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DIARY FOR JUNE.

4. SUN ... *Whit Sunday.*
5. Mon ... Recorder's Court sits. Last day for notice of trial [for Co. Ct.
11. SUN ... *Trinity Sunday St. Barnabus.*
13. Tues... Quar. Sess. and Co. Ct. sitt. in each Co.
18. SUN ... *1st Sunday after Trinity.*
20. Tues... Accession Queen Victoria, 1837.
21. Wed ... Longest Day.
22. Thurs.. Sittings Court of Error and Appeal.
24. Sat .... *St. John Baptist* Midsummer Day.
25. SUN ... *2nd Sunday after Trinity.*
29. Thurs.. *St. Peter.*
30. Frid.... Last day for County Council finally to revise Assessment Roll.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

JUNE, 1865.

BRITISH OATHS' ACT.

Notwithstanding the numerous reformations and amendments that have of late years been made in the law of evidence, both in this country and in England, there is, at least, one provision remaining, which does not redound to the credit of its original introducer, or of those who at a subsequent period effected some very important and beneficial changes in this important branch of the law.

The statute alluded to was not the production of our own legislators, who, being only Provincials, might be expected to do childish and thoughtless acts, but of that full-grown and almost immaculate assemblage, the House of Commons in England.

In the year 1835 an act was passed by the Imperial Parliament, entitled, "An act to repeal an act of the present session of parliament, intituled, an act for the more effectual abolition of oaths and affirmations taken and made in various departments of the state, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths." (5 & 6 Wm. IV. cap. 62.)

With the expediency or propriety of substituting declarations for oaths and affidavits, in England or any other country, we have, of course, nothing to do. The inhabitants of each country must be the best judges of what is suitable to themselves. For our part we have not yet come to the conclusion that a simple declaration, made without the sanctity of an oath, would conduce to public interests, or indeed to the advancement of public morality; though this latter is a more debatable question, and there is much force in the argument of those who contend that persons, who are long in the habit of taking what are in most cases merely formal oaths, such for instance as custom-house oaths, become indifferent and careless as to the sacred nature of the obligation they take upon themselves. But whilst we might admit that a change in this respect would be grateful to the feelings of many right-thinking men amongst us, we may naturally demur to another country, even though it be our own mother country, attempting to compel us to receive in our courts *as evidence*, the simple statement of a witness subject to, and fearful of no searching cross-examination, signed before some unknown magistrate, and uncontrolled by even the semblance of any thing that might remind him that his statement, whether true or false, was the subject of divine omniscience.

One very noticeable inconsistency of the act is, that whilst it enacts, that in any suit brought in any colony for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, &c., situate therein, it may be lawful for the plaintiff, or defendant, or any witness, to verify or prove any matter relating thereto by a declaration in writing to be made before a justice of the peace, &c., (sec. 15) it carefully provides in another place (sec. 7) that nothing in the act shall apply to any oath or affidavit which is required to be taken in any suit or judicial proceeding in any court of justice in Great Britain or Ireland.

The utter want of caution, and the carelessness evinced, and the inconsistences apparent in this act so far as it applies to the colonies, are most able and fully commented upon in the judgment of the late Sir John Beverly Robinson, in *Smith* v. *McGowan*, 12 U. C. Q. B., 287, but like the present Chief Justice of Upper Canada, at that time sitting as a puisne judge in the Court of Queen's Bench, we do not "desire to weaken by further observations

the effect of the temperate but clear and decided manner in which the objections to the statute have been pointed out." Those interested in the subject will there find it much better and more clearly discussed than we could do it, and to this judgment we refer them for further information.

The fact of this statute remaining so long unrepealed may probably be attributed to t' infrequency of its use, but this is no argument for its longer continuance; and to conclude in the words of the present Chief Justice, "In any point of view the enactment is at variance with the rights of self-government possessed by the North American Provinces, and I sincerely hope may be repealed."

PRACTICE OF BAILING BY JUDGES IN CRIMINAL CASES.

On page 165 of Vol. 7 of the *Law Journal* will be found an article on the law and practice of bail in criminal cases, to which we refer our readers in connection with *The Queen* v. *Chamberlain et al.*, published in another place in the present number. The writer of that article suggested as allowable the practice which has been sanctioned by Mr. Justice Wilson, in the case named, that is to say, to have the depositions certified by the County attorney; and expressed his belief that the better course in all cases would be (as suggested in that article) to obtain copies from that officer, rather than from the committing justice. We subjoin an extract therefrom on this point.

The writer, after mentioning that the procedure is not traced out in the particular enactment, goes on to say—"but enough may be collected from the several enactments bearing on the subject, to show the proper practice in such cases. Suppose, then, a practitioner instructed to apply to the county judge for an order to bail a party committed for a crime. The first step will be to procure certified copies of the examinations and papers upon which the judge is to act. If the party charged be actually in gaol, it may be assumed that the papers are filed with the County attorney; for section 39 of the Consolidated Act, before referred to (Con. Stat. C. ch. 102), and section 9 of the Local Crown Attorney's Act (c. 106, U. C.), require the depositions and papers to be 'delivered to the County attorney without delay,' and so in respect to coroners, by section 62 of the first named act. The words 'without delay' must be taken to mean without unreasonable delay, and in practice the papers are usually sent by the next mail, or are at once sent in an enclosed packet by the constable intrusted with the execution of the warrant of commitment, to be by i... .vered to the County crown attorney, when he lodges his prisoner in gaol. But if on inquiry it is found that the committing magistrate has not transmitted the papers to the County attorney, that officer would doubtless call upon the magistrate at once to forward them; and that without prejudice to any proceeding that would lie against the magistrate for default in not obeying the requirements of the statute. In some cases it may save time to apply directly to the committing justices; but, unless in very urgent cases, it is better to obtain the certificate from the County crown attorney—for unless every thing is in form the papers may require to be again sent to the committing magistrate for correction, and, in any case, notice will probably be required to be given to the County attorney."

As remarked by Mr. Justice Wilson, it would be impossible for the committing magistrate, after he has complied with the law in transmitting the papers to the County attorney, to certify in the manner required by the act; and, "in favor of liberty," the learned judge made the order to bail on the depositions transmitted and certified by the County attorney.

But after all, the 63rd section of the Consolidated Satutes of Canada only provided an additional mode of verifying the depositions, &c., on the application to a judge to bail, and the judge might, we take it, act upon any proof which satisfies him, under the extensive powers given by the 54th section of the same act; and the official certificate of a County attorney is at least as reliable as the like certificate from a justice of the peace.

There are, however, two provisions bearing on this question which do not appear to have been mentioned by counsel in the case of *The Queen* v. *Chamberlain* Section 5 of ch. 80, Con. Stat. Can. provides that "in every case in which the original record could be received in evidence, a copy of any official or public document in this province, purporting to be certified under the hand of the proper officer or

person in whose custody such official or public document," &c., shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, &c.; and section 60 of Con. Stat. C. ch. 102 enacts, that after examinations taken before magistrates have been completed, and before the first day of the court to which the prisoner is committed to be tried, &c., the prisoner *may demand from the officer or person having custody of the same* copies of the depositions on which he has been committed, &c., on payment of a reasonable sum for the same, not exceeding five cents for each folio.

Under one or both of these enactments the judge might well receive certified copies of the depositions from the County attorney, if express authority were needed for receiving that species of evidence of depositions taken in the charge upon which a prisoner applies to be admitted to bail.

OVER-HOLDING TENANTS.

It might naturally be supposed by those taking a cursory glance at the statutes of 1864, that these disagreeable people had, after all that has been said about them, been effectually provided for by the legislature. It was perhaps thought that giving jurisdiction in the premises to the county judges, was all that could possibly be necessary. This, of course, was a high compliment to them, for which, as for many other favours of the same kind, they are doubtless very grateful.

It will be seen by comparing the late act (27 & 28 Vic., cap. 30.) with the 63rd sec. of the Ejectment Act, (Con. Stat. U. C., cap. 27, sec. 63, taken from 4 Will. IV., cap. 1, sec. 53) that the first and second sections of the act first referred to are copied, almost word for word, from section 63 of the Ejectment Act. Now these sections define the class of tenants that come within the provisions of the act; and therefore the decisions on the earlier statute on this point, apply equally to the later one. But these decisions, which were collected and commented on in an article on this subject in a previous volume,* shewed various defects in the law as it then stood, and which therefore still exist.

These cases shew that the operation of the act is very limited. It does not apply to tenancies at will, to monthly tenancies, to tenances from year to year, nor to cases where a term is forfeited by breach of covenant; in fact the act is confined to cases where the tenant holds over after the expiration of a term certain. created by the contract of the parties, and becomes a trespasser and liable to be ejected without notice or demand.

It is a pity that this was not looked to when the last enactment was introduced. We did our duty in the premises by calling attention to the defects in the then existing law. Perhaps the next law-maker that tries his hand on the law of landlord and tenant, will take the hint and be more successful.

* 10 U. C. L. J., 1.

THE LOWER CANADA LAW JOURNAL.

It is proposed, in Montreal, to issue on 1st July next, a legal periodical under the above title, "to take somewhat the same position" there "that the *Upper Canada Law Journal* holds in the Western Province."

We shall be glad to welcome this periodical, and hope for its success. We do so without in the slightest degree reflecting upon the *Lower Canada Reports*, or the *Lower Canada Jurist*, both of which publications are of a high character. But devoted as they are exclusively to reports of decided cases, their ambit is necessarily limited.

It is intended that the *Lower Canada Journal* shall contain original articles on subjects interesting to the profession, important proceedings and decisions of all the courts, civil and criminal, selected matter from English and American periodicals, miscellany of intelligence interesting to the profession, and be a medium of communication between members of the profession.

The publication will be a quarterly one, and the price only $2. But in order to be of much service to the profession as a medium of communication and miscellany of intelligence, it ought at least to be a monthly. This we presume it will soon become, if the project receive the support it deserves.

We have received a copy of Mr. McMillan's "New Manual of Costs, Forms, and Rules in the Common Law Courts of Upper Canada." It appears to be a most useful little book, containing 142 pages. We shall refer to it again in our next issue.

LAW SOCIETY EASTER TERM, 1865.

CALLS TO THE BAR.

The following gentlemen, during this term, obtained the necessary certificates qualifying them for call to the bar, viz:—

J. Hutcheson Esten, J. C. Hatton, G. Y. Smith, W. C. Loscombe, Sutherland Malcomson, W. Sidney Smith, A. S. Hardy, C. S. Corrigan, John McIntyre.

ATTORNEYS ADMITTED.

The following gentlemen were, during this term, sworn in as Attorneys and Solicitors in the several courts of law and equity in Upper Canada:—

Elmes Henderson, G. A. Holmes, James O. Loane, P. F. Walker, Frederick W. Campbell, Stephen F. Griffith, W. Sidney Smith, G. V. Price, Alfred Hoskin, C. S. Corrigan, John McIntyre, R. H. Haycock. D. B. Maclennan, Sutherland Malcomson, S. P. Yeomans, J. Watson Hall, Benjamin Cronyn, Charles D. Dallas, W. J. White, John Farley, Alfred McDougall, Samuel Wickson, Nicholas Murphy, W. B. Simcoe Kerr, Henry Holland.

NOTICES FOR NEXT TERM.

Fifty-seven gentlemen have given notice of their intention to present themselves for examination for call to the bar next term.

Fifty-one gentlemen have given notice for next term for admission to the Law Society as students.

[These figures are more eloquent than words could be. *Quære*—Why do people insist upon entering an expensive and laborious profession, by which the vast majority of them will not be able to make "salt for their porridge."]

We have much pleasure in directing the attention of those whom it may concern, to the professional card of Mr. Holcomb, which will be found in our advertising columns. Previous to his commencing the practice of his profession in New York, he graduated in the Toronto University, and studied in a law office here. Having been a pains-taking and industrious student, we have no doubt that business entrusted to his care will be properly attended to, and his knowledge of Canadian law will be especially useful in matters of business sent to him from this country.

SELECTIONS.

QUACKERY.

The conviction of Wray *alias* Henery aroused the virtuous indignation of the British press to a degree that is inexplicable, as the offence of which he has been found guilty has been known to have been committed daily by the hundreds of quacks who carry on their nefarious but profitable practice in London and every town in the kingdom, and as the proprietors of the newspapers that have been loudest in his condemnation, and in the expression of indignation, have not hesitated to give to his advertisements, and those of others of the same class, a place in their pages. How few of our daily papers can be safely admitted into the family circle, owing to the highly objectionable nature of the advertisements of these quacks, by which alone they are enabled to live. If their advertisements were refused admission in the newspapers, half their trade would be gone. It is said that one London quack alone spends £10,000 a year upon his advertisements. This circumstance is itself enough to show how profitable a business this must be; and we recently heard of a case which explains the manner in which it is made so.

A nervous gentleman—so runs the tale—was induced to consult one of these fellows on a subject of extreme delicacy; the quack, seeing with whom he had to do, left the room mysteriously, and returned with a glass of stagnant water, into which he made this poor nervous man look with a magnifying glass, and, perceiving therein all kinds of creeping things, he became very much alarmed. The quack, seizing the opportunity, assured his patient that what he saw was the cause of complaint, and that there was no man in London able to cure him but himself, and he refused to prescribe until he was paid £500, and a cheque was immediately drawn for the amount. How he worked upon the nervous fears of this poor man can well be imagined, into whose purse he contrived, there can be little doubt, to dip still deeper.

Now, we do not imagine that the refusal of their advertisements would absolutely deprive these gentry of the publicity which is essential to them, but it would deprive them of that kind of recommendation which an advertisement in a respectable newspaper conveys to the mind of the ignorant and unreflecting who very often imagine that the proprietor of a high class newspaper would not admit into his columns an advertisement if he did not know something of the character of the advertiser. The description of persons fitted to be their victims being very well known to them, and their whereabouts, in whatever locality they are to be found, the post will be made the medium of conveying their filthy advertisements to their dupes. But then this mode of advertisement is within the grasp of the law.

There is another mode of advertisement to which they resort—viz., the distribution of their works at the public museums, to the annoyance and disgust of those who frequent our leading thoroughfares. This too, can be suppressed by the strong arm of the law. Surely that which Lord Campbell's Act has done with regard to obscene prints, can be done in the case of obscene publications, and the exhibitions of loathsome and disgusting figures and busts.

No quack is permitted to practise in France. When a man is about to commence the practice of medicine in any town there, he is obliged to present to the mayor, or other authority of the town, his diplomas, and if they are not *en regle*, he is not allowed to open his practice. The result is, that the public health and the purses of individuals are alike protected. Why cannot that which is done in France be done in England?

Doubtless there is this grave difficulty. According to our English mode of thinking, it is a serious and generally reprehensible interference with the liberty of the subject to extinguish a profitable trade, as this is, by legislative enactment, and there must be a very clear and cogent case of public benefit to compensate us for the sacrifice of personal liberty. "What," say the objectors, and not without force, "interfere with the right of a British subject to make any contract respecting his own pocket or health that in his own discretion he may himself please? Why should the Legislature interfere to protect men against their own folly? In seeking to suppress these publications, we may prevent scientific and medical inquiry? Why should we, in effect, revive an obsolete monopoly? This would be a gross, wanton, and un-English interference with that which is most dear to us—our free, uncontrolled, unfettered liberty;" and so forth. And it is not enough to say that similar objections may be and have been made to every project of reform brought under the consideration of the Legislature, and that, nevertheless, the reforms have been effected with advantage to the public. The real question at issue here is not whether the arbitrary suppression of these quacks would or not be a public benefit—no one can deny that it would be so, except the quacks themselves—but whether there is or not involved in this suppression a principle so fraught with danger as to render its adoption a greater evil than the nuisance it is desired to suppress. We cannot deny that to watch over the moral conduct of the population by law savours somewhat suspiciously of "paternal government." When the New England colonists declared adultery to be a crime punishable with the pillory, few people in this country doubted that, however excellent the morality of the statute in question, it was, practically, tyrannical. The question for us, then, is, have we, declamation apart, a right to prevent the open exercise of this most "noxious trade?" and we do not hesitate to say that we have.

Why is cheating a criminal offence? Because it is the duty of law to protect *property*, and cheating is an invasion of the rights of property. Is it, then, less the duty of law to prevent the weak and credulous from being deceived out of their health, which is property, and made furthermore to pay their money for that which cannot be taken to be "valuable consideration." Moreover, public decency is within the proper scope of the law, and these exhibitions and advertisements offend against public decency.

We admit freely that the task is not an easy one; but that is no reason why the attempt should not be made. Lord Campbell, in dealing with the Holywell-street obscenities, had similar difficulties to encounter, yet he made the attempt, and practically succeeded in his object.

The failure of the Medical Registration Act to suppress these evils is another proof of the necessity of a public prosecutor. The medical council consider, and probably with justice, that they are not called upon to institute proceedings, at their own risk, against quacks, who, by their assumed titles, hold themselves out to the public, who have no means of knowing better, as duly-qualified medical practitioners; and a kind of sanction is believed to be added to this representation by the appearance of their advertisements in respectable newspapers. As the law at present stands, there is no person or body compelled to prosecute.

The first step necessary sounds a strong one, but it is really right in principle. Let it be made a misdemeanour to assume the title or qualification of a medical man, unless authorised by the diploma of some recognised or legalised body or institution; then appoint a public officer bound to institute legal proceedings against all persons who violate the law in this respect, on a proper *primâ facie* case being shown; next prohibit any man from practising medicine in any place until his diplomas have been submitted to some magistrate, and a proper opportunity afforded for any person who may be so minded to test their genuineness. Let the presentation of a false diploma be declared a misdemeanour, and power of summary conviction (subject to the right of appeal) given to the magistrates; next the magistrates should be invested with power to close those museums that disgrace our leading thoroughfares, wherever found, and the provisions of Lord Campbell's Act should be extended to the circulation of those filthy publications.

This latter is, perhaps, the most difficult branch of the subject, because it may fairly be said, where is the line to be drawn between a scientific and a filthy publication. Many duly-qualified practitioners devote themselves to the treatment of what are called "secret diseases," and write skilful treatises upon

the subject. This is unquestionably so, and, while there is no necessity for the public to read these books, it is as absolutely necessary that the profession should be in possession of them as of any other medical works. They must therefore be advertised in the usual style in which other learned books are offered to the profession, but not otherwise; and it may well be confided to the authorised tribunals to deal with the authors of such works, and to say, under all the circumstances of each case, whether the advertisement was or not a legitimate one, and, if not, then to treat it as a misdemeanour.

It is not necessary here to enter into the details by means of which these provisions might be carried out, as they will easily suggest themselves to every experienced draftsman. Let the principle but be admitted that the men are public nuisances, as deserving of being stopped as unqualified solicitors or unauthorised brokers, and that the publications are an offence against public decency, and the rest will follow upon well-established precedents, almost without the necessity of consideration.—*Solicitor's Journal.*

USURY.

The commodities and incommodities of usury have been fruitful themes of discussion among civilized nations time out of mind; and to-day, when unlimited wealth flows into the coffers of our merchants and bankers, the subject is necessarily exercising the minds of commercial men more than ever.

Originally, usury meant the taking of any money for its use: now, if money be paid for the use of money according to law, it is denominated *interest;* if more be taken it is *usury.*

Almost every nation has fixed by law a rate of interest for the use of money, upon the principle that it is easy for the lender to oppress the borrower.

The laws of Great Britain regulating interest have been quite various and significant. During the reign of Henry VIII., who became king in 1509, the rate of interest was legalized at ten per cent., and so continued, with but slight change, till James I. came to the throne (1603), when it was reduced to eight per cent. While England was a commonwealth it was only six per cent., which rate was re-enacted under 12 Charles II. (1661). By statute 12 Anne (September 29th, 1714), interest was again reduced to five per cent. From this statute of Anne, which provides that no person shall take, directly or indirectly, upon any contract, or loan of moneys, wares, or merchandise, above the value of £5. in the hundred for a year, and that any person taking more than that rate shall forfeit and lose treble value of the moneys and other things so lent,—the states of our Federal Union have carved their varied usury laws.

By Act 3 & 4 William IV., were exempted from the operation of usury, all bills or notes having "more than three months to run." Several modifications have occurred during the reign of Victoria, and by statute 1 Vict. 80, and 2 Vict. 37 (same as the statute of 7 William IV.), bills and notes are not effected by usury laws, if payable at or within twelve months, at legal interest, and not secured by mortgage, nor any contract for the loan or forbearance of money, above the sum of £10. shall be affected by the usury law: *Pannell* v. *Attenborough*, 4 Q. B. 867. And by statute 17 & 18 Vict. c. 90, all laws then in force upon usury were appealed.

The Sexviri of Athens were commissioners, who did watch to discern what laws waxed improper for the times, and what new law did in any branch cross a former one, and so *ex officio* propounded their repeal, upon the maxim *Salus populi suprema lex.* In the absence of this system with us, it devolves upon members of the legal profession more particularly to discern the real wants of society and the needs of commerce. While there should be no blind adherence to former rules, it is still necessary to exercise thought, foresight, and discretion, lest in a reform we "root up also the wheat."

As opinion obtains in many states, that money, being only worth what it will bring, should be regulated by voluntary contract of parties, subject to mercantile usage governing contracts of merchandise,—in fine, that the "tooth of usury" ought to be blunted, and as this prevailing sentiment has exerted, and must continue to exert, no inconsiderable influence upon adjudications, we purpose to devote some space to the discussion and review of two principal propositions: *First,* The present status of usury in the United States; and *Second,* The practicability of a reformation in the usury law of New York.

I. Strictly speaking, there are three requisites to constitute usury: 1. A loan, either express or implied; 2. An understanding that the money lent shall or may be returned; 3. That a greater rate of interest than is allowed by the statute shall be paid. It is clearly settled, also, that there must be an unlawful or corrupt intent confessed or proved, before a transaction will be pronounced usurious,—this is an important ingredient to constitute the offence.

1. It has been held in New York, see 5 Denio 236, that an usurious contract is incapable of ratification; but, said Balcom, J., in *Smith* v. *Marvin*, 25 How. Pr. R. 326, the assertion is not strictly true, for when a usurious loan is "voluntarily paid," the contract is certainly ratified, except as to the unlawful interest, which may be recovered back. Also, in the case of *Dix* v. *Van Wyck*, 2 Hill R. 522, Bronson, J., delivering the opinion of the court, observed, "Contracts affected by usury are not so utterly void, but that they may be ratified." Thus it follows, if a bor-

rower repay a loan which he might have avoided for usury, he cannot recover the money back again; though by the New York statute he may recover the excess which has been paid over lawful interest, within one year, as in Main and Virginia; or at common law at any time within six years.

In Massachusetts, it is held, that where there has been no payment, demand, or adjustment, in ascertaining the amount due on a note made payable with interest annually, simple interest only can be computed: *Hastings* v. *Wiswall*, 8 Mass. 455; *Ferry* v. *Ferry*, 2 Cush. 98; *Von Hemert* v. *Porter*, 11 Met. 210. The same rule has been followed in Maine: *Doe* v. *Warren*, 7 Greenl. 48.

What constitutes a voluntary payment of a loan? In the case of *Mumford* v. *Am. Life Ins. and Trust Co.*, 4 Comst. R 463, it was held, that the payment of a usurious loan was not voluntary, if obtained by the lender out of collateral securities in his hands without the concurrence of the borrower.

2. *Of Contingent interest.* In ordinary transactions, if the gain to the lender, beyond legal interest, is made dependent upon the will of the borrower, as where he may discharge himself by a punctual payment of the principal, —as if I covenant to pay one thousand dollars one year hence, and if I do not then pay it, to pay five hundred dollars, or fifty per cent., being in the nature of a penalty for non-performance, it would not be usurious; as where there is no loan or forbearance there can be no usury,—and both parties must intend to provide for the payment of more than legal interest.

Thus, the Supreme Court of the United States held, in the recent case of *Spain* v. *Hamilton's Admin.*, 1 Wall. 604, that, where the promise to pay a sum above legal interest "depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious." Nor will usurious interest be inferred from a paper which, while referring to payment of a sum above the lawful interest, is "uncertain and so curious," that intentional bad device cannot be affirmed.

It is clearly understood, that the essence of the contract of *bottomry* and *respondentia*, is, that the lender runs the risk, and is thus entitled to the marine interest. This mercantile rule is sanctioned either by usage or law in almost every country: Ord on Usury 24 to 48; *Thorndike* v. *Stone*, 11 Pick. 183.

There is a distinction made between such cases and those of personal risk of the debtors being able to pay; if anything is paid for such risk it is usurious.

3. *What interest vitiates a contract.* If interest be paid upon miscalculation, it does not render the contract usurious; but if taken through ignorance of law it would be, upon the familiar maxim, *ignorantia juris non excusat.*

It is not material in what form the contract is made, as the courts necessarily inquire into the real nature of the transaction, and no shift or device can protect it. A novel and interesting case was recently tried in Massachusetts, as to the liability of an executor who received unlawful interest innocently, which was reserved in a note due to his testator; and it was held that an action would not lie against the executor personally to recover back "threefold" the amount of usury so paid, although he be described in the writ as executor: *Heath* v. *Cook*, 7 Allen R. 59.

The question whether interest calculated by tables, upon the principle of 360 days being a year, is usurious, has been somewhat mooted. The New York courts have held that usury would attach: *N. Y. Firemen's Ins. Co.* v. *Ely*, 2 Cow. 678; *Utica Ins. Co.* v. *Tillman*, 1 Wend. 555; 8 Cowen 398. In Massachusets, however, they have decided, otherwise: *Agricultural Bank* v. *Bissell*, 12 Pick. 586; and also in Vermont: *St. Albans' Bank* v. *Scott*, 1 Vt. R. 426; *State Bank* v. *Cowan*, 8 Leigh. 253. Professor Parsons, in his excellent work on contracts, thinks this latter the better opinion. In Ohio, Iowa, and some of the other states, Rowlett's tables are authorized by statute.

New York and Massachusetts courts hold, that the taking of interest in advance by a bank, upon discounting notes, is not usurious; and the same opinion obtains in most states: *Mowen* v. *Hymers*, 12 N. Y. 230.

The rule for casting interest where partial payments have been made, is given in the case of *The State of Connecticut* v. *Johnson*, 1 Johns. Ch. R. 17, by Chancellor Kent, as follows:—"Apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payments be less than the interest, the surplus of interest must not be taken to argument the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance of principal as aforesaid." The renowned Judge Shaw, of Massachusetts, also declared this to be the proper rule in computing interest on partial payments.

In New York and the New England states it has been generally held, that new securities for old ones which are tinted with usury, are void with the old ones, and subject to the same defence.

But in Arkansas, where the plaintiff held several notes against the defendant, by agreement with him calculated interest due on each note and added it to the principal, took a new note for the whole sum bearing ten per cent. interest, it was held not usurious: 1 Eng. R. 463.

Whether a note valid in its inception, but

usuriously transferred by the payee or indorsee, is valid against the maker, has been variously decided. Lord Kenyon once held that such holder would be entitled to recover: *Parr* v. *Eliason*, 1 East 92; and in the case of *Campbell* v. *Read*, Martin & Yerg. R. 392, it was decided, that a note thus usuriously indorsed is valid as against the maker, in the hands of a holder *in good faith*. By Statute of Michigan, a holder of a bill or note in good faith, for valuable consideration, without notice and before maturity, shall be entitled to recover as if such usury had not been alleged and proved. This is a wise and equitable provision, working great benefit. New York repealed a similar provision by the amendment of 1837. There are but few cases in which a bill or note is void in the hands of an innocent indorsee for valuable consideration; such cases are, when the consideration in the instrument is money won at play, or it be given for a usurious debt. Notes given by a corporation, in violation of a statute, are void, even in the hands of an innocent holder: *Root* v. *Godard*, 3 McLean 102. In Mississippi a note was held to be void, where the signature was procured by fraudulent representations: *Dunn* v. *Smith*, 12 S. & M. 602, The payee of a note may transfer it at a discount exceeding the legal rate of interest; but where an indorser buys a note (valid in its inception), he can recover against the indorser only the sum paid with interest, though the full amount may be recovered against the maker: 15 Johns. R. 49; 4 Hill 472. If a usurious note be given up and cancelled, on the promise of the debtor to pay the original debt, with lawful interest, such promise would be binding; or if, when the interest is due and payable, or constitutes a then subsisting debt, the debtor ask to retain it, and agrees to pay interest upon the amount at the legal rate, the agreement is not usurious. Though a note be valid between the original parties, yet the indorser cannot sue the maker, if the indorsement was on an usurious consideration: Story on Bills 189; 1 Peters R. 37.

4. *Of usury in parties procuring loans.* Whether a bonus or premium is in the nature of a gift or promise at the time of the transaction, is a question of fact; if the undertaking assumes distinctness enough to become a contract for additional interest, the penalties of the usury law would attach.

A creditor in loaning money is not allowed to receive a compensation as for services in procuring the loan, nor make a condition of a loan that the borrower shall purchase a certain article; and whether the contracting parties sought to evade the statute is a question for the jury: Cowen's Treat. 63; 1 Johns. Ch. 6.

In New York city, very large business is done, by brokers in procuring money loans, and the question often arises what transactions are usurious. It is clear, that if a borrower pays a broker commission for his services in effecting a loan, in addition to paying lawful interest to the lender, it does not render the loan usurious, provided, the broker acts as agent merely and is not the person making the loan, and the lender receives no part of the commission: *Condit* v. *Baldwin*, 21 N. Y. 219, 21 Barb. 181; On the other hand, if the loan was in fact made by the person pretending to act as broker, his receiving a commission beyond simple interest, would constitute usury.

If a party guarantee or indorse paper for two months at two and a half per cent., it is not usurious (where there is no loan), for a man may sell his credit as well as goods and lands, dealing fairly, at any price he can get: *Reed* v. *Smith*, 9 Cow. 647; *Moore* v. *Howland*, 4 Denio 264; 1 N. Y. Legal Obs. 107.

If A. loans money to B. on simple interest, and on paying the same, B. expresses gratitude by a gift to A., either of money or goods, it would not be usurious; but if it be given in accordance with a previous promise, usury would attach.

The weight of authority recognises the principal, that none but parties or privies to an usurious contract can take advantage of it; and to avoid a security it must be shown that the agreement was usurious from its origin: *Nichols* v. *Fearson*, 7 Peters R. 103; *Rice* v. *Welling*, 5 Wend. 597; *Gardner* v. *Flagg*, 8 Mass. 101

Usury, though commonly an unconsionable defence, is a legal one, and if proved, the courts must sustain it; if impolitic, the legislature alone can annul or repeal it. It is a defence which is not encouraged by the New York courts; and since the enactment of Laws of 1850, neither a corporation nor a receiver of one can maintain an action to recover back usurious premiums paid by it.—*American Law Register.*

(*To be Continued.*)

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* S. J. VanKoughnet, Esq., M.A., *Barrister-at Law, Reporter to the Court.*)

Baxter v. Baynes.

Unstamped promissory note—27 & 28 Vic., ch. 4—Pleading.

Where the defendant neither denied the making of the note sued on, nor pleaded the absence of a stamp, *Held*, that a defence on the latter ground could not be urged.

Semble, 1. That the only mode of raising the defence of the want of a legal stamp is by a plea denying the fact. 2. That such plea would be displaced by evidence shewing that the instrument had been properly stamped at the time of signature, and initialed by the maker, but had been rubbed off, defaced, or improperly removed by some one else; that, on these facts being shewn, the note would not be void, and that the defendant would be relieved from the penalty under the act.*

[C. P., H. T., 1865.]

* That part of the case which bears upon the late Stamp Act only is given, the remainder not being of general interest.—Eds. L. J.

The declaration stated that the defendant, on 29th September, 1864, by his promissory note then over due, promised to pay Baxter & Galloway or bearer $550 with interest one month after date, and Baxter & Galloway delivered the note to the plaintiff, who became the bearer thereof, but the defendant did not pay the same, and the plaintiff claimed £175.

The defendant pleaded, 1. That he was induced to make the note by the fraud of the plaintiff. 2. That he made the note and delivered the same to the plaintiff without value or consideration for his so doing, or for his paying the amount thereof, or any part thereof, and that plaintiff always held the note without any value or consideration. 3. A plea of set off for money lent, money received, money paid, interest, and on an account stated.

The plaintiff took issue on all the pleas. The cause was taken down to trial at the last winter assizes for York and Peel before Mr. Justice Morrison, when a verdict was rendered for the defendant * * *

Robert A. Harrison obtained a rule *nisi* for a new trial.

F. McKelcan shewed cause. * * * The note was void for want of a stamp: 27 & 28 Vic. cap. 4, sec. 9. The defendant under that section would be liable to a penalty if he paid it without a stamp. Application was made at the trial for leave to add a plea raising this question, but was refused.

Robert A. Harrison, contra. * * * The making of the promissory note is not denied, and the defendant if intending to set up the illegality should have pleaded it under the 8th rule of Trinity term, 1856: *Lazarus* v. *Cowie*, 3 Q.B. 459; *Field* v. *Wood*, 7 A. & E. 114.

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

As to the want of a stamp, the 9th sec. of stat. 27 & 28 Vic., cap. 4, in effect provides, "if any person signs, becomes a party to, or pays any promissory note, draft, or bill of exchange, chargeable with duty under this act, before such duty (or double duty as the case may be) has been paid by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of $100, and, except only in case of the payment of double duty as hereinafter mentioned, such instrument shall be invalid and of no effect in law or equity; and the acceptance of payment or protest thereof shall be of no effect, except that any subsequent party to such instrument or person paying the same may at the time of so paying or becoming a party thereto pay such double duty by affixing to such instrument a stamp or stamps to the amount thereof. * * And such instrument shall thereby become valid, but no prior party who ought to have paid the duty thereon shall be released from the penalty by him incurred as aforesaid; and in suing for any such penalty the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps affixed to any instrument shall be *primâ facie* evidence that such party did not affix such stamp as required by this act."

The 8th rule of court of Trinity term, 1856, is, "In every species of action or contract, all matters in confession or avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *exampli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, endorsing, accepting bills, &c., or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded."

It was provided by Imperial statute 31 Geo. III. cap. 25, sec. 19, to which Imperial statute 55 Geo. III. c. 184, sec. 8, refers, that "unless the paper on which a bill or note be written be stamped with the proper duty or a higher duty, it shall not be pleaded or given in evidence in any court, or admitted to be good, useful, or available in law or in equity." Sec. 17 of 3 & 4 Wm. IV. of Imperial Statute, cap. 97, provides that, "when the commissioners of stamps shall discontinue the use of any dies and provide fresh ones in lieu thereof, and give the proper notice thereof, the new dies shall be the only true ones for denoting the duty to be charged in any case to which the dies are applicable, and all deeds and instruments for the marking or stamping of which any such new dies shall have been provided, and which shall be engrossed, written, or printed on vellum, parchment or paper, stamped or marked with any other dies than the said new dies so provided, shall be deemed to be engrossed, written, or printed on vellum, parchment, or paper, not duly stamped or marked as required by law."

Under the English stamp act if an unstamped bill is read in evidence before an objection has been taken to it, the court will not allow the defendant to take the objection afterward. In an action on a banker's draft the defence was that it was post dated. The effect of such post dating under 55 George III. cap. 184, is, that they do not come within the exception, as applicable to that description of drafts, relieving them from the necessity of being stamped unless properly dated; and the plea amounted to this that no banker's draft was made, the plea in fact being that the defendant did not make the said draft *modo et formâ*. It was contended that the defendant ought to have pleaded this matter specially, but the court were of opinion that the defence could be set up under the general issue. In argument it was contended that from the facts shewn and for want of the stamp the bill could not be given in evidence, and that it would be improper to plead that a document was not evidence. *Field* v. *Woods*, 7 A. & E. 114, is authority on both points, and refers to the effect of the English stamp acts. In *Dawson* v. *Macdonald*, 2 M. & W. 26, the action was against the acceptor of the bill. The defendant obtained an order for an inspection, and also an order to plead several matters; viz., 1. He did not accept the bill. 2 & 3 Denying the drawing and endorsing. 4. A special plea, raising the defence that the bill was written on paper stamped with an old die, in contravention of Imperial statute 3 & 4 Wm. IV. cap. 97, sec 17. Plaintiff obtained a rule to strike out the fourth plea, as the matter thereby pleaded might be given in evidence under

any of the other pleas, or at all events under the plea of non-acceptance. Parke, B., said, "the only consequence of wrong stamping is, the bill could not be given in evidence. * * * There can be no question this defence is admissable under the plea of non-acceptance."

In *M'Dowal* v. *Lyster*, 2 M. & W. 52, the defendant in an action against himself, as the drawer of a banker's cheque, pleaded it was given to secure a gambling debt, and plaintiff was a holder of it without consideration. The defendant's counsel moved to add a plea that the cheque was drawn at a distance from the place where it was made payable, and was falsely dated in contravention of the provisions of 9 Geo. IV. cap. 49, sec. 15:

Per curiam —"The court will not interpose to assist the defendant in defeating an instrument, which he has knowingly executed in an illegal manner. If he wished to raise this defence he should have pleaded he did not make the cheque declared on."

In *Lazarus* v. *Cowie*, 3 Q. B. 459, the action was by the endorsee of a bill against the acceptor. The defence set up was that the acceptance was for the accommodation of the drawer and without consideration; that before the endorsement to the plaintiff the drawer negotiated the bill for his own use and paid it when due, and it was re-delivered to him, and after it was due the drawer endorsed it to plaintiff without being re-stamped, or payment of any duty in respect of re-issuing it; and that the plaintiff before endorsement to him had notice of the premises. On special demurrer it was held that the plea was good, and in giving judgment Lord Denman concludes as follows: "It is said, however, that the stamp acts do not make a bill without a stamp void, but only forbid its being received in evidence. That may be so in some cases, but the 19th section of statute 5 Geo. III. cap. 184, expressly prohibits the re-issuing a bill of exchange which has been paid, and inflicts a penalty of £50 on any person doing it. A bill issued contrary to such a prohibition is certainly void."

The plaintiff's counsel in argument contended that the defect of stamp was only available by taking the objection at the trial, so as to cause the rejection of the instrument as inadmissable in evidence. According to the established practice, if the objection is not taken at the proper time the judge will direct the jury that there is a valid legal instrument giving a good cause of action.

I think by analogy these authorities shew that the defendant, under the pleadings, cannot properly set up thedefence that the note was not properly stamped, for he does not deny the making of the note; so that the fact being admitted on the record I fail to see under what plea the objection can be raised. According to the views expressed by Lord Denman in the case in 3 Q. B., and under our 8th rule above quoted, the pleading of the want of a stamp would seem to be the most regular and convenient way of bringing up the defence. Suppose a proper stamp had been placed on the note at the time it was signed, and had been properly initialed by the maker, and had subsequently got rubbed off would the note be void? and if these facts were shewn in answer to a plea denying that the note was properly stamped, would they not displace the plea? That the absence of the stamp properly initialed is only *primâ facie* evidence in an action to recover the penalty would seem to imply, that if the stamp had been properly placed thereon and defaced, and had been lost or removed by some one improperly afterwards, that the *primâ facie* case would be answered, and the defendant freed from the penalty. Without expressly deciding that the only mode of raising the question of want of a legal stamp on a bill or note is by pleading it, I have a rather strong opinion that such will be found to be the proper way of doing so.

Rule absolute for new trial.

White et al. v. Baker.

Promissory notes payable in American currency—Plea, tender before action brought of smaller amount in Canadian currency, alleged to have been at time of tender equal to plaintiff's claim—Demurrer.

To the first and second counts of a declaration on two promissory notes, dated respectively 11th September and 29th November, 1860, for the respective sums of $500 24 and $388 85, payable six months after date, the defendant pleaded that the notes were signed and entered into in the State of Illinois, one of the United States of America, to be paid, when due, in United States currency, and alleged a tender by defendant before action of $606 12 of lawful money of Canada, which was *at the time last aforesaid* equal to plaintiffs' claim, and a refusal by plaintiffs to accept same.

Held, on demurrer, plea bad; firstly, for alleging the amount tendered to have been equal to the plaintiffs' claim on the day of tender, before action brought, instead of at the time of making the notes sued upon, with subsequent interest, &c.; and, secondly, for alleging that the amount tendered was equal *to plaintiffs' claim*, instead of "equal in value to a certain sum of the currency of the United States," &c.; though, *semble*, this might be only ground of special demurrer.

[C. P., H. T., 1865.]

This was a demurrer to the first plea, which was pleaded to the first and second counts of the declaration.

The first count set out, that on the 11th September, 1860, the defendant, by his promissory note, promised to pay to the order of the plaintiffs $500 24, six months after date, but that he did not pay the same.

The second count was on a promissory note of the 29th October, 1860, for $388 75, similar to the note in the first count in other respects.

The plea was, that the promissory notes were signed and entered into by the defendant in the State of Illinois, one of the United States of America, to be paid, when due, in United States currency; and that before the commencement of this suit, to wit, on the 23rd November, 1864, the defendant tendered to the plaintiffs the sum of $606 12 of lawful money of Canada, which was at the time last aforesaid equal to the plaintiffs' claim in the first and second counts mentioned, and that the plaintiffs refused to accept it; and that defendant brought the same into court, &c.

The plaintiffs' grounds of demurrer were, that the sum tendered was a smaller sum than their claim; that it was not alleged to have been equal in value to the moneys in the first and second counts mentioned, at the time when they became payable; that no excuse was assigned for non-payment of the moneys when they became due, nor were any damages tendered for such non-payment.

C. S. Patterson, for the demurrer, referred to *The Niagara Falls International Bridge Company et al.* v. *The Great Western Railway Company*, 22 U. C. Q. B. 592; *Crawford* v. *Beard*, 13 U. C. C. P. 35; *Judson* v. *Griffin*, 13 U. C. C. P. 350.

S Richards, Q. C., contra, referred to *Hutton* v *Ward*, 15 Q. B. 26; Westlake on Private International Law, s. 232, as establishing that the plaintiffs were only entitled to recover the rate of exchange between the two countries at the time of the commencement of the suit, and not at the time when the notes became payable.

A. Wilson, J., delivered the judgment of the court.

It is not disputed that the *place* of payment is Illinois, where these notes were made and delivered, and that the rate of exchange must be governed by the rate prevailing between the *forum* in which the suit is brought, and the place where the money is to be transmitted; but it is contended that this rate is to be determined by that which prevailed at the time when the suit was brought, and not at the time when the money became payable.

In the passage cited from Westlake it is stated: "But what if the question of place becomes complicated with one of time, by a variation of the rate of exchange between the date when the debt fell due and that when the action is brought? It is the latter period at which the exchange must be taken; for the only fixed element is the amount owing in the place where the debt is payable, increased of course from time to time by such interest as may there accrue upon it. What is due elsewhere fluctuates from *forum* to *forum*, and from moment to moment, being always the sum which, on being remitted, will produce that amount."

The assertion (for it is not reasoning), that there is "a fixed element of amount in the place where the debt is payable," is not correct, so long as it is claimed to be paid in a foreign currency, or, in other words, so long as it is subject to the laws of exchange; but even if there be such a fixed element of amount at the place of of payment, how can that apply more to the time of the suit than to the time of the payment?

If this had been a bill of exchange instead of a promissory note, the application of the rule of exchange to the time of the dishonor would have been more obvious.

Suppose, then, instead of this [illegible], the plaintiffs, residing in Illinois, had dr[illegible]n a bill upon the defendant in Canada, payable in I[illegible]inois, and he had accepted it: when that bill fell due and was dishonored, the plaintiffs, according to the Law Merchant, would have been at liberty to redraw upon the acceptor for the amount he ought at the time of the dishonor of the bill to have paid to the drawers or holder, together with the expenses and any additional exchange which was then prevailing between the two places. Why does not the same rule apply to a note as to a bill? The payee of a note relies upon the punctuality of the maker to redeem the paper, which the payee has probably negotiated; and if the maker do not redeem it, the payee in such a case must: and if he do, why should he not get from the maker the money which he, the payee, has been obliged to pay, and which the maker ought to have paid? Why, if the payee has paid $500, which was the whole claim on the note when it fell due, is he to recover what would at the time of his own payment be equal to $700, because one year after, when he brought his suit in a foreign country, his own currency had risen in value? Or why should the maker avoid paying the full $500, because the currency had in the meantime of his own neglect fallen? There is no reason why the one should thus gain, and the other should thus lose: they both contracted with relation to a particular time, which was the maturity of the note, and that, we think, must govern. Story's Conflict of Laws, ss. 309, 310, 311, and *Suse* v. *Pompe*, C. B. N. S. 538, are full authorities for this opinion.

The plea is, however, open to objection, in [illegible]eging that $606 12 of lawful money of Canada was equal to the plaintiffs' claim; for their claim was really a question of law, to be determined by many considerations, and this the jury cannot try; but they could try whether $606 12 of the money of Canada was equal in value to a certain other sum of the currency of the United States; and this is the mode in which it should have been alleged. It is very likely that this is only cause special demurrer in this view of it: but in setting up the tender of a smaller sum as a discharge of the greater, it is made objectionable in substance.

Judgment for plaintiffs on demurrer.

Wilkins v. Row.

Injury resulting from the clearing of land—Refusal to interfere with verdict of jury.

A man must exercise care and discretion as to the time and mode of clearing his land: and if his neighbour be injured by rashness or inconsiderateness on his part, he will be liable to him for the damage.

It is, however, always a question for the consideration of the jury whether or not a man has exercised his own right to the injury of his neighbour; and where the case has gone fully to them, with all proper directions on the law by the presiding judge, their verdict will not be disturbed by the court, unless it is contrary to law, even though the evidence would fully have warranted a different finding.

[C. P., H. T., 1865.]

This was an action for setting fire to the plaintiff's woods. The trial took place at the last fall assizes, at Cobourg, before Morrison, J.

The facts of the case, as they appeared in evidence, were, that the defendant, desiring to make a small clearing on his land, which adjoined the plaintiff's, merely for the purpose of a "turnip patch," as it was called, during the very dry weather of the previous summer set fire to a portion of his premises, and the fire extended into and burned a large tract of the plaintiff's land.

There was conflicting evidence as to his having attempted to put out the fire, his efforts appearing to have been directed merely towards protecting his own property, and not the plaintiff's. The damage was very extensive, the fire having destroyed a cedar swamp, which the plaintiff had protected for between forty and fifty years, the timber from which, it appeared, would have sold well for railway ties.

The jury rendered a verdict in favor of the defendant.

C. E. English obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law, evidence, and the weight of evidence.

Hector Cameron shewed cause.

J. Wilson, J., delivered the judgment of the court.

The defendant had the right to clear his own land at any time, provided he did not injure his neighbour in doing it. In dry weather he was bound to exercise prudence and discretion in setting fire in his own clearing; and if he did so rashly and inconsiderately, in a place where, and at a time when, it was likely to injure his neighbour, and it did injure him, he was liable for the damage. These are rules deducible from considerations of natural right, and from time immemorial have been embodied in the legal maxim, "*Sic utere tuo, ut alienum non lædas.*"

But whether a man has exercised his own right to the injury of his neighbour or not, must be always a question for the consideration of the jury under all the circumstances of every particular case. Here all the circumstances were spread before them, and the learned judge gave all proper directions in point of law: no fault, indeed, has been found with the charge, but they found for the defendant.

The court is asked to grant a new trial, because the verdict is said to be contrary to law and evidence, and the weight of evidence. We think it was not contrary to law: certainly the evidence would have fully warranted a verdict for the plaintiff. The facts of the case were of a character familiar to the occupations of the jury, about which they were not likely to form an erroneous judgment. It was unfavorable to the plaintiff's view of it, and we cannot on authority disturb it. The rule will therefore be discharged.

Rule discharged.

Squire qui tam v. Wilson.

Property qualification of Justices of the Peace—Con. Stats. C. ch 100, sec. 3—Conflicting evidence—Judge's charge.

In a *qui tam* action against defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises on which defendant qualified, was vague, speculative, and inconclusive, one of the witnesses in fact, having afterwards recalled his testimony as to the value of a portion of the premises and placed a higher estimate upon it: while the evidence tendered by the defendant was positive, and based upon tangible data:—

Held (*A. Wilson, J., dissentiente*), that the jury were rightly directed, "that they ought to be fully satisfied as to the value of the defendant's property before finding for the plaintiff: that they should not weigh the matter in scales too nicely balanced: and that any reasonable doubt should be in favour of the defendant."

Observations on the principle of the valuation of land with a view to determining the property qualification of Justices of the Peace.

[C. P. H. T., 1865.]

This was a *qui tam* action against the defendant for acting as a Justice of the Peace in and for the United Counties of Huron and Bruce without being qualified, according to "The Act respecting the qualification of Justices of the Peace," Con Stats C cap. 100

The declaration contained eleven counts.

The defendant pleaded not guilty to all, and as to ten counts, an action *qui tam* pending against defendant at the suit of one David Paulin.

The plaintiff joined issue on the first plea, and replied to the second that the action of Paulin was commenced and prosecuted by fraud and collusion between Paulin and the defendant.

On this replication the defendant joined issue.

The cause was tried before Hagarty, J., at the last assizes held at Goderich, and a verdict found for the defendant.

In Michaelmas Term last, *Robert A. Harrison* obtained a rule *nisi* to set aside the verdict and for a new trial on the grounds of misdirection in this, that the learned judge told the jury that if there was any doubt as to the sufficiency of the defendant's property qualification as a Justice of the Peace, to give him the benefit of the doubt; and for non-direction in this, that the judge refused to tell the jury that by law the onus of proving a sufficient qualification was cast upon the defendant, and that if the jury doubted as to its sufficiency the verdict should be against the defendant; and upon grounds of improper rejection of evidence in this, that he refused to hear the testimony of Charles A. Harte, a witness called on the part of the plaintiff; and on grounds of surprise, and grounds disclosed in affidavits and papers filed.

During the present term, *C. Robinson*, Q.C., shewed cause.—There is no reason for complaining of non-direction, for the presumption is always in favor of the good faith of a public officer. Before acting the defendant had to make oath that his property was worth $1,200. This he did, and he has proved by two witnesses that the property is of this value. It is true that the plaintiff produced as many and more witnesses to prove that in their opinion it was worth less, but they had not seen the property so fully as to be able to estimate its value, and after all it was but their opinion. It is true, too, that the statute requires the property qualification to be $1,200, but it is easy to get witnesses honestly to undervalue the property, and thus cast a doubt upon its value; but a doubt thus cast should be in favor of the defendant, because the presumption always is that a man is acting rightly, not wrongfully.

As to the rejection of the evidence of Harte, it must be admitted that his knowledge of the circumstances as to which he was called to speak was derived from the defendant during the relationship of attorney and client, and the evidence was, therefore, properly rejected. As to the affidavits filed by the plaintiff, they disclose no new facts, but a repetition of opinions of value, which are met by affidavits on the part of the defendant representing its value to be $1,200. There is no surprise, and no ground on which a new trial ought to be asked for or granted, for the defendant was the owner in fee of the land.

On the question of misdirection he referred to Con. Stats. Canada, ch. 100, secs. 3, 6; on the alleged non-direction to *Great Western Railway Company of Canada* v. *Braid*, 8 L. T. N. S 31, S C. 9 Jur. N S 339; *Taylor* v. *Ashton*, 11 M. & W 401, 417; Taylor on Ev. 4 ed. 366–369; *Connell* v. *Cheney*, 1 U. C. R. 307; and as to the surprise, *McLellan q. t.* v. *Brown*, 12 U. C. C. P. 542.

Harrison, in support of the rule, animadverted upon that part of the judge's charge, wherein he directed the jury not to weigh in scales too nicely balanced the value of the defendant's property. He argued that the statute required the qualification to be $1,200, and that the legal presumption was against the defendant if doubt

was thrown upon its value; for he was bound without reasonable doubt to have property of the clear value of $1,200, and the whole onus of proving this lay on the defendant. He cited *The Lexington F. L. & M. Ins. Co.* v. *Paver*, 16 Ohio, 324; Best on Presumptions, 29, 57.

J. Wilson, J.—The 6th sec of the Con. Stats. C., cap 100, enacts that "the proof of his qualification shall be upon the person against whom the suit is brought." The defendant, in answer to the plaintiff's charge, that he had acted without the proper qualification, put in his oath of qualification, dated 17th of April, 1861, on certain property in Clinton, described therein. He called the person from whom he purchased the property in January, 1865, who proved that the defendant had then paid for it $1,200, and had since expended $400 more upon it, and that it was worth as much at the time of trial as it was when he purchased it. He proved by another witness, who had opportunities of examining it, that the lot on which the house stood was an eighth part of an acre, and was worth at least $1,200; that an adjoining lot of double the size, but with a house worth $100 less than the defendants, had been sold for $1,600 within three months.

To displace this evidence, the plaintiff called three witnesses to speak to the value of the property. The first was the assessor for the years 1859,'60 and '61. He said that he had assessed its yearly value in 1861 at $36, representing an absolute value of $600, which he said was a fair value. The lot is over forty feet front by two chains deep, and might be now worth $200 or $300, and the buildings might have cost $500 or $600, but are not worth what they cost: he was never inside the house, and had never examined it, with a few to value it, for three years. The next witness said he thought the property worth $700 to $800; he had been inside the house, but never up stairs; but he admitted he had never looked at it with a view to value, for he did not expect to be asked. The third and last witness said that before the repairs he thought it worth about $600, but he had not seen it since the repairs; he should not like to give $900 now; some might give more, and, perhaps, if he had examined it through, he might value it at more.

The learned Judge reports to us that he directed the jury, "that they ought to be fully satisfied as to the value of the defendant's property before finding a verdict for the plaintiff; that he thought they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The last part of this charge is what is complained of in the rule; but in the argument the mode in which the jury were directed to weigh the matter was insisted upon as objectionable.

In both respects we think the charge was right. This is the first time that any question has arisen as to the valuation of property in view of this "Act respecting the qualification of Justices of the Peace"; and it would be desirable if some principle of valuation could be laid down for the guidance of those who act, and those who may have reasons of complaint under it. It is for the most part a consolidation of the 6th Vic, cap. 3, which in the preamble recites that "as well by the criminal laws of England in force in this province as by divers provincial acts. Justices of the Peace are invested with great powers and authority, therefore it has become of the utmost consequence to all classes of Her Majesty's subjects that none but persons well qualified should be permitted to act as Justices of the Peace, and that the laws now in force in this province are insufficient for this purpose." It enacted, as the act before us does, that all Justices of the Peace shall be of the most efficient persons dwelling in the districts and counties respectively; and further, that no person shall be a Justice of the Peace, or act as such, who has not real estate, of the description mentioned in the act, of or beyond the value of $1,200 over and above what will discharge all incumbrances affecting the same, &c. The object of the act was two-fold; first, that the Justices should be of the most sufficient persons; and secondly, that they should be worth unencumbered real estate to the value of $1.200 at least, to satisfy any one who should be wronged by their proceedings. Then, that Justices might be deterred from acting, the right is given to any person to sue *qui tam* and recover a penalty of $100 for each offence against him who acts as a Justice without qualification, or without having taken and subscribed the oath of qualification set forth in the act. The present action is for ten such offences, and the point raised by this rule is, what is sufficient proof of this qualification, and in case the evidence of value be doubtful, which party is to have the benefit of the doubt. That the price paid for land and the money expended upon it, do not constitute its value, is a matter of every day's experience. We incline to think its value depends much upon the number of persons who at the moment are willing to purchase, coupled with the unwillingness of the owner to sell, and in a less degree by the amount of capital held for investment in land at the time. The anxiety of the owner to sell, when few are willing to buy, frequently reduces it to a value more nominal than real. Strictly speaking, the value of land, like any other commodity, is the price it will bring in the market at the time it is offered for sale; but to apply this rule to land in this country would be manifestly unjust, for there would be found times when no one would be willing to buy at any price, and for the simple reason that capital is not, and land always is, abundant in the market.

The defendant's oath of qualification was put in, and if evidence at all, it was evidence of value in his estimation; but in judging of the value a man sets upon his own property, especially if it be his home, we cannot weigh his opinion of it in "scales too nicely balanced." It may have acquired value in his estimation from its associations or, it may be, from the pains he has bestowed upon it to make it conformable to his ideas of elegance, or fitness, or comfort; or he may value it from the very preciou ness which ownership and possession give to the house and home of most men.

Nor can we weigh the estimates of stangers as to the value of a man's house and land in scales more nicely balanced; for, allowing all credence to the honesty of those who give their opinions, they must be more or less speculative, accordin

the stand-point of view from which they are taken. The evidence for the plaintiff here affords an illustration. He calls the assessor for the years 1859, '60 and '61. In this last year the oath of qualification had been made. This witness, we have just seen, assessed its yearly value at $36, thus representing its actual value at $600. *At present he says it may be worth $300* more, but he had never been inside the house at all; and yet the yearly value of a house, as well as its absolute value, must in a considerable degree depend upon its internal appearance and finish. Nor does he say how it is that it is worth more now *than in 1861; but in this country property* out of business situations will seldom rent to pay six per cent. of its value.

Another witness values it at $700 to $800; but he had never been up stairs and never had looked at it with a view to its value. Another says it was, he thinks, *worth $600 before it was repaired* but he has not seen it since; he should not, however, like to give over $900 now for it, although some might give more. If these estimates of value by the witnesses for the plaintiff were weighed in scales nicely balanced, there could be but indefinite justice. No proper valuation can be made of a house without seeing it inside; for some men disregard the exterior, who are lavish of internal finish, and *vice versa;* and what one or another would give as speculative amounts cannot be a safe rule of value, unless they have examined the property, or are intending purchasers. The defendant's witnesses represent the value of it to be $1,200 or more on given data, and on a reasonable knowledge of what the property was. If the plaintiff had met this by data more definite, by a comparison of the value of land in the immediate neighborhood, or by a detailed estimate of the value of the buildings and their state of repair, external and internal, there might have been ground for finding fault with the direction; but when the evidence is vague, where it might have been more definite, we think the learned judge laid down the only rule which was safe, at least under the circumstances of the case.

In the affidavits before us on this motion, for and against it, the same differences of opinion exist. One witness for the plaintiff who had sworn, he would build now just such a house for $450, in an affidavit for the defendant corrects this and says, he could not do it for less than $600. We infer he had omitted to take into consideration the value of the verandah. On the one side they represent it as worth $1,200, on the other as of less value.

Then as to the express misdirection, "that any reasonable doubt as to value should be in favor of the defendant." When the defendant had made a *primâ facie* case, sustaining his oath, his conduct, and his obedience to an act of the legislature, by evidence based upon tangibe data, and when the plaintiff threw a doubt upon it, by evidence of speculative opinion, without given data, and without the knowledge of the thing valued, and without laying down any rule of general application, we can safely say that, under all the circumstances of this case, the learned judge was right in his direction. The plaintiff undertook to make out that the defendant had been guilty of dereliction of duty, if not of positive crime; but the presumption is always in favor of right acting, rather than of *wrong doing.*

The grounds for a new trial, on the score of surprise, we need hardly discuss: the plaintiff supposed the defendant's estate was a leasehold. which the latter answers by producing under oath his conveyance in fee. On the whole we *think the plaintiff's rule should be discharged.*

A. Wilson, J.—It is reported that the learned judge at the trial directed the jury that "they ought to be fully satisfied as to the value of the defendant's property before they found a verdict for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The first part of the charge I understand to mean, that the jury should be fully satisfied that the value of the property *was not* what the defendant represented it to be, before they should find a verdict against him.

The statute provides, "that no person (except when otherwise provided for by law,) shall be a Justice of the Peace, or act as such, who has not in his actual possession, to and for his own proper use and benefit, a real estate, &c., of or about the value of $1,200 over and above what will satisfy and discharge all incumbrances," and the act further provides, that in any action, suit, or information brought against a person for acting as a Justice of the Peace, not being so properly qualified, "the *proof of his qualification* shall be upon the person against whom the writ is brought."

The evidence in this case was contradictory. The evidence given by the plaintiff's witnesses was, that the property was worth $700 or $800, *and that given by defendant's witnesses was,* that it was worth $1,200.

I think the effect of the charge was, that the plaintiff had failed to sustain his case, because the jury might assume he had not successfully impeached the correctness of the defendant's *valuation; instead of directing the jury that* if the defendant had not satisfactorily made out that he did possess the necessary qualification they should find against him, because the law had cast upon him the burden of exonerating himself by proving affirmatively, as he was the *proper person to do it* and the one who could best do so, his own qualification.

As I think there was a misdirection, I think there should be a new trial, and this may be ordered for such a cause in a penal action. Whether it would be attended with a different result on any other charge which might be given, it is for the plaintiff to consider.

Richards, C. J., concurred with J. Wilson, J.

Rule discharged.

COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

Smith v. Roe.

Attorney and agent—General agent and particular agent—Service of papers—Ratification of agency.

The fact that a man employs another to do a specified act for him at a particular time, raises no presumption whatever that the person so employed has authority to do a similar act at a different time.

Where defendant's attorney, living in St. Thomas, sent an appearance to Messrs. B. B. & S, of London, whence the writ of summons issued, to enter there for him, which was done, and on the 24th January, plaintiff's attorney served the declaration and demand of plea on Messrs. B. B. & S., which did not reach defendant's attorney till the 25th January: *Held*: although on two other occasions B. B. & S. had entered appearances in li e manner for defendant's attorney, B. B. & S. were not to be deemed general agents to accept service of papers for defendant's attorney; and, therefore, *held also*, that the time for pleading did not count till the 25th January, when declaration and demand of plea were actually received by defendant's attorney at St. Thomas, and so judgment entered on the 1st February following for default of plea set aside as irregular.

Held also, that the receipt of the declaration and demand of plea by defendant's attorney from B. B. & S., and subsequent sending of a plea to them to be filed and served, was not a ratification of the service on B. B. & S. as his agents, so as to make the service count from the day that B. B. & S. received it.

[Chambers, Feb. 28, 1865.]

This was a summons to set aside a judgment as having been entered too soon, and all proceedings subsequent thereto.

The action was brought in the Court of Queen's Bench, and commenced in the county of Middlesex.

Mr. Stanton, an attorney, residing at St. Thomas, in the adjoining county of Elgin, caused an appearance to be entered for defendant in the deputy clerk's office in London, sending the same to Messrs. Becher, Barker & Street, who entered the same for him.

Mr. Stanton had not any agent regularly entered as such for him at London, but had Toronto agents (Messrs. Crawford & Crombie) duly entered.

On the 24th January, 1865, plaintiff's attorney having ascertained that the appearance had been entered by or through Messrs. Becher, Barker & Street, served copy of declaration and notice to plead on them for Mr. Stanton.

On the 1st February, no plea being filed, plaintiff's attorney signed judgment; and on the same day one of the firm of Becher, Barker & Street served copy of pleas by Stanton on plaintiff's attorney, and on the same day filed it in the office. Plaintiff's attorney being the same day asked by them would he let defendant in to plead, declined doing so.

Mr. Stanton swore that he received the declaration on the 25th January, which had been served on Messrs. Becher, Barker & Street on the 24th; that the latter had no authority to accept service or receive papers on his behalf, and that on the 1st February he had sent the plea to them to file and serve: that he had been in the habit of sending appearances and papers to different attornies in London, to be filed or served for him, and received declarations and papers through different attornies, and has always regarded them as served on him at the time he received them, and not when handed to the practitioners in London to be sent to him; and that he regards the declaration in this cause as served on him the day he actually received it in St Thomas, viz., 25th January, and not on the previous day when served in London.

The plaintiff's attorney swore that he had searched in the deputy clerk's office for two years, and found only six suits in all the courts, in which Mr. Stanton had acted for parties; that Becher's name is entered in two of the suits as agent for Stanton; in two other suits no name appears as agent, but he (deponent) believed the appearances were entered by Becher: in another suit, brought by the plaintiff against one Charles Roe, the name of Mr. Abbott, another London attorney, appears as agent: no account was given of the sixth suit. It also appeared that on the 2nd February, the day after judgment was signed, the plaintiff's attornies, in another suit defended by Stanton, served declaration for him on Mr. Abbott, whose name appeared as agent for Stanton.

R. A. Harrison, contra.

The following cases were cited on the argument: *Clemow* v. *Officers of Ordnance*, 5 U. C. Q. B. 458; *Parke* v. *Anderson*, 5 U. C. Q. B. 2; *Houghton* v. *May*, 1 U.C. Prac. R. 165; *Hamilton* v. *Burns*, 1 U. C. Cham. R. 257; *Robson* v. *Arbuthnot*, 10 U. C. L. J. 186.

Hagarty, J.—The Common Law Procedure Act, section 61, is very explicit in providing for a case like this, viz.:—"If the attorney of either party do not reside or have not a duly authorized agent residing in the county wherein the action has been commenced, then service may be made upon the attorney wherever he resides, or upon his duly authorized agent at Toronto; or if such attorney have no duly authorized agent there, then service may be made by leaving a copy of the papers for him in the office where the action was commenced, marked on the outside as copies left for such attorney."

The plaintiff's course on this statute would have been very clear, and it is to be regretted that he did not follow it strictly.

I see nothing in the papers before me to warrant the assumption that Messrs. Becher, Barker & Street had any general authority to accept service of papers for Mr. Stanton, so that any service on them of Middlesex business would answer to a service on the regular Toronto agents.

The fact that a man employs another to do a specific act for him at a particular time, raises no presumption whatever that the person so employed has authority to do a similar act at a different time.

Lord Cranworth says, in a late case in the House of Lords (*Poole* v. *Leask*, 8 L. T. N. S. 645; same case, 9 Jur. N. S. 829): "Unless there is proof either that the agency is a general continuing agency to endure until revoked, or that the agent fills some character from which such a general agency may be presumed, the fact that there has been separate agency in any number of previous cases affords no evidence of agency on any subsequent transaction, however closely it may resemble all which have gone before."

Cockburn, C. J., adopts a somewhat similar view in *Moody* v. *London & S. C. Railway*, 1 B. & S. 290. Thus: "A man employs a solicitor, and even calls him his solicitor, but that does not give that person authority to bind him in a particular instance. Here nothing was proved except that on other occasions he acted as solicitor for the company," &c.

I also refer to a late case in our own court—*Myles* v. *Thompson*, 23 U. C. Q. B. 553.

All the evidence adduced to prove that Messrs. Becher, Barker & Street were Mr. Stanton's

Stanton's agents, consisted in shewing that in two previous suits they had entered appearance for him — the suits, I think, not proceeding beyond appearance, and that in this suit they had simply filed the appearance for him. I have seen no authority at all approaching the position contended for by the plaintiff No conclusion of an authority to accept service can in my judgment be drawn from such acts.

But it is contended by Mr. Harrison that as Mr. Stanton in fact received the declaration and demand of plea from Becher, Barker & Street, and sent a plea to them to be filed and served, he thereby ratified the service of the declaration on them as his agents. This is almost the only point much in plaintiff's favor But it seems to me as only amounting to an admission by Stanton that he had received the declaration and notice to plead from persons in London who were, as it were, asked by plaintiff's attorney to send or give them to him, and that in such a case his filing a plea was a voluntary act on his part, shewing his willingness to plead in the proper legal time after he had actually received or been served with declaration.

If Becher, Barker & Street were his agents, service of course was complete when the declaration was served on them on the 24th January, and it was equally so whether they ever forwarded it to Stanton or not. If not his duly authorized agents at the time of service on them, and if they did not receive the declaration and notice to plead as such agents, in what capacity did they receive them? I can hardly answer the question, except by saying that they were a mere channel of communication between plaintiff's attorney and Mr. Stanton—a mean adopted by the former to have service made on Stanton; and the latter, as it seems to me, had the right so to regard it, and to receive the declaration and demand of plea as he would from any ordinary third person instructed to give it to him, or as if he received it by post from plaintiff's attorney.

I agree that if he had authorized papers to be mailed to him from London, the service would be reckoned from the time of mailing, whether they ever reached him or not: (*Robson* v. *Arbuthnot*, 10 U C. L J. 186.) But there is only one alternative; he either authorized service on Becher, Barker & Street, or he did not. If he did not, then they received the declaration and demand of plea, not as his authorized agents, but merely as persons requested by plaintiff's attorney to send them to or serve them on him at his (the plaintiff's) risk; and Stanton's accepting it, and sending a plea to the same persons, to be filed within eight days from the time the declaration reached him, cannot, I think, be held to ratify the service on them to be reckoned from the time it was made.

The setting aside of this judgment may possibly work some hardship. This is to be regretted. But I think it necessary to have some intelligible rule to govern cases such as the present The provisions of the statute, as I understand it, if observed, will prevent any difficulty in the service of papers.

I make the summons absolute without costs, unless defendant will undertake to bring no action for anything done on the judgment signed. If he so undertake, then with costs.

Defendant undertook to bring no action, and so summons was made absolute with costs.

Heron v. Elliott et al.

Con. Stat. U.C. cap 27, s. 9—Rules 93 and 132—Appearance by landlord, how entitled—Notice of appearance and notice of title, how entitled—Summons to set aside proceedings, how entitled—Unnecessary to serve notice of title.

Held 1. that where leave is given to a landlord under the Ejectment Act to appear and defend the appearance must be entitled in the cause against the defendants named in the writ.

Held 2. that notice of appearance and notice of title if so entitled (*i. e* in the cause against the original defendants) are correctly entitled.

Held 3. that a notice of title where a landlord is allowed to appear instead of the persons named in the writ need not be served.

Held 4. that a summons obtained to set aside the appearance and subsequent proceedings for irregularity styled in the cause against the new defendants was correctly entitled

[Chambers, Feb. 23, 1865]

Plaintiff obtained a summons calling upon defendants to shew cause why the appearance and notice of title filed by them and the notice of such appearance served, or some or one of them, should not be set aside as irregular with costs, on the grounds—

1. That the appearance was improperly styled as to the name of the cause.
2. That the notice of title was likewise improperly styled as to the name of the cause.
3. That no copy of said notice of title had been served on plaintiff's attorney.
4. That the notice of appearance was also improperly styled, and on grounds disclosed in affidavits and papers filed.

The action was ejectment and the persons named in the writ were John Springer, Elijah Corgell, Robert J. Cochrane, George Swift, and Robert McBride.

On 3rd February last Mr Justice Morrison on reading the affidavit of the attorney for the defendants Andrew Elliott, Henry Cadwell, Mary M. Cadwell, Leonard Vaughan, Martha Vaughan, and Henry C. Shannon, by order made *ex parte*, entitled in the cause of the plaintiff against the persons named in the writ, gave leave to the persons first named to appear and defend the action for the property claimed, either jointly with any one or more of the persons named in the writ, or separately by themselves, and either as tenants of the whole of the lands claimed, or as landlords of part or tenants of the residue or otherwise howsoever.

On 7th February last the following memorandum of appearance was filed in the office of the deputy clerk of the Crown:—

In the Queen's Bench.

Charles Heron, plaintiff And John Springer, Elijah Cargell, Robert J. Cochrane, Geo Swift and Robert McBride, defendants.	Timothy Blair Pardee, attorney for Andrew Elliott, Henry Cadwell, Mary M. Cadwell, Leonard Vaughan, Martha Vaughan, and Henry C. Shannon, appears for them as landlords and defends for the whole of the premises herein, in the place of said defendants,

under and by virtue of a judge's order bearing date the 3rd day of February instant

Entered this 7th day of February, A D. 1865.

T. B. Pardee,

Attorney for Elliott, Cadwells, Vaughans and Shannon.

On the same day Mr. Pardee caused a notice of appearance, styled in the same manner as the appearance, *i.e.* in the cause against the persons named in the writ to be served on the plaintiff's attorney, and on the same day filed a notice of title styled in like manner and addressed to the plaintiff's attorney, to be filed in the office of the deputy clerk of the Crown, but not served.

Robt. A. Harrison shewed cause. He adverted to the fact that Con. Stat. U. C. cap. 27, s. 9, declaring that any person not named in the writ, may, by leave of the court or judge, "appear and defend," on filing such an affidavit as therein mentioned, in no manner professes to regulate the form or style of the appearance. He next referred to Rule 93, Har. C. L. P. A. 635, which declares that "where a person not named in the writ of ejectment has obtained the leave of the court or a judge to appear and defend, he *shall* enter an appearance according to the C. L. P. A. entitled in the action against the party or parties named in the writ as defendant or defendants, &c." Thereupon he argued that the appearance in this cause was strictly regular and that to entitle them as contended for by plaintiff would be irregular. He pointed out that in *Haskins* v. *Cannon et al.*, 2 U. C. Pr. R. 334; *Peebles* v. *Lottridge et al.*, 19 U.C.Q.B. 628, no reference whatever was made by counsel or court to this rule of practice, and therefore that these cases should not be taken as establishing any different rule. He cited Chit., 9 Edn. 536, as supporting his contention. He also argued that the notice of appearance and notice of title were both correctly entitled, and that where persons not named in the writ of ejectment are allowed to appear and defend it is unnecessary to serve notice of title (Con. Stat. U. C. cap. 27, s. 8; Rule 93 *supra; Fairman* v *White*, 24 U. C. Q. B. 123.) He contended that plaintiff's summons was incorrectly entitled, and that in any view the summons must be discharged, and as moved with costs, if discharged, must be discharged with costs (*Willer* v. *Hall*, 1 Dowl. N. S. 703; *Becket* v. *Durand*, 6 U. C. L. J. 15.)

F. A. Read, contra, argued that Rule 93 is inapplicable to the case of a landlord appearing in lieu of his tenant, that in such case the appearance must be in the cause styled against defendants actually appearing as the real defendants (*Haskins* v. *Cannon et al.*, 2 U. C. P. R. 334; *Peebles* v. *Lottridge*, 19 U. C. Q. B. 628; *Adshead* v. *Upton*, 22 U. C. Q. B. 429.) That the notice of appearance and notice of title were under any circumstances incorrectly entitled (*Thompson* v. *Welch*, 3 U. C. L. J. 133; *Harper* v *Lowndes*, 15 U. C. Q. B. 430) and that the latter like a pleading should at least have been served (Rule 132, Har. C. L. P. A. 650; Con. Stat. U. C. cap. 22, s 112, 122; *Watkins* v. *Fenton et al.*, 8 U. C. C. P. 289)

Adam Wilson, J.—The 93rd rule referred to by Mr. Harrison is as follows:—"When a person not named in the writ in ejectment has obtained leave of the court or judge to appear and defend he *shall* enter an appearance according to the C. L. P. Act, 1856, *entitled in the action against the party or parties named on the writ as defendant or defendants*, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sues in person."

The form in Chitty's Forms, 9 Edn. 536, is precisely to the same effect.

A. B., plaintiff, against C. D. and E. F. defendants.	D. A., attorney for L. L., appears for him as landlord, &c., &c.

And the notice of such appearance is entitled in the same manner, page 537.

The defendant's proceedings are therefore in my opinion sufficiently regular in form in the appearance, notice of appearance, and notice of title.

After the appearance and notice no doubt the person or persons admitted to defend must be named in the issue books, nisi prius record, &c., and therefore I hold that the plaintiff's summons entitled *not* in the name of the original defendants, but in the name of the landlords who have been substituted for the original defendants is regular, because that is now the proper cause pending and the proper style of it (*Peebles* v. *Lottridge*, 19 U. C. Q. B. 628.)

It does not appear by the statute that the appearance or a copy of it is to be served upon the plaintiff's attorney, and if so, the notice of the defendant's title, when there is one which is to be filed with the appearance, need not be served. The statute only requires that the notice limiting the defence to part of the property claimed should be served. I do not think the appearance in this action though substantially answering the place and purposes of a plea is a pleading within Rule 132, which requires pleadings to be served. It is provided by s. 16 of the Ejectment act that in case an appearance be entered the claimants or their attorney may without any pleadings make up an issue, &c. This summons must therefore be discharged with costs.

Summons discharged with costs.

The Queen v. Chamberlain et al.

Bail in criminal cases—Copies of information, examination &c., how certified—Con. Stat. Can., cap. 102, s. 63.

Held, that where a prisoner makes application to a judge in Chambers to be admitted to bail to answer a charge for an indictable offence, under Con Stat. Can., cap. 102, s. 63, the copies of information, examination, &c. may be received, though certified by the County Crown Attorney and not by the committing justice.

[Chambers, March 2, 1865.]

On 21st February last, defendant Chamberlain caused a notice to be served on the agent of the Attorney General to the effect that on the next day, at the hour of ten o'clock in the forenoon, an application would be made to the presiding judge in Chambers at Osgoode Hall for the admission to bail of the defendant Chamberlain to answer the charge for which he stood committed; and further, that certified copies of the depositions, &c., on which such application would be made had been brought from the office of the Clerk of the Crown into Chambers by judge's order for the purpose of the application.

The depositions, which were certified by the Clerk of the Peace in and for the county of Oxford, under the seal of the Court of Quarter Sessions in and for that county, disclosed the

charge of forgery, which was the charge for which the accused stood committed.

Robt. A. Harrison shewed cause, and submitted that the only jurisdiction which a judge in Chambers had to bail on such a charge was either on writ of *habeas corpus* or under Con. Stat. Can., cap. 102, s. 63, and that the latte. statute requires a notice to the committing magistrate, and that the copy of information, examination, &c., should be certified close under the hand and seal of the convicting magistrate, which had not been done in this case, and so he argued that there was no jurisdiction to bail the accused.

J. B. Read, contra, referred to the County Attorneys' Act, Con. Stat. U. C, cap. 106, which now provides that the County Attorney shall receive all informations, &c., which the magistrates and coroners are hereby required to transmit to him. He also referred to s. 9 of the Act, which provides that the county attorney shall be "the proper officer" of the court to receive depositions where a party is committed to trial.

Adam Wilson, J.—The committing magistrate must make a proper return of the informations to the County Attorney. After this has been done he cannot transmit such proceedings to the Clerk of the Crown, nor can he deliver the packet containing the same to the person applying therefor, because he has delivered the proceedings to the County Attorney, as he was bound, in whose custody they are and must afterwards remain.

I think in favour of liberty I shall make the order to bail upon the transmission and certificate of the County Attorney.

It would unquestionably be better to have this matter specially provided for by legislation, although it is not impossible now for the committing magistrate still to transmit a certified copy close under his hand and seal.

Order accordingly.*

Randall v. Bowman et al.

Execution on judgment on specially endorsed writ before time limited in the C. L. P. A. sec. 55—An irregularity, when an abuse of the process of the court—Waiver—Assignment for benefit of creditors—Right of assignee to move to set aside execution.

A writ of *fieri facias* issued on a judgment on a specially endorsed writ before the expiration of eight days from the last day for appearance, is an irregularity, and if knowingly issued, an abuse of the process of the court.

Defendants, who were in business, knowing that the writ had been irregularly issued, said on the day after the issue of execution. that they would not mind the issue of the writ if they were only allowed to keep their store open for the remainder of the week, to which the sheriff assented and made arrangements for so doing: *held* not to be a waiver of the irregularity in the issue of the execution.

Quære, Can debtors, who, being unable to pay their debts in full before the issue of execution, called a meeting of their creditors with a view to an assignment under the Insolvency Act, waive an irregularity in the issue of execution, whereby one of their creditors gains an advantage over the general body of creditors?

Five days after the issue of execution, and four days after the conversation above mentioned, the debtors made an assignment for the general benefit of creditors under the Insolvency Act: *held* that the assignee in conjunction with the debtors, were the proper parties to move to set aside the execution

[Chambers, March 4, 1865.]

* See page 142.

J. A. Boyd obtained a summons calling on the plaintiff to shew cause why the writ of execution against the said defendants' goods and chattels, issued upon the final judgment signed herein, on or about the 21st day of February, instant, and now in the hands of the Sheriff of Waterloo, should not be set aside with costs, on the grounds that the same was prematurely sued out upon said judgment before the expiration of eight days from the last day for appearance; and on the grounds that proceedings in insolvency had been commenced prior to the institution of this action and the issue of such writ.

And why the said sheriff should not be ordered to abandon possession of the said defendants' goods, and deliver up to the defendants or their assignees, the money made by him under said execution, with leave to file the said assignee's affidavit on the argument.

The affidavits filed on moving the summons shewed that on the 10th February last, defendants gave notice calling a meeting of their creditors with a view to an assignment of their effects under the Insolvency Act; that on 11th February, plaintiff in this cause issued and served upon defendants a writ specially endorsed for the amounts of severally promissory notes made by defendants, and held by plaintiffs; that on the 21st February, final judgment was entered in default of an appearance; that on the same day a writ was issued against the goods and chattels of defendants, and on the next day placed in the hands of the sheriff, who at once made a levy; and that on the 27th of February, defendants made an assignment of their effects to F. J. Jackson, under the Insolvency Act of 1864, at whose instance as well as on behalf of defendants, the application to set aside the writ was made.

On the return of the summons, an affidavit of the assignee was filed pursuant to the leave given in the summons, merely mentioning the date of the assignment, and stating that he had as well as defendants, authorised the application to set aside the writ.

Robt. A. Harrison shewed cause. He filed an affidavit of the plaintiff's attorney wherein it was sworn that execution was issued on the 21st February, by the special instructions of plaintiff, that word was sent to deponent by one of the defendants not to issue the execution for at least a couple of days after the plaintiff should recover judgment herein, to which the deponent made no reply, but issued execution on the day judgment was entered, and placed the same in the sheriff's hands; and before execution was issued in a certain other suit of a relative of the defendants, one Henry B. Bowman, against Peter Jacob Heins, one of the defendants, which last mentioned judgment deponent believed was fraudulent and collusive; that on the morning of the day after the writ of execution was placed in the sheriff's hands, deponent met Israel D. Bowman, one of the defendants, who told deponent that execution was issued herein eight days sooner than the law allowed, if they defendants objected to it, to which deponent replied that the judgment recovered herein was all for money lent by plaintiff to them, and that if they could set aside the execution, deponent did not think

that they would attempt it under the circumstances, but that they could do as they pleased, to which defendant Israel D. Bowman said he would not have cared if it had not been given to the sheriff for a couple of days; that he then said he would not mind the irregularity of the execution if he could keep the store open as usual to the public for the remainder of the week, to which deponent said the sheriff would put their own clerk in possession if they wished that course taken, to which he replied that he did.

There was also filed on the part of plaintiff an affidavit of the sheriff, in which he swore that on the 21st of February, the writ of *fieri facias* was placed in his hands for execution; that on the same day defendants had knowlege that the writ was so placed in his hands for execution; that on the following day he called at the place of business of defendants for the purpose of seizing their stock-in-trade; that he had then no other execution in his hands against the defendants or either of them; but about 4 o'clock in the afternoon of the same day, a writ of execution against one of the defendants for nearly $100, in favor of Henry B. Bowman, who is the father of one of the defendants, and the father-in-law of the other defendant, was also placed in his hands; that when he called upon the defendants he saw both of them in their store in Berlin, and informed them of the nature of his business; that Israel D. Bowman, one of the defendants, told deponent the writ of *fieri facias* was irregular by being issued too soon, and could be set aside if they the defendants like to do so, that both of the defendants then stated to deponent that the objection they had to the writ herein being in deponent's hands was, that they wished to keep the store open as long as possible, to which deponent replied he could arrange that to their satisfaction; and subsequently saw them again on the same day, and both of them agreed to put their clerk, one Thompson in possession of the store as a sheriff's officer; that deponent accordingly put Thompson in possession under the writ issued herein, and defendants subsequently agreed to pay Thompson for his services in holding possession of the goods for deponent, and expressly consented to deponent's proceeding under the writ herein; that on 22nd February last, deponent advertized the stock-in-trade to be sold under said execution on the 3rd March last, and that he put up a notice of sale on the store of defendants in their presence, to which they made no objection; that from the general tenor of the conversation deponent had with the defendants, and on his agreeing with them to keep their store open with their clerk in possession and themselves in it as usual for the remainder of the week, deponent inferred that they defendants would take no steps to set aside said writ even if it were irregular.

Mr. Harrison contended that the assignee being a stranger to the judgment was not in a position to move to set aside the execution for irregularity; *Wilson* v. *Wilson*, 2 U. C. Pr., 374; *Perrin* v *Bowes*, 5 U. C. L. J., 138; *Balfour* v. *Ellison*, 8 U. C. L. J., 330: that the writ though issued too soon was not irregular, that even if irregular when issued, the irregularity had been expressly waived by defendants on and after the 22nd February. *Rawes* v. *Knight*, 1 Bing. 132; *Lloyd* v. *Hawkyard*, 1 Man. & Ry., 320: *Holt* v. *Ede*, 1 D. & L. 68; *Williams* v. *Rapelje et al.*, 11 U. C. Q. B. 420; *Jones* v. *Ruttan*, 6 U. C. C. P. 402; *Ross et al.* v. *Cool*, 9 U. C. C. P. 94; *Ringland* v. *Lowndes*, 9 L. T. N. S. 479;) and that the sheriff having acted upon their suggestion as a ground of waiver, the waiver was absolutely binding upon them; so that when the assignment was made, the execution was a binding writ in the sheriff's hands to be executed, and should prevail against the assignment (*Burn* v. *Carvalho*, 1 A. & E. 883; *Woodland* v. *Fuller*, 11 A. & E. 859.)

J. A. Boyd, contra, argued that the assignee was a proper person to move, and that the application might, if necessary, be made in his name alone. (27 & 28 Vic. cap. 17, s. 4, sub-sec. 9, s. 5, sub-sec. 9;) that the execution having been issued in violation of the express language of the C. L. P. Act was clearly irregular (s. 55), and that being so the assignment must prevail against it (27 & 28 Vic. cap. 17, s. 2, sub-sec. 7, s. 3, sub-sec. 22.) that defendants were not in a position to waive any irregularities in the issue of the writ, to the prejudice of the general body of their creditors. (*Ib.* s. 8, sub-sec. 5, *Evans* v. *Jones*, 11 L. T. N. S. 636), and therefore that the execution should be set aside with costs to be paid to the assignee.

Adam Wilson, J.—The plaintiff was guilty of an unauthorised abuse of the process of the court in issuing his execution against the goods of defendants on the very same day on which he became entitled to enter, and did enter his judgment for want of an appearance to his specially endorsed writ of summons where the Statute declares he "may at the expiration of eight days from the last day for appearance *and not before*, issue execution."

The effect of this, if allowed, would be to sweep off the whole estate of the debtor, and to prevent its just distribution among the creditors rateably according to the deed of assignment of 27th February, under the Insolvency Act.

There had been no waiver I think of the proceedings taken, and I doubt if there could be to the prejudice of the other creditors according to the case of *White* v. *Lord*, 13 U. C. C. P. 289.

I have no doubt the application is properly made, and the execution will therefore be set aside with costs, to be paid to the assignee.

Summons absolute with costs.

CHANCERY.

(*Reported by* Thos. Hodgins, Esq., LL.B. *Barrister at-Law.*)

Gore Bank v. Sutherland.

Trust estate—Costs of Trustees' defence—Mortgagee's costs—Practice.

A mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of creditors, under a trust deed excluding all preference and priority, praying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee with the view of charging the trustee with all payments made by him to simple contract creditors before satisfying the specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the rig

of the mortgagee to the relief prayed for against the trust estate, and submitting that the mortgagee was only entitled to the usual foreclosure or sale decree, but not to the costs other than a *præcipe* decree.

Held, That as the trust deed excluded all preference and priority as to the payment of the debts, that the rules applicable to the administration of the estates of intestates did not apply, and that the mortgagee, for anything beyond what his mortgage would realize, could claim only the same as other creditors,

And as the mortgagee could have obtained all the relief he was entitled to by a decree on præcipe, he was declared entitled only to the costs of such a decree, and was ordered to pay to the trustee his costs of defending the trust estate.

The bill in this case was filed by the Gore Bank as assignee of Robert Terrie against William Sutherland, the mortgagor, and Robert Linton, assignee for the benefit of the creditors of said Sutherland, and was in the usual form of a mortgagee's bill; but the plaintiff in the prayer of the bill prayed that the premises might be sold and the produce thereof applied in or towards payment of the mortgage debt and costs, and that the defendants might be ordered to pay the balance, if any, after such sale; and that it might be declared that the plaintiffs were entitled to rank upon all the residue of the estate of said defendant Sutherland so assigned for the amount of such deficiency, and to be paid the same, prior to all other creditors of the said Sutherland as of an inferior degree, or of such who were specialty creditors and subsequent in point of time to the plaintiffs' mortgage.

The defendant, Linton, answered the bill, setting forth that under the assignment all the creditors were entitled to share ratably, and without preference or priority, and that he had faithfully administered the trusts of said assignment, and had in accordance therewith paid the creditors of said Sutherland a fair and equal proportion or dividend of the estate; and that the plaintiffs had accepted a portion of said estate so distributed, and had given a receipt therefor as follows:—

"$458 79-100. Received from Robert Linton, assignee of the estate of Wm. Sutherland, the sum of four hundred and fifty-eight 79-100 dollars, being a first and final dividend of 28 67-100 per dollar on said estate. It is, however, agreed by me, that if any further claim or claims which are at present unknown to the assignee be presented, whereby it may be shown that we have received more than our just proportion of the proceeds of the estate, then we agree to refund such amount overpaid.

(Signed) "W. G. Cassels,
"*Cashier.*"

Barrett, for the plaintiff, contended that the plaintiff being a specialty creditor was entitled to exhaust the trust estate before relying on his mortgage, and that he was entitled to an account of money wrongfully paid by the trustee to simple contract creditors. He relied upon the rules applicable to the administration of the estates of intestates as being analogous to the plaintiffs' rights in this case.

Hodgins for the trustee, *contra*.

Spragge, V. C.—The cases under administration orders do not apply. There the mortgagee who has a covenant for payment of the mortgage money is a specialty creditor for the whole mortgage debt; but here the mortgagee can only claim beyond his mortgage as a *cestui que trust* under the deed, and can only claim what the deed gives him. As to the costs, if he is entitled to any special relief, for which the registrar could not draw up a decree, he must have his whole costs and not be confined to costs of obtaining decree on *præcipe*. If he could have obtained upon *præcipe* all that he is entitled to, then he should be confined to such latter costs. Mr. Barrett says he ought not to pay the trustee the costs of his answer; but I doubt that. The trust estate was attacked, and a trustee should not be discouraged from putting in an answer to protect it.

I have seen the trust deed—all preference and priority is expressly excluded. The mortgagee, for anything beyond what his mortgage may bring, can claim only the same as other creditors. The plaintiffs, therefore, are only entitled to the costs of a decree on *præcipe*, and must pay the trustee his costs of defending the trust estate.

CHANCERY CHAMBERS

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

MacDonald v. Putman.

Solicitor and Client.—Privileged communications.

A defendant, one of the members of the firm of *G* and *C*, when proving a claim in the master's office, was called on to produce "all the letters to or from Mr. *L.*, (his solicitor,) in reference to the questions involved in the proceeding of proving the claim of *G.* and *C.*, excepting such as passed in contemplation of *G.* and *C.* proving their claim in the present suit" *Held*, that he was bound to do so.

The distinction between the protection afforded to solicitors and clients, respectively, with regard to communications made pending, or in anticipation of litigation, pointed out.

This was a motion by way of appeal from the certificate of the master, from which it appeared that he had refused an order on Messrs Gilmour and Coulson, creditors of the defendant, Putman, to produce certain correspondence between them and the attorney who had been acting for them at law, in their action against Putman. The grounds of the appeal, and the authorities cited, appear in the judgment.

Crooks, Q. C., for the plaintiffs, who appeal.
Hector, Q. C., contra.

Spragge, V. C.—A claim was made in the master's office by persons trading under the name of Gilmour and Coulson; and a member of the firm, Alfred Hiram Coulson, was examined by the plaintiff touching their claim. In the course of the examination the solicitor for the plaintiffs asked the witness "to produce all the letters to or from Mr. Lawder, in reference to the questions involved in the proceeding of proving the claim of Gilmour and Coulson, excepting such as passed in contemplation of Gilmour and Coulson, proving their claim in the present suit." "Under the advice of his solicitor the witness refuses to produce them, on the ground that they are privileged communications between Gilmour and Coulson and their solicitor." The master held that he was not bound to produce them. I have taken the question and the master's ruling from his certificate. The question is raised before me upon appeal from the certificate.

The short point is, whether the client, being the person interrogated, is or is not bound to disclose what passed between himself and his solicitor in relation to that which is now the subject of litigation, there being at the time of such communication no suit pending or in contemplation. A plain distinction runs through the cases where the discovery is sought from the solicitor, and where it is sought from the client; and if in this case it had been the solicitor that had been under examination, I should have had no difficulty in holding, not only that he was not bound to answer, but that he was bound not to answer.

The distinction to which I have adverted has been the subject of repeated comment by eminent judges, as unsound in principle. In *Greenough v. Gaskell*, 1 M. & K. 98, the disclosure was sought from a solicitor, of professional communication between himself and his client *ante litem motam*, and Lord Brougham, in his very able judgment, while holding such communication privileged from disclosure by the solicitor, took occasion to remark: "To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it."

In the case of *Lord Walsingham* v. *Goodricke*, 3 Hare, 122, decided nine years afterwards, Sir James Wigram, expressed himself strongly in favour, as a matter of principle, of the rule being the same where the client is interrogated as it is where the solicitor is interrogated. He said, "If the matter were *res integra*, I should scarcely hesitate to decide in favor of the privilege;" but he felt himself bound by authority, particularly in the case of *Radcliffe* v. *Fursman*, 2 B P. C. 514, in the House of Lords, to decide that communications between solicitor and client *ante litem motam* were not privileged from disclosure by the client, except only in so far as they contained legal advice or opinions.

In *Flight* v. *Robinson* 8 Bea. 22, heard the following year, Lord Langdale held the client bound to disclose communications between himself and his solicitor *ante litem motam*; and he held that compelling such disclosure was right in principle.

The same was decided by Lord Cranworth, then Vice-Chancellor, in *Hawkins* v *Gathercole*, 1 Sim N. S. 150, upon the authority of *Lord Walsingham* v *Goodricke*, and without expression of the learned judge's views whether it was right in principle or not.

Glyn v. *Caulfield*, 3 McN. & G. at p. 474, quoted by the plaintiff, is not upon the particular point in question here. It is probably referred to for the language of the Lord Chancellor, (Lord Cottenham, I take it, from the date of the argument.) "that professional privilege is a ground of exemption from production adopted simply from necessity, and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety; beyond what is absolutely necessary for this purpose, it ought not to be allowed to curtail that most important and valuable power of a court of equity, the power of compelling a discovery"

Before the last two cases, which were decided in 1851, occurred the case of *Pearse* v. *Pearse*, 1 DeG & S. 12, before Sir J. L Knight Bruce, then Vice-Chancellor, decided in 1846. The question arose upon the settling of interrogatories in the Master's office between vendor and purchaser upon a question of title, and what his honor did was to direct, not that any of the interrogatories should not be answered at all, but that some of them should not be answered *then* (p 29) The communications sought to be protected occurred *ante litem motam*; and the learned judge reviewed at length and with much force, the principle upon which disclosures by a solicitor are protected, while the like communications were not protected when the client was interrogated, and he argued, with great ability, against the soundness of any such distinction; and contended that *Radcliffe* v *Furman*, being a case where discovery was sought from a trustee, was not a binding decision where discovery was sought of communications in regard to a man's own individual affairs. The report of *Richards* v. *Jackson*, 18 Ves 472, before Lord Eldon, he considered a very unsatisfactory one. The inclination of the learned judge's opinion was undoubtedly strong against the distinction as a matter of principle; and he questioned the applicability of the authority upon which Sir James Wigram had mainly decided *Lord Walsingham* v. *Goodricke*, against his own view of what was sound in principle

Sir W Page Wood, in *Manser* v. *Dix*, 1 K. & J. 451, heard before him in 1855, expressed his full concurrence in the view of Sir J L Knight Bruce, in *Pearse* v *Pearse*. The question there also rose upon an inquiry as to title, and Sir Page Wood distinguished it from *Lord Walsingham* v. *Goodricke*. "Upon that ground," he says, at page 460, "I think that the distinction is that the whole question in that case was not a question upon the title, but whether there had been a contract or not." But while the learned judge took this distinction between *Lord Walsingham* v. *Goodricke* and the case before him, he intimated very clearly that in his view all communications between solicitor and client ought to be protected, whether the disclosure of them were sought from the client or the solicitor.

But in a case heard before the same learned judge in 1858, *Lafone* v. *The Falkland Islands Company*, 27 L J. Chy. 25, his language in delivering judgment would seem to indicate a modification of his views upon this point. One of the grounds taken by Mr. *Rolt*, in favor of the disclosure sought, was, that the communications were made *ante litem motam*. His honor did not at all intimate his opinion to be that that circumstance made no difference; his language was, "But they have been sworn to be in apprehension of litigation, and it appears to me that I should be refining too much if, when there was a contemplated litigation of some sort, the precise character and form of that litigation not being ascertained, I were to hold that information obtained in contemplation of that litigation was not to be protected, because the frame of the suit was somewhat different from what was contemplated. In effect, it was a matter in which

the company expected to be placed in litigation with an opponent, expecting that, they employed a solicitor, who says he wants certain information for their defence with regard to any litigation that can take place." This seems to assume that communications *ante litem motam* are not protected where the client is examined, and I think removes Sir Page Wood from the advocates of a contrary doctrine.

The present Master of the Rolls, in *Ford* v. *DePontes*, 5 Jur. N. S. 993, laid down the rule very generally in favor of protection to the client when interrogated; but in *Thomas* v. *Rawlings*, 6 Jur. N. S. 667, which appears to have been heard subsequently, though reported earlier, he states the rule thus, speaking of discovery by a solicitor, "He is not bound to disclose communications made by the client to himself, provided those communications have some reference to the *lis mota*, either before and in anticipation of, or subsequent to the institution of proceedings." It may be doubted whether Sir John Romilly is correctly reported, for the qualification introduced has no place when the disclosure is sought from a solicitor.

In *Lawrence* v. *Campbell*, 28 L. J. Chy. 780, Sir Richard Kindersley is reported as saying, "Whatever fluctuations of opinion have taken place on the question, it is not now necessary, in the case of an English solicitor, for the purpose of privilege and protection, that the communication should pass either during or relating to actual or expected litigation; it is sufficient if they are confidential between the attorney and his client in that capacity." The question before the Vice-Chancellor was whether the privilege extended to the case of a Scotch solicitor residing in England, consulted professionally by his client residing in Scotland. The disclosure was sought from the Scotch solicitor, and his honor, no doubt, stated the rule where the disclosure is sought from a solicitor. I think his words import this, and he would have hardly stated as settled law, that the rule as he stated it applied to disclosure by the client.

We find from the cases great difference of opinion among learned judges as to the soundness of the distinction contended for: Lord Brougham, Sir James Wigram, and Sir Knight Bruce, and, at one time certainly, Sir Page Wood, holding the distinction unsound in principle, and that all communications between solicitor and client, at whatever time made, should be protected from discovery, whether sought from the client or the solicitor. On the other hand, Lord Langdale and Lord Cottenham have expressed contrary opinions, and it is not improbable that the Lord Chancellor took occasion to say what he did in *Glyn* v. *Caulfield*, in consequence of what had fallen from Sir Knight Bruce, in *Pearse* v. *Pearse*.

But whatever may have been the opinions of learned judges, the cases decided upon the point preponderate in favor of compelling the disclosure where the communication has not been pending, or in anticipation of litigation, and the disclosure is sought from the client. *Pearse* v. *Pearse* can hardly, indeed, be called a decision the other way, as that case, as well as *Manser* v. *Dix*, did not proceed upon the general question, but upon the discovery sought between vendor and purchaser upon a question of title.

In this state of the authorities, therefore, I must hold that Mr. Coulson was bound to produce the documents demanded of him by the plaintiff's solicitor. I allow the exception to the Master's certificate.

INSOLVENCY CASES.

Before the County Judge of the County of Lincoln.

McInnes v. Brooks.

Insolvent Act of 1864, *sec.* 3, *sub. sec.* 2—*Demand on Trader to make Assignment—Default—Attachment—Endorsing Writ—Computation of Time—Affidavits.*

A trader having ceased to meet his liabilities, a demand was served upon him on 31st January, requiring him to make an assignment. On February 6th (the 5th being on a Sunday), an order was granted for and an attachment issued. One of the affidavits filed on application for attachment was sworn to on February 4th. On an application to set aside the writ and all proceedings for irregularity, it was *Held*,

1. That the order for the issuing of the writ was not made too soon.
2. That it was immaterial that one of the affidavits was made within the five days allowed for petitioning under sub. sec. 3, or for making an assignment in accordance with the demand;
3. That the writ of attachment should have been endorsed with a statement that the same was issued by order of the judge of the county court; but an amendment was allowed on payment of costs by plaintiffs.
4. Objections that the affidavits of the two credible witnesses were not filed at the time of issuing attachment, that the proceedings were not taken three months, &c., and that sufficient time was not allowed to defendant to give notices required by act for taking proceedings on a voluntary assignment, were over-ruled.

The defendant being a trader, and having ceased to meet his liabilities generally, as they became due, a notice under sub-section 2 of sec. 3 of Insolvent Act was served on him on 31st January, 1865. On 6th February, 1865, (the 5th being a Sunday), an application was made and an order granted for an attachment, which was issued on that day. The order was granted on affidavit of the plaintiff showing indebtedness, and that defendant was insolvent within the meaning of the above section, and negativeing notice of any proceedings by defendant to make a voluntary assignment; and on affidavits of two other persons, showing similar facts as to insolvency, and negativeing notice (one of these was sworn on 4th February) and an affidavit of no notice being published in newspapers in Hamilton or St. Catharines. A summons was taken out on the day the writ was returnable, to set aside the writ and all subsequent proceedings for irregularity, with costs, on the following grounds:

1. That the said writ of attachment was not properly endorsed, it not being shown that the same was issued under and by virtue of the order of the Judge of the County Court, of the County of Lincoln.

2. That one of the affidavits upon which the attachment was founded, and which was material, was made and sworn to before the time had expired when according to the Insolvent Act of 1864, the said defendant could file his petition praying that no further proceedings be taken upon the demand served upon him.

3. That the proper and legal affidavits of two credible witnesses, were not filed at the time of

issuing the said attachment showing that the said defendant was insolvent within the meaning of the said act.

4. That the said attachment was issued within the time allowed by the Insolvent Act of 1864 for the defendant to file his petition praying that no further proceedings be taken upon the demand which was served on the 31st day of January, 1865.

5. That the proceedings taken under the Insolvent Act of 1864, were not taken within three months next after the act or omission relied upon as subjecting the estate of the said defendant to the proceedings under the act.

6. That all the affidavits upon which the said attachment was issued, were made and sworn to within the time allowed by the said act to take proceedings after being served with the said demand.

7. That sufficient time was not allowed to the said defendant to give the notices required by the said act for taking proceedings under the second section of said act.

The plaintiff's affidavit showed, that his claim was on several over-due notes, only one of which had matured within three month before the insolvency proceedings, which was the only foundation for the fifth ground; and in support of the seventh ground it was shown that the notice could not have been published in the *Canada Gazette* or the *Niagara Mail* before the time when the attachment issued. The *Mail* being the only paper published at Niagara, but defendant's residence being nearer to Hamilton and also to St. Catharines than Niagara.

It was urged on behalf of the plaintiffs: 1. That it was not alone the ceasing to meet his commercial liabilities which constituted the defendant an insolvent, but the fact of his, while having so ceased, and having been required to make an assignment, failing to comply with the requirements of the act; and that whether or not a notice of a meeting for the purpose of making a voluntary assignment could have been advertised, the plaintiff had waited the time required by the act.

2. That as to the mode of the computation of time, as under sub-sec. 7 of sec. 3, the writ is to be subject, as nearly as can be, to the rules of procedure of the courts in ordinary suits as to its issue, &c.; it should be made in the same manner as in cases of notice to declare, plead, &c., and that under rule 166 of Trinity Term, 1856, the proceedings were not taken too soon.

The defendant's counsel relied on the decisions under cases under English statutes.

Lawder, Co. J.—As to the objection taken to the attachment, that it is not properly endorsed, it not being shown that the same was issued under, and by virtue of the order of the Judge of the County Court of the County of Lincoln, I think that this should have appeared on the face of the attachment, but inasmuch as the defendant shows by his petition and affidavit filed on the application to set aside the attachment, that an order was in fact made, although too soon, as claimed by defendant, (which I over rule), I think the writ can be amended, which I order accordingly; but as this application is perhaps not what can be called a vexatious one, and an endorsement is required to make proceedings regular, I grant and make order for amendment, on payment of costs by plaintiff to defendant; and I order that summons be discharged on amendment being made and costs paid.

COUNTY COURTS.

In the County Court of the County of Essex.

In re Timothy O'Connell, an overholding Tenant.

Overholding tenants—27 & 28 Vic. cap. 30—Procedure.

Held, that a landlord proceeding under 27 & 28 Vic. cap. 30, against an alleged overholding tenant, must adduce some evidence to shew that the tenant refuses to give up the premises, and that his tenancy has expired.

Held also, that the affidavit of the landlord himself, filed under sec. 1, with a view to proceedings under the act, is not legal evidence against the tenant.

[Sandwich, Feb. 27, 1865.]

In this matter an order was made by the judge of the County Court, on reading the affidavit of George Murray, the landlord, under the 27 & 28 Vic. cap. 30, relating to overholding tenants, fixing a day and place to enquire and determine whether Timothy O'Connell was the tenant of Murray for a term which had expired.

Horne appeared for the tenant.

Prince, Q. C., for the landlord, proposed to read the affidavit of the landlord upon which the appointment was made, as evidence in his behalf, and contended that the affidavits made out a *primâ facie* case in his favor, and cast upon the tenant the onus of proving that the tenancy had not expired; and that, the tenant failing to adduce any evidence, the landlord was entitled to a precept to the sheriff, commanding him to place the landlord in possession of the premises in question.

Leggatt, Co. J.—The statute 27 & 28 Vic. cap. 30, is intended to provide a more expeditious mode of proceeding against tenants overholding wrongfully, than is provided by cap. 27 of the Consolidated Statutes of Upper Canada; and the language is precisely the same as the 63rd and following sections of the latter statute, with reference to the preliminary steps to be taken by the landlord.

Instead of making his application, however, to the superior courts at Toronto, and having a commission issued by those courts, and instead of summoning a jury to try the question of tenancy, the landlord now makes his application to the County judge, who forthwith appoints a time and place at which he will enquire and determine whether the person complained of was tenant, &c. There is nothing, however, in the whole act, that I can find, that would warrant the judge in ignoring altogether the rules of evidence which are observed in ordinary cases before a court, or which would justify the judge in issuing his precept to the sheriff to eject the tenant on the *ex parte* statement of the landlord. If the tenant do not appear, the landlord would of course be then entitled to an order *pro confesso*. The affidavit of the landlord is only inceptive, and intended simply to shew some grounds to the judge for proceeding under the statute. It constitutes, too, a sort of record,

shewing the issue to be tried on the day appointed for hearing, because the statute requires the landlord to state in his affidavit the reasons, if any, given by the tenant for not leaving the premises.

If we look at the affidavits in this case, it will appear that the landlord asserts one thing, and the tenant another, viz , on the one hand, that the tenancy had expired, and on the other, that it does not expire till the end of December next. This is the issue to be tried, and the affirmative is on the landlord.

The statute affords the landlord a very summary mode of proceeding against his tenant, and the judge of the County Court extraordinary powers. In the absence of anything in the statute expressly warranting a different course, I think it would be highly impolitic for a judge to grant an order for the expulsion of a tenant, except upon the most satisfactory and conclusive evidence, aside from the landlord's statement.

I think a judge acting under this statute cannot be too wary in this respect, as there can be no doubt that landlords would in many instances take proceedings under the act where they would hesitate to have recourse to the ordinary suit of ejectment, with the evidence which they might have at their command.

Having come to the conclusion that the landlord must adduce some evidence to shew that the tenant refuses to give up the premises he occupies, and that his tenancy has expired, if Mr. Murray is not prepared with such testimony, this application must be dismissed, but without costs, as it is a novel proceeding, under a new statute.

ENGLISH REPORTS.

COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED, May 6.

(*Present, Lord Chief Justice* Erle *and Justices* Blackburn, Mellor, Smith, *and Baron* Channell.)

The Queen v. Malany.

Criminal law—County Courts—Perjury on examination on judgment summons.

The prisoner was indicted for perjury, committed in the County Court of Birmingham. He was a defendant in a suit. After judgment had been given in the case against the prisoner, the judge was about to decide as to whether he should make an order for immediate payment of the debt, or whether it should be paid by instalments, and he asked the prisoner whether his names were not Bernard Edward Malany, in which names he had been sued. The prisoner swore that his name was Edward Malany only. The judge of the County Court upon this struck out the cause. The prisoner was tried before Mr. Baron Martin, who reserved a point, whether, under the circumstances, the prisoner was indictable for perjury.

Gibbons now appeared for the prosecution, and urged that under the County Court Act it was expressly stated that no misnomer should vitiate the suit if the person was commonly known by the name. The question was, whether it was matesial to the issue, and that depended upon the view taken by the judge. He submitted that the judge had made it material, and the jury had found that it was corruptly false.

The Lord Chief Justice said the alleged perjury was that the prisoner swore that his name was Edward, and not Bernard, and that in so saying he acted wilfully and corruptly. The objection was, that it was an immaterial inquiry. The court were of opinion that the objection could not be sustained. It was made material by the judge in the course of forming his judgment; he was going through the process, whether it should be judgment for instant payment or for payment by instalments, and in considering that he made inquiry as to the Christian names of the prisoner, and, in answer, the prisoner swore that which was false. He was of opinion that the conviction could be sustained. Conviction affirmed.

The Queen v. Smith.

Indictment for manslaughter—Ill treatment—Evidence—Dying statement.

The prisoner was indicted for the manslaughter of Martha Turner. It was said that the deceased, a girl 22 years of age, was in the service of the prisoner, that she was of weak intellect, and that she died in consequence of insufficient food; that she was subject to great privations, was beaten and otherwise ill-treated, that threats were used to intimidate her, and she became ill and weak, and died. It became a question whether she was helpless and under the restraint of her mistress. The case was tried before Mr. Justice Smith. It was objected that there was no evidence to go to the jury. A dying statement of the deceased was admitted, which had been objected to. The learned Judge directed the jury that if they were satisfied there had been culpable neglect, and if the deceased was helpless and under the restraint of her mistress so that she could not withdraw from her control, then the jury might find the prisoner guilty. The jury convicted the prisoner. The following points were reserved for the opinion of this Court:—Whether the dying statement was admissible, and whether there was evidence to support the indictment.

Bulwer was now heard on behalf of the prisoner; and he urged that there was not sufficient evidence to show what had become of the girl from the time she had left the service till the time she was found at the workhouse, three days afterwards. She died from inflammation of the lungs, caused from a want of sufficient food. Witnesses were not called who could have given important evidence There was nothing to show any legal restraint by the mistress, and moral restraint would not make the prisoner responsible. What was called the dying statement of the girl was not admissible, as it was not properly obtained, and its contents were not evidence properly admissible.

The Court said they would wish to hear Mr. Metcalfe, who appeared on the other side, upon one point—namely, was the deceased under the dominion and restraint of the prisoner, so as to be unable to discharge herself from her control?

Metcalfe said the weak intellect of the deceased must be taken into consideration. The statement of the deceased was that she was ill, and was lying on the bricks in the cellar, and saw no other person but the prisoner, who came to her once a day to bring her some bread; there was a tap in the cellar from which she obtained water. Her mistress frequently beat her with a cane. The girl was under such moral restaint from the threats used by the prisoner that she could not get away.

Mr. Justice Blackburn said it was extraordinary that the woman who took the girl to the workhouse was not called. A prosecutor ought to endeavour to obtain the whole truth of the case, and not to keep back witnesses.

Mr. Metcalfe said he had reasons to doubt whether that woman would tell the truth.

The Chief Justice said, if the counsel for the prosecution believed that a witness would not state the whole truth, then it was his duty not to call that witness.

Bulwer replied.

The Court were of opinion that the conviction could not be sustained. The deceased was not in such a state that she could not have withdrawn herself from the control of her mistress. The ill-treatment spoken of was not sufficiently proximate to the death. From all that appeared the girl might have left at any time.—Conviction quashed.—*Times.*

UNITED STATES REPORTS.

Palmer v. Myers et al.

Partnership—Assignment for benefit of creditors.

When a partner has absconded, the remaining partners may make an assignment for the benefit of creditors, without his consent.

[Supreme Court—General Term.—February, 1865.]

This action was brought to set aside an assignment for the benefit of creditors, upon the ground that only two of the three partners, comprising the firm, actually executed the same, without the assent of the third. Other points were raised upon the trial, but were not presented to us on this argument.

The defendants relied on the defence, that the partner who did not sign the instrument had, before its execution, absconded from the city.

Upon the trial he offered to prove such absconding, and had executed an assignment in Massachusetts, without the consent of the other members of the firm, and that at the time of making the assignment by the defendants they were unable to procure the signature of said Johnson, the absconding partner.

The evidence offered was excluded, and the defendants excepted.

Judgment was rendered for the plaintiff.

By the Court: Ingraham, P. J.—That an assignment for the benefit of creditors made by a part of the members of the firm without the consent of the other member, where such partner is present, is invalid, has been settled by repeated adjudications: (*Pettee* v. *Orser*, 6 Bos. 128, affirmed in Ct. of Appeals, Dec., 1865; *Robinson* v. *Gregory*, Ct. Appeals, Dec., 1863; *Wells* v. *March et al.*, Ct. Appeals, March, 1864.) And it is also settled that the mere absence of the partner from the State when the assignment is executed will not make the transaction valid: (*Robinson* v. *Gregory*, *supra*.)

The reason assigned for these decisions is, that such a transaction breaks up the whole business of the firm, and places the property in the hands of the trustees, through the act of a portion of the members of the firm, when all should be consulted and have an opportunity of taking part therein, and in the selection of the trustee.

Even in a case where the transfer was for the purpose of paying a debt, although a majority of the Court sustained the transfer by one partner, it was seriously doubted by two of the Judges: (*Mabbett* v. *White*, 2 Kernan, 442.)

In the present case, one partner had absconded, and upon the trial the defendants' counsel offered to prove that, prior to making the assignment, Johnson, the partner who did not execute the assignment, "had ceased to act as a member of the firm, and he has absconded, and had made fraudulent conveyances of the copartnership property, &c, and that before and at the time of making the assignment the other partners used diligent efforts to obtain the concurrence of Johnson, but were unable to effect the same or have any communication with him." This evidence was excluded as immaterial on the objection of the plaintiff's counsel, to which the defendants excepted.

The question raised by this objection is, whether the fact, that one of the partners has absconded and ceased to act as a member of the firm, is a sufficient excuse for the execution of an assignment by the other partners, so as to sustain such an instrument as a valid transfer of the property of the firm.

The case of *Wells* v. *March*, in Court of Appeals, March Term, 1864, above referred to, is somewhat in point. In that case the assignment was executed by one partner only in his own name, and he signed the name of the firm. It appeared in evidence that the firm was Nace & Coe; that Nace had taken and used the property of the firm and absconded, leaving a letter addressed to Coe, in which, after admitting his conduct, he said: "Take charge of everything in our business—close it up speedily. I assign you my interest in the business of Nace & Coe." This letter and the absconding was held by the Court sufficient to authorize the execution of the assignment by the remaining partner, and the judgment in favor of the defendant was affirmed.

When one of a firm absconds, he abandons the business of the firm, and leaves the management of the affairs of the partnership with those who remain behind, and such act should, in my judgment, be construed as vesting in the other members of the firm full authority to manage and settle up the business.

It is, in fact, an abandonment to them of the entire management and disposition of the property belonging to the firm, and vests in them full authority to do what is necessary to pay the debts and wind up the concern.

The letter, in the case last referred to, was but an expression in writing of what was without it the natural consequence of the absconding partner's acts.

This was held in *Kemp* v. *Canby* (3 Duer, p. 1), and in *Deckard* v. *Case* (5 Watts, p. 22); *Kelly* v. *Baker* (2 Hilton, 531). Where one partner dies, the surviving partners have the control and disposition of the property, and may make an assignment of the property of the firm for the benefit of creditors, without consulting the representatives of the deceased partner (3 Paige, 517). The same rule should be applied to one who abandons the interests of the firm, and absconds, to avoid the creditors, or for any other cause, leaving to his partner the control of the business.

The evidence, I think, was admissible, and the Judge erred in excluding it. A new trial should be granted; costs to abide event.

Sutherland, J., concurred.—*N. Y. Transcript.*

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Insolvent Act of 1864.

Gentlemen,—As a great difference of opinion seems to prevail in relation to the meaning of sub-section 16 of section 11 of the above act, I beg leave to submit the matter to the consideration of the profession throughout the province.

The sub-section is as follows: "The costs of the action to compel compulsory liquidation shall be paid by privilege as a first charge upon the assets of the insolvent; and the costs of the judgment of confirmation of the discharge of the insolvent, or of the discharge if obtained direct from the court, and the costs of winding up the estate, being first submitted at a meeting of creditors and afterwards taxed by the judge, shall also be paid therefrom."

Some legal gentleman are of opinion, and one county judge has decided, that the whole sub-section applies to cases of compulsory liquidation *only;* while others contend that part of the sub-section clearly applies to cases of "voluntary assignments," where the insolvent has obtained a discharge from his creditors, and afterwards gets a judgment confirming that discharge from the judge of the county court, and also to cases where a discharge is obtained "direct from the court," without any preliminary proceedings having been taken.

It is a rather startling interpretation to give the sub-section, to hold that it applies to cases of "compulsory liquidation only;" because the act was framed for the relief of those already bankrupt, rather than to provide for cases of future bankruptcy. And if the costs of obtaining a discharge under a voluntary assignment are not to be paid out of the assets of the insolvent in the hands of the assignee, how is it possible for him to reap any benefit from the act? He has already surrendered, on oath, to the assignee "all his estate and effects, real and personal," and it is not reasonable to suppose that the legislature intended that he should find his own costs in some way or other, after he had given up every thing. The disbursements range from fifty to sixty dollars, and if these are not to be paid out of the estate of the insolvent, then the act is sadly defective. It is a stumbling block thrown in the way of the blind, and the sooner it is removed the better for those who expected some benefit from its provisions. It is a matter of the utmost importance to the community, and to the profession, and I trust that the county judges throughout the country will indicate, in some way, the interpretation which each is inclined to give it.

Solicitor.

Cobourg, May 27, 1865.

To the Editors of the Local Courts' Gazette.

Securities by public officials — Guarantee Societies.

Gentlemen,—A great deal of information has been given on the subject of Division Courts in the *Gazette.* But there is one matter to which I desire to draw your attention—I mean the importance of having respectable men to fill the offices of Clerk and Bailiff—with this object I suggest that an act be passed authorising the judges to accept the bonds of some guarantee society, instead of the security now taken, which is often nothing more than a form imposing much annoyance and trouble on judges. I think this course would be the means of introducing a better class of men to offices of trust, and add much to the efficiency of the Courts.

Yours, &c.,

A Subscriber.

Kinmont, April 25, 1865.

[This is a subject which is of importance not only to Division Court officers, but to all public officials. It has already, however, been brought before the Government, and a Bill is

in course of preparation similar to that suggested by our correspondent. There is, we believe, a similar act in force in England.—Eds. L. C. G.]

To the Editors of the Law Journal.

Taxation of costs—Fee to clerk for taxing bill on judgment in default.

Gentlemen,—Is a clerk of the County Court entitled to three shillings and four pence for taxing a bill of costs in a judgment for default of appearance? It appears to me that no such fee can be charged in a bill of costs in a judgment for default of appearance, there being no possibility of an allocatur being called for in such a case. I understand an allocatur to mean a certified memorandum (for which three shillings and four pence is received) of the costs from the clerk of the Court, to be used in the event of being required at a new trial, or for any other purpose.

An early answer will oblige yours, &c.,

A Member of the Profession.

To the Editors of the Law Journal.

Taxation—Fee to clerk for computation.

Gentlemen,—Will you be kind enough to inform me, if a stamp of one dollar for computation is required on a judgment for default of appearance, when there is no computation by the clerk, the only interest claimed by the plaintiff having been inserted in the special endorsement on the writ of summons (by consent of the defendant), and no further interest required to be calculated by the clerk?

An answer in your next issue will oblige

A Member of the Profession.

[We insert the above, but have no space in this number for comments.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. Jan. 27.

Evans v. Wright and Another.

Interpleader—When granted—Tenant right—Dispute as to who is tenant.

E. hired a farm, and his son resided on and managed it, paying rent, and taking receipts in his own name. The defendants gave the son notice to quit, and a valuation of tenant-right was made by valuers appointed by the defendants and the son. The father gave the defendants notice not to pay the amount of the valuation to any one but himself; and the son having commenced an action, to recover the amount of the valuation, the defendants applied for an interpleader order.

Held, that this was a case for interpleader, and that if the father was dissatisfied with the valuation, he might apply to the court for relief. (13 W. R. 468.)

CHANCERY.

L. J. Jan. 31; Feb. 14, 28.

Jopp v. Wood.

Domicil, acquired and original—Infant—Scotch merchant resident in India—Service under foreign government.

A Scotchman went out to India in 1805, and died there in 1830, having returned to Scotland only once, for a short visit, in 1819. During the whole of his residence in India he was employed in trade. There was no evidence of an intention to return to Scotland before 1814, but from that date there was abundant evidence of a desire and intention to return.

Held, that his Scotch domicil of origin was never lost.

Domicil can be changed only "*animo et facto*," and long and continuous residence in a foreign country, other than that which is attributable to employment in the service of the government of the country, though possibly decisive as to the *factum*, is merely equivocal as to the *animus* of the *propositus*.

The *animus* requisite to effect a change of domicil consists in an intention to abandon the domicil of origin.

The cases as to servants of the East India Company are exceptions to the general rule, and their principle will not be extended.

Per Turner, L. J.—No presumption of intention to change a domicil can be raised from residence during the infancy of the *propositus*. (13 W. R. 481.)

M. R. Feb. 8, 10, 13, 15.

Davies v. Otty.

Death of witness before affidavit filed.

Where a witness, who has sworn an affidavit, dies before it is filed, the court will receive the evidence, making allowance for the circumstance that there has been no opportunity of cross-examination. (13 W. R. 484.)

M. R. March 2.

Wentworth v. Lloyd.

Taxation of costs — Commission to examine witnesses abroad.

The costs incurred in a colony, under a commission to examine witnesses, must be taxed in England upon the scale which would be allowed in the colony, and the taxing master, in case of difficulty, ought to refer to the colony for information, but not to send the bill of costs there for taxation. (13 W. R. 486.)

V. C. K. Feb. 28.

London Monetary Advance, &c., Company v. Brown.

Practice—Form of decree—Bill for a legal mortgage—Deposit of deeds.

Where there is a mortgage by deposit of deeds, and the memorandum states an agreement to execute a legal mortgage, a decree on a bill to enforce the security will not direct a sale, but foreclosure; but if there is no memorandum, a sale will be directed. (13 W. R. 490.)

V. C. W. Jan. 30; Feb. 13; March 3.

Kirkwood v. Thompson.

Mortgage—Redemption—Power of sale—Purchase by second mortgagee—Trustee for sale.

A second mortgagee may, in the absence of fraud, purchase the mortgaged property, on the best terms he can, when it is offered for sale by a prior mortgagee, under a power of sale.

Such a purchase is not affected by the circumstance that the second mortgagee has taken his security in the form of a trust for sale, or by the circumstance that the second mortgagee was in possession at the time of the sale. (13 W.R. 495.)

M. R. March 23, 27.

Mortimer v. Bell.

Vendor and purchaser—Sale by auction—Puffing.

A sale by auction is not rendered void in equity by the fact that a puffer was employed—not to screw up the price but only to prevent a sale at an under value.

It makes no difference that the defendant was the only *bonâ fide* bidder, and that all the ten biddings previous to his were fictitious.

Semble, unless a sale is expressed to be without reserve, it is implied that there will be a reserved price or bidding. (13 W. R. 569.)

PROBATE.

In re English.

The intention of a testator that a duly executed paper writing should operate as a will, may be proved by parol evidence. (13 W. R. 503.)

Crofts v. Crofts.

Both the attesting witnesses to a will having given evidence against its due execution, the court held the presumption *omnia rite esse acta*, to be rebutted, although the will appeared on the face of it to be duly executed, and the attestation clause was complete and formal. (13 W.R. 526.)

INSOLVENTS.

(*Gazetted March* 11, 1865.)

John Stickland	Brantford.
David Linklater	Mitchell.
Daniel Harmer	Montreal.
Samuel Morningstar	Bertie.
George S Morningstar	Bertie.
Levi Morningstar	Bertie.
James Doyle	Gananoque.
Benjamin Allen	Owen Sound.
Alfred Fisher	Sarnia.
Charles Page Cameron	Tp. Haldimand.
William Wilson	Port Hope.
William Mickle	Meaford.
Harrison C. Bettes	Brighton.
John Allen	*Tp. Brock.*
H. N. Case	Hamilton.
James Matchet	Tp. Nottawasaga.
Richard Dickson	Pembroke.
William Bennett	Port Hope.
Frederick Rumball	Clinton.
Henry C. Kaye	Guelph.
J. J. Marshall	Mount Forest.
U. C. Lee	Stratford.
James Charlton	Montreal.
John Sharpe	Asphodel.
Henry Fowlds	Asphodel.
Norbert Goderre	Montreal.
William Gordon	Millbrook.
Templeton Brown	Peterboro'.
Chas. Desjardins	Quebec.
A. Couture	Quebec.
Andrew Wallace	Goderich.
Robert Park	Goderich.

(*Gazetted*, 18*th March*, 1865.)

John Sullivan	Seymour.
Francis W. Heather	Peterborough.
Hector McLean	Tp. Mariposa.
Hugh McLean	Tp. Mariposa.
Archibald McLean	Tp. Mariposa
Thomas Gerrin jun	Mt. Vernon.
T. R. Cousens	Merrickville
Magloire Morrissette	Quebec.
A. Young & Son	Sarnia.
John David Fee	Stratford.
Heny Bechtel, jun	Tp. Waterloo.
Robert Jones	Guelph.
George Trock Morehouse	St. John.
J. Bte D'Aoust	St. Polycarpe.
William Browne	Ottawa.
J. W. Stone	Burleigh.
Giles Stone	Burleigh.
William Darley Pollard	Meaford.
Robert Sanderson	Hamilton.
Joel Carpenter	London.
Lachlin McQuarrie	Brampton.
W. A. McPherson	Richmond, C.E.
James Hickey	Kingston.
Adolphus Bourne	Montreal.
Peter Joseph Gilhausen	*Ottawa.*
John Carmody	Ottawa.
Anthony Gafney	Tp Horton.
David W. Wartman	Selby.
George L. Robson	Tp. Beach.
William Brogan	Ayr.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

HUGH McKAY, of Delta, Esquire, to be a Notary Pub. in Upper Canada. (Gazetted May 6, 1865.)

FREDERICK WILLIAM OLLARD, of Brockville, Esq. to be a Notary Public in Upper Canada. (Gazetted May. 1865.)

THOMAS M. FAIRBAIRNE, of Peterborough, Esq. Barrister-at-Law, to be a Notary Public in Upper Can. (Gazetted May 27, 1865.)

JOHN CRAWFORD, of Vienna, Esquire, to be a Not. Public in Upper Canada. (Gazetted May 27, 1865.)

CORONERS.

ARTHUR MOBERLY, Esquire, M.D., Associate Cor. County of Simcoe. (Gazetted May 27, 1865.)

STEPHEN F. SMITH, Esquire, M.D., Associate Cor. County of Perth. (Gazetted May 27, 1865.)

WILLIAM HAWKINS VARDON, Esquire, M.D., Associate Coroner, County of Waterloo. (Gazetted May 27, 18.)

TO CORRESPONDENTS.

"Solicitor"—"A Subscriber"—"A Member of the Profession"—"A Member of the Profession"—under "General Correspondence."