson to pay the debt was established, and indeed it was not denied. It was, therefore, incumbent upon him to show affirmatively his discharge from that liability. This he attempted to do by evidence that he was surety and that the creditor had told him on one occasion that Shirlock, the principal debtor, was good enough for the money, that he did not want him (Okeson), that he had been to the West to see Shirlock, that he had a good crop of wheat, a fine appearance for a good crop of corn, and a good stock of horses and cattle on his farm; that he had given him time, or would give him time; and that Shirlock would pay it, and that he did not want Okeson any longer.

The Court charged the jury that "if this conversation occurred, and it was all the conversation that occurred between the parties, and Okeson was the surety of Shirlock, it would discharge Okeson, and be an available defence on the ground that it would lull the surety into security and prevent him from taking any action for his own security or idemnity; and it would be a fraud upon the surety for the creditor afterwards, contrary to his assurance, to call upon the surety for payment." To this instruction the plaintiff excepted, and he has assigned it here for error.

It is noticeable that the learned Judge did not submit to the jury to find what the plaintiff intended, or what the defendant understood by the expressions, he had "given time" to Shirlock, and that "he did not want Okeson any longer." The Court construed the language of the witness, and took away from the jury all inquiry as to its meaning. The rule, however, is undoubted, that the meaning of the words used in conversation, and what the parties intended to express by them, is exclusively for the jury to determine. (9 Watts, 59.) It is obvious that the testimony is utterly inadequate to prove a direct and binding release of the surety. The creditor said "he did not want Okeson any longer," but this did not amount to an agreement to discharge him, and if it did, it was entirely without consideration, and therefore inoperative. Nor does the expression of the creditor that he had given time to the principal debtor, necessarily amount to proof of an equitable release of the surety. It was quite possible for him to give time, without affecting in the least the liability of Okeson.

Nothing short of an agreement to give time which binds the creditor, and prevents his bringing suit, will discharge the surety. Mere delay without such a binding agreement will not. Now if

such an agreement may be inferred from a simple declaration of the creditor that he had given time (which we do not admit,) it is not to be inferred by the Court as *presumptio juris et de jure*. Whether the jury were at liberty to draw such an inference need not now be considered; how they could certainly is not manifest, for giving time, and a contract to give time, are distinct and independent things. Proof of the existence of a subject matter about which a contract may be made would seem to have no tendency to prove that one in fact had been made. Indeed, the learned Judge of the Common Pleas does not appear to have rested the defendant's case upon either of these grounds. His view was that the defendant was discharged, because the language of the plaintiff, alleged to have been proved, would lull him into security, and prevent his taking any action for his own indemnity, and because it would be a fraud upon the surety for the plaintiff afterwards to call upon him for payment. The simple meaning of this is that the plaintiff was estopped, not by matter of record or by deed, but by matter *in pais*. The objection to it is, that there was nothing in the evidence to warrant the conclusions that the defendant had been injured by the declarations of the plaintiff, or that he was in any worse condition than he would have been in had those declarations never been made. Certainly it was not for the Court to say as a matter of law that he had been injured. But it is essential to an equitable estoppel by matter *in pais*, that he who sets it up should show that he had been misled or hurt. (*Dezell* v. *Odell*, 3 Hill, 215; *Patterson* v *Little*, 1 Jones, 53; *Hill* v. *Epley*, 7 Casey, 334.) It never yet has been held that a declaration of the creditor that the principal debtor was good enough, that the surety was in no danger, and that the debt would be collected from the principal, without more, was sufficient to estop the creditor from proceeding against the surety. Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterwards without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions of opinion. They neither invite confidence, nor is confidence often reposed in them. Standing alone, they will not discharge the surety. *Bank* v. *Klingensmith*, 7 Watts, 523, does not sustain the charge of the Court in this case. There the creditor held a judgment against the principal and surety. The surety called upon the creditor, and requested that an execution might be issued, to seize the principal's property about being removed. He stated that he wished to be released, and that the principal had property sufficient within reach of an execution to pay the debt. The creditor refused compliance, stated that the principal was good enough, and that he would give the defendant clear of his endorsement. No execution was issued. There is no similarity between that case and the present. There the surety was in motion to secure himself. He had a right to insist that execution should be issued and he did insist. There was proof of actual injury in not holding the execution, an execution to which the surety was entitled on his request, and the case was put upon the ground, both in the Court below and in this Court, that he had sustained injury not from the declaration of the creditor, but from the withholding of the execution. The case of *Harris* v. *Brooks*, 21 Pick. 196, relied upon by the defendant in error, is not unlike *Bank* v. *Klingensmith*. There the surety was also in motion. He called upon the creditor, stated that if he had to pay the debt he wished to attend to it soon, as he then could get security of the principal. The creditor assured him that he (the creditor) would look to the principal for payment, and that he (the surety) need not give himself any trouble about the note, for he should not be injured. The case was put to the jury with the instruction, that if in consequence of this assurance of the creditor the surety omitted to take up the note and secure himself out of the property of the principal debtor, he was discharged. The defence, therefore, as in *Bank* v. *Klingensmith*, rested not on the declarations of the creditor alone, but on them and superadded evidence that there had been actual harm resulting from them to the defendant. This essential to estoppel *in pais* was therefore not wanting, as it is in the present case. The language of Chief Justice Shaw is to be understood as applicable to the case he then had in hand, a case in which the jury had found that injury had resulted from the declarations of the creditor, and the only question therefore was, whether they were such as to warrant his relying upon them, and guiding his action by them. Surely without having been the occasion of injury to the defendant, the creditor cannot be guilty of a fraud upon him by calling upon him to pay a debt which he has promised to pay, and no declaration which has not in fact influenced his conduct can have done the surety any harm. In losing sight of this consists the error of the charge, and for this reason, pointed out in both the assignments of error, the judgment must be reversed.

Judgment reversed and a *venire de novo* awarded.

MONTHLY REPERTORY.

COMMON LAW.

EX. C. GENERAL STEAM NAVIGATION CO. v. ROLT. *Feb.* 2.

Principal and surety—Action against surety—Prepayments to principal a defence—Leave reserved to enter a verdict—Evidence—Constructive notice.

In an action against the defendant as surety to recover damages for penalties incurred by his principal for not finishing a ship for the plaintiffs within the time specified in the contract, it appeared that the plaintiffs had paid part of the contract price prior to the principal before it became due.

Held, that such prepayments were *prima facie* a prejudice to the defendant and a defence to the action.

Upon motion by leave reserved to enter a verdict for the plaintiffs the court will only consider whether upon the evidence and finding of the jury the verdict ought to be so entered, but will not regard the way in which the case has been left to the jury.

The jury, in answer to the Judge, negatived any knowledge by the defendant of the prepayments referred to above having been made, but the Judge did not ask whether by such prepayments the defendant had been prejudiced.

Held, that an objection, if any, upon this ground was the subject of a bill of exceptions, but could not be raised upon motion to enter a verdict.

C. P. May 7, June 27, Nov. 11.

WALMSLEY AND ANOTHER (ASSIGNEES, &C.) v. MILNE.

Mortgagor and Mortgagee—Fixtures.

M. the owner of land, in 1853, mortgaged it in fee to O, who in August, 1858, sold it to the defendant. M. became bankrupt in September, 1858. After the mortgage and before the sale, M., who had always continued in possession, erected buildings on the land, and set up a steam engine and boiler used for supplying with soft water the baths which had been erected on the premises, also a hay cutter and malt mill or corn crusher and grinding stones; all (except the grinding stones) being secured with bolts and nuts, or otherwise firmly affixed to the buildings, but in such a manner as to be removable without damage to the buildings or to the things themselves. The upper millstone lay in the usual way upon the lower grinding stone. All the fixtures were put up for the purpose of trade. They were all firmly annexed to the freehold, for the purpose of improving the inheritance and not for any temporary purpose.

Held, in an action by the bankrupt's assignees to recover the articles so affixed, that when the mortgagor, after the date of the mortgage, annexed the fixtures for a permanent purpose and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee, and that consequently the assignees of M., the mortgagor, could not maintain the action.

The relationship existing between mortgagor and mortgagee was discussed as to what denomination of tenant he (the mortgagor) was, at all events not such a tenant as would so operate. The fixtures should be considered as chattels. Next day, however, one of the Judges requested to have stated that he entertained serious doubts as to whether the articles were chattels or not.

REVIEWS.

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

We have little more than glanced through this work. The subject of which it treats being of such importance we are not prepared in this number, and without giving it a more careful persual, to review it as fully as we should wish to do.

We can however, form a sufficient judgment of the merits of the work to say that the author seems fully to understand how to treat his subject so as to render it equally valuable as a text book for the student and a book of reference for the practitioner.

There can be no question but that a work of this kind is needed owing to the great changes which the Law of Real Property has undergone of late years. A glance at the heads of its contents is sufficient to satisfy us that it will be found a most useful book in the library of a Canadian Lawyer. "The work is divided into three books, the first embracing the nature and quality of estates in corporeal hereditaments, with their qualities and characteristics; the second treating of incorporeal hereditaments their nature and characteristics, and the third presenting in outline the titles by which real property may be acquired and held and the rules of its transmission and transfer."

The following comprise some of the titles of the subjects treated of in the first volume—Nature and classification of Real Property—Estates in Fee simple—Estates tail—Estates for life—Estates by courtesy—Dower—Jointure—Estates during coverture—Joint Estates—Estates for execution—Morrtgages.

The name of the publishers is a sufficient guarantee that the work is typographically well executed.

THE MONTHLY LAW REPORTER; Edited by George P. Sanger. Boston: Walker, Wise & Co.

Each number of the Reporter contains short articles on legal topics of general interest, discussions of mooted points of law, full reports of cases not reported elsewhere, abstracts of all cases of importance in the principal courts, Federal and State; full abstracts of all English cases of use in the United States; Reports of Revenue cases, Treasury decisions in Revenue matters, State legislation, &c. The publication was commenced in 1837, and has since been attended with a pretty fair measure of success. Every number contains 64 pages, handsomely printed on good paper, making annually a volume of 768 pages. Twenty-two volumes have been completed. The subscription is only $3 per annum.

BLACKWOOD'S MAGAZINE—September number. New York: Leonard, Scott & Co. Contents—1. A Sketch of the Life and Character of Sir Robert Peel; 2. The Romance of Agostini; 3. Great wits—mad wits; 4. King Arthur and his round table; 5. The Struggle at Melazzo; 6. The Tower of London; 7. Norman Sinclair.

The *first* is an elaborate and truthful sketch of the life of the great man whose name it bears. The mark which he made on the page of history was one of no ordinary size. His life and his services will not soon be forgotton. The *second* is the commencement of what is described as a true story of modern Rome. It is likely to be widely read, and so far as we can judge from the portion given is worthy of extensive perusal. The *third* takes for its text the saying, "Great wits to madness nearly are allied," and its aim is to prove that genius is health and strength, not disease and weakness. The lives of many illustrious men are noticed in proof of this position, and the whole article is not only very readable, but one of unusual interest, and is characterized by much depth of reasoning. The *fourth* does not require much description from us as it speaks for itself. We may however mention that the object of the writer is to show that antiquarian hero worship is unreal. The *fifth* is a description of the thrilling scenes now being performed in the theatre of Italian liberty, and is greatly in praise of the well-known Garibaldi. The *sixth* is an entertaining history of what is well known in history "the grim old building on the Thames," the Tower of London, the place of many a harrowing scene—whose walls, if gifted with language, could tell more than ever pen has described or pencil depicted. The *seventh* is a Romance which is being published in the pages of "Blackwood" by an unknown author, and is said to be well worth reading.

THE CHRISTIAN EXAMINER, September, 1860. Boston: Walker Wise & Co., 245 Washington Street.

This is a very able expositor of what is conceived to be scriptural truth. The leaning of the publication is decidedly Unitarian, and yet many papers which are contributed to its pages may be read by all denominations, and are not calculated to give offence to any denomination. Of these, "Paul's argument for the abolition of the Law," and "The Woman of Thackeray," in the number before us, are two such papers. The remaining papers are intituled, Dr. Huntington's Introduction to Bickersteith; Leslie; German Hymns; St. Augustine at Keppo. We are very glad to be able to add this sterling publication to the list of our exchanges.

The ECLECTIC MAGAZINE for October, 1860. New York: W. H. Bidwell, is received.

It opens with a portrait of Garibaldi, by Sartain. It is said to be from an original photograph, and to be true to life. If so, Garibaldi must be as handsome as he is energetic and determined. The portrait, now that the name of the original is on every tongue, is most opportune. The letter-press of the number is as follows: 1. The Protestant and Catholic Revolt; 2. The Patrimony of St. Peter; 3. William Caldwell Roscoe's Poetry; 4. Garibaldi, his life and times; 5. On the importance of energy in life; 6. Vonved the Dane; 7. Cayenne, a penal colony; 8. Dr. Krapf's travels in Eastern Africa; 9. Baron Humboldt's letters; 10. Imaginative literature; 11. Expected return of the Comet of Charles the Fifth; 12. The great Armada fight; 13. Concerning summer days; 14. Footfalls on the boundary of another world; 15. The great eclipse in Spain

---

THE LOWER CANADA REPORTS: Quebec, Augustin Cotè.

We have received Nos. 7 and 8 of Vol. 10, of these reports. They contain the reports of thirteen decided cases, of which one *Montizambert* v. *Gervais* is of great public importance both in Upper and Lower Canada. It was an appeal from a judgment rendered in the Superior Court of Quebec and determines on general principles and in general terms, that a Registrar of titles is responsible for the damages caused by his negligence, whether the loss arises out of his neglect to enregister a title or by reason of an insufficient certificate of title given by him.

THE LOWER CANADA JURIST: Montreal, John Lovell.

We have received several numbers of this publication and shall be glad to receive it more regularly; we do not know the cause of the irregularity whether it is the time of publication or rests entirely with the post-office authorities. We recommend the enterprising Mr. John Lovell, to make proper inquiries into the matter.

TO CORRESPONDENTS.

M. JOHN HOLGATE, and JAMES F. ELLIOTT—Under "Division Courts" pp. 230, 231.

J. A., Dunnville.—Received too late for this number, will be answered in our next

SEMPER FIDELIS.—The publication of your letter would serve no good purpose. Therefore declined.