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DIARY FOR FEBRUARY.

2. Friday Purification B. V. M.
4. SUN... *Sexagesima.*
5. Mon... Hilary Term commences.
9. Friday Paper Day Q.B. New Trial Day C.P.
10. Satur. Paper Day C.P. New Trial Day Q.B.
11. SUN... *Quinquagesima.*
12. Mon... Paper Day Q.B. New Trial Day C.P.
13. Tues... *Shrove Tuesday.* Paper Day C.P. N.T. Day Q.B.
14. Wed... *Ash Wednesday.* Paper Day Q.B. N.T. Day C.P.
15. Thurs. Paper Day C.P. [Last day for service for County
16. Friday New Trial Day Q. B. [Court.
17. Satur. Hilary Term ends.
18. SUN... *1st Sunday in Lent.*
24. Satur. *St. Matthias.* Declare for County Court.
25. SUN... *2nd Sunday in Lent.*

NOTICE.

Subscribers in arrear are requested to make immediate payment of the sums due by them. All payments for the current year made before the 1st March next will be received as cash payments, and will secure the advantages of the lower rates.

THE

Upper Canada Law Journal.

FEBRUARY, 1866.

THE REGISTRY ACT.

Every new statute has been from time immemorial a more or less fruitful subject of discussion and litigation. The one we now refer to is no exception to the rule, at all events so far as discussion is concerned. The time has not yet arrived for litigation as to any of its provisions—that time may come and probably will, unless amateur conveyancers and even some of those who ought to be "learned in the law" are a little more careful than are some we know of.

One of the points in dispute is, are two witnesses necessary for the proper registration of a deed? One used to be sufficient for a deed, two were necessary for a memorial; but memorials are done away with and in their place is put a duplicate original, or if no duplicate, then *the* instrument must be left in the Registry office. The affidavit now required may be and probably will be an additional protection against fraud, but then it is not absolutely necessary so far as we see that the witness should state that he knows the parties or any one of the parties. Could the Registrar refuse to register the deed without such a statement of knowledge, we imagine not. It is also argued that the first part of section 39 uses the words "one of the witnesses to such instrument," and section 46 speaks of "the witnesses to any instrument." It is impossible to say with certainty what the Legislature intended—there is nothing express upon the point, and we are left to our own individual judgment on the point. The cautious ones take the not very troublesome precaution of having two witnesses, others confident in their opinion only require one.

Some again say that there should be duplicate affidavits, one on each instrument (when executed in duplicate). We can scarcely think that this is necessary, but it is very commonly done. It is, say the careful ones "better to be sure than sorry." But whilst speaking on the subject of affidavits, we must warn such of our readers as need the caution not to trust implicitly to all the forms of affidavits that are to be found on the backs of printed deeds and mortgages, supposed by the vendors thereof to be in accordance with the statute. In some of these there is no such statement of the name, place of residence and calling of the witness, as some assert the act requires. It appears to be necessary, say they, an eminent equity counsel to the contrary notwithstanding, that this statement should be a substantive part of the affidavit.

It has been suggested, and the suggestion is a good one, that instruments executed in duplicate should shew the fact by a short declaration at the commencement after the words "This Indenture," or in some other convenient place.

No certificate of identification such as was formerly required in the case of instruments executed out of Upper Canada appears to be necessary under the new act. It is also to be noticed that the affidavit of execution must be made *on* the instrument (sec. 40) and it will not be sufficient as it formerly was *to annex it.*

Some persons have suggested difficulties in the reading of section 36, though we do not at present see the force of the objections raised. There are also some unimportant mistakes in some of the forms.

Sect. 40 of the act as amended in committee of the session previous to the one in which it was ultimately passed contained certain clauses which are not now to be found under the corresponding section (sec. 39) in the present act. They were these:

"6. But if he do not know them or do

not know the whole of them, he shall state the fact;

"7. And as to such of them as he does not know, he shall state the circumstances which lead him to believe that the party or parties whom he does not know and whose signature or signatures he attests, is or are in truth the party or parties named in the instrument, such as—that the party declared himself to be the person in question, and the witness had no reason to doubt the truth of the same, or that the party whom the witness does not know was identified to him by such person [naming and describing him] who is a person well known to the witness and whose statement the witness believes to be true."

Sub-sections 4 and 5 of section 39 as it now stands are bald in the extreme. Surely the expunged clauses which are given above would, if nothing else, have been useful in suggesting the sort of information which may still be given with advantage. If it were provided that the witness *must* swear to a knowledge of the parties to the instrument, or one of them, we could understand what was intended, though such a provision would occasionally be one of great inconvenience. But it is only necessary to state that the witness knew the parties "*if such be the fact.*"

Various other questions and difficulties have been started respecting this act to which we cannot now refer. We shall be glad to hear from any one interested in the subject as to these or any other points which admit of or require discussion. Upon the whole we do not think the act has been quite as carefully drawn up as the public had a right to expect, considering the time that it has been under discussion by the legislature, and the numerous suggestions that have from time to time been made with reference to it by competent persons; but many of which, it is alleged, have been overlooked, or have not been sufficiently carefully worded.

THE PATENT LAWS.

(*Continued from p.* 4.)

Our contributor continues his observations on this subject, as follows:

Nothing can show more conclusively the entire falsity in principle as well as in practice of the Patent Law, than the various attempts or rather proposals which have been made to render it less complicated and uncertain, or less mischievous and oppressive; and their absolute and acknowledged failure to effect either one or the other. It is admitted by every one whose opinion on the subject is entitled to any weight, whether given in evidence before the late Committee of the Lords, or on previous occasions, or formed by an attentive perusal of the "report," that, for one reason or another, and in whatever light it may be viewed, the Patent Law is in its present state open to most serious objections, and is beyond measure complicated. Many of the ablest and most experienced have denounced the law altogether. Others have proposed such alterations in the law, or such amendments to it, as in their opinion may tend to lessen the evils complained of; but in each and every case, such proposed amendment or supposed improvement has been pronounced impracticable.

It is asked, is the law really so complicated and uncertain as is alleged. We answer yes, and to such an extraordinary degree that there seems no "way to limit either party to a precise statement of his case, before an action comes into court for trial; the trial itself being sometimes necessary to show even to the plaintiff his exact cause of complaint, and to the defendant his exact means of defence; and it is no slight evil that the first trial in a patent action should be employed, as it commonly is, at an enormous cost, in ascertaining the subject of contest." This is put certainly almost as strongly as such a case could be, and the following is given as an example. In a sewing-machine case lately heard before the Lord Chancellor, there had been it appeared several trials in the courts of law, one of which occupied six days, besides one hundred and thirty-four suits in chancery, when it was at last found that the claim was altogether beyond the scope of the original specification. In another case the plaintiff obtained a verdict, which the Court of Queen's Bench, as well as the Court of Exchequer, set aside. These decisions were reversed on appeal to the House of Lords; and this reversal the Commissioners would again overrule by giving a still higher authority to some officer of the Crown over and above the Law Lords. There is considerable uncertainty and complication here.

Again, is the Patent Law mischievous and oppressive? Yes, we again answer, enormously so. The evidence given before the committee by the leading manufacturers all

declare it. The late Mr. Brunel did so in 1851, equally with Mr. Scott Russell now. The evidence of the Comptroller of the Navy, Rear Admiral Robinson, is also sufficiently pointed. "The inconvenience," said he, "resulting from patents applied to ship building, is so very great that it is scarcely possible to build a ship, being a combination of wood and iron, without trenching upon some body's patent; and I am entirely of opinion that the patents are drawn up for that especial purpose, without any idea of their being practically applied for the benefit of the public, but only that the patentee may lie in wait for a colourable evasion of his patent taking place." Indeed a careful consideration of the evidence, including the various proposed amendments to the law, irresistibly leads to the same conclusion as that arrived at by the plain-spoken admiral, and shows that the matter has passed out of the hands of the inventor, properly so called, into the hands of the mere schemer. The admiralty, wise in their generation, have cut the Gordian knot; and acting on their Comptroller's hint, declare that the Crown is not bound by a patent. Many others, it is believed, are coming to a similar opinion on the part of the public.

If incessant litigation is an evil, certainly the field opened up by the operation of the Patent Law is of the amplest dimensions; sufficient to make Paul Rooney stare, large as his experience must have been, ere the Encumbered Estate Courts compelled Irish landlords to turn their attention to something beyond the hereditary law-suit: and as to the sphere of research laid open to the Patent-Law solicitor, why, the whole world is before him; he may require witnesses from Thibet, or affidavits from China, although the case litigated may involve nothing more valuable or interesting than (a question actually disputed) the tie of a lady's glove, or the material of her garter.

Out of such a mass of absurdity how can the poor artizan who is, in the vast majority of cases, the *bona fide* inventor, expect protection? How can the manufacturer escape constant annoyance, or being continually made a prey to the needy adventurer? That which has been said on the subject will easily lead us to understand the feeling of a leading manufacturer, who said in his evidence that he made a practice of buying up every patent that came out in his line of business, without a care or a thought as to its usefulness;—it is simply a patent, and therefore in the way, and he buys it up to get rid of the nuisance. In truth the Patent Law appears to have outlived its time; and what may have been a useful stimulant formerly, has run into delirium tremens now. If it has outlived its time, and if it cannot be improved upon or amended so as to make it a matter of practical benefit and justice to the many and not to the few, instead of, as is asserted, an engine of oppression, mischief, and injustice in the hands of the few, at the expense of the many, no course remains but to repeal it *in toto*.

LAW SOCIETY.—HILARY TERM, 1866.

The following gentlemen, out of fifteen who went up, passed the necessary examination qualifying them for call to the bar:—F. Fenton, Toronto; McNeil Clark, Prescott; Jno. C. Upper, Dunnville; C. Lemon, Toronto; John Bain, Toronto; E. G. Malloch, B. A., Perth; W. F. Read, Toronto; D. Chisholm, Port Hope; Elmes Henderson, Toronto; S. B. Newcomb, Ingersoll.

The papers of Messrs. Fenton and McNeil Clark were considered so satisfactory, that they were not required to pass any oral examination.

Of twenty-four gentlemen who went up for examination for admission as attorneys, the following obtained certificates:—F. Fenton, Toronto; J. E. Farewell, Oshawa; S. H. Payne, Cobourg; W. H. Cutten, London; F. D. Barwick, Toronto; D. Chisholm, Port Hope; C. Lemon, Toronto; R. W. Parkinson, Toronto; J. P. Clarke, Toronto; George J. O'Doherty, Sarnia; F. W. Ollard, Brockville; H. Lapierre, Ottawa; Wm. Millar, Berlin; James Lennon, Toronto; James Gowan, Sarnia; Edward Furlong, Cayuga.

Messrs. Fenton, Farewell, Payne and Cutten were not called upon for the oral examination.

Our readers will by this time doubtless have received the Index for the *Law Journal*, and the Index for the *Local Courts' Gazette*, for last year. They are more complete than formerly, as well as fuller, owing to the increased width of the column. The Almanac has also been distributed. It is the same as that for last year, with the exception, of course, of the necessary alterations in the calendar, a few slight alterations in the tables of stamps, and

some changes in the Judiciary and in the tables of Court and County officials. We trust it may still be found as useful and correct as it has, we are assured by many, hitherto been.

RECENT CHANCERY ORDERS.

The following are the late Orders of the Court of Chancery, dated December 20, 1865, which came into force on the 1st January last:

Infant Defendants In Suits.

1. In the case of an infant defendant, under the age of ten years, a copy of the bill of complaint is not to be served on the infant personally, but is to be delivered to, or left at the dwelling-house of, the person with whom, or under whose care, the infant is residing at the time of the service; and if more defendants than one under the said age, live with, or under the care of the same person, one copy only is to be served for all such infant defendants.

2. Notice of application for the appointment of a guardian *ad litem* to an infant defendant of the age of fourteen years or upwards, is to be served upon such infant personally, unless the Court otherwise directs, and is also to be served as directed by the Order at present in force.

Service of Bill after Periods Limited.

3. In case of service of a bill of complaint after any of the periods limited by Order 5 of 6th February last, the application for the allowance thereof is to be made within four weeks after the service; and in that case the order allowing the service need not be served, but the period of four weeks is to be added to the time which the defendant has by the General Orders to answer the bill.

4. In case of the application not being made within four weeks after service of the bill, the order for the allowance of the service may be made on such terms as the Court sees fit.

Officers of Corporations.

5. An officer of a corporation aggregate is not to be made a defendant for discovery only; but any such officer who might by the former practice have been made a defendant for the purpose of discovery may be examined by the plaintiff in the same way as a party, after the answer of the corporation is filed, or after the time for filing the same has expired.

Amendments—Facts occurring after Bill Filed.

6. Where, in a case not provided for by the Order of the 6th of June, 1862, a plaintiff desires to state, or put in issue, facts or circumstances occurring after the institution of the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, such facts or circumstances may be introduced into the original bill of complaint by way of amendment.

7. If the cause is not in such a state as to allow of the bill being amended, the plaintiff may state and put in issue such subsequently occurring facts and circumstances by filing a statement, either written or printed, to be annexed to the bill. But no such statement is to be filed unless accompanied by an affidavit that the matter thereof arose within two weeks next before the filing of such statement, or unless the Court otherwise order. A copy of the affidavit is to be served with a copy of the statement.

8. Such proceedings, by way of answer and otherwise, are to be had and taken on the statement so filed, as if the same were embodied in a supplemental bill; but the Court may make any order which it thinks fit for accelerating the proceedings thereunder in any manner that may be just and practicable.

Mortgages.

9. The notice under Order 4, of 10th of January, 1863, is to specify whether the plaintiff desires a foreclosure of the equity of redemption or a sale of the mortgaged premises; and in case of a foreclosure being desired, the following is to be added to the notice: "If you desire a sale of the mortgaged premises instead of a foreclosure, you must deposit with the Registrar at Toronto, within the time allowed for you to answer, the sum of $80 to meet the expenses of such sale." And any defendant may obtain a sale upon depositing in court the sum of $80, and filing in the office of the Registrar at Osgoode Hall a note in writing to the following effect: "I pray a sale of the mortgaged premises in the plaintiff's bill mentioned, or a competent part thereof, instead of a foreclosure."

10. If upon such deposit being made and note filed, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect; and he is thereupon to notify the defendant of such election. The notice may be to the following effect:

"In Chancery.—(*Short Title.*)

"To ——— Defendant.

"Take notice that the plaintiff elects that the sale of the mortgaged premises be conducted by you instead of by the plaintiff, and you are at liberty to withdraw the deposit made by you in this cause for the purpose of such sale."

And upon the plaintiff filing with the Registrar a note of such election, and proof of service of such notice, the defendant making the deposit is to be entitled to a return thereof, and the Registrar is to draw up the Decree accordingly.

11. When the time for answering in the case of bills filed for the foreclosure of the equity of redemption in mortgaged premises,

or for the sale thereof, has expired, the plaintiff is to be entitled upon præcipe to a Decree as is provided by Order 4, of 10th January, 1863, as well where the defendant, or one of several defendants, answers the bill, admitting the execution of the mortgage and other facts, if any, entitling the plaintiff to a Decree, or where any of the defendants disclaim any interest in the mortgaged premises, as where no answer is put in to the bill.

12. The 3rd clause of the notice to be indorsed on the bill is in such case to be varied as follows: "If you fail to answer or demur within the time above limited, or if you answer admitting the execution of the mortgage and other facts stated in the bill as entitling the plaintiff to a Decree, you are to be subject to have a Decree or Order made against you forthwith thereafter," and, &c.

Administration Order.

13. Upon application for the administration of the estate of a deceased person upon notice of motion without bill filed, no accounts or inquiries in respect of the real estate are to be directed, unless notice of the application has been given to the heirs or devisees interested therein, or one or more of them. But after inquiries directed in respect of the personal estate, the Court may in a proper case, after notice given to those interested in the real estate, or to one of more of them, make a supplemental order in respect of the real estate, upon such terms as the Court sees fit.

Matters adjourned from Chambers.

14. Matters adjourned from Chambers under section 3 of Order 34 of the General Orders of the 3rd of June, 1853, are to be heard in Court by one Judge; and are not to come before the full Court, except by way of rehearing the Order made in Court thereon.

Practice at Hearings.

15. Where a defendant, at the hearing of a cause, objects that a suit is defective for want of parties, and has not by answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, if it thinks fit, may make a Decree saving the rights of the absent parties.

16. Where a party or witness is examined at the hearing of a cause, or a document is put in as evidence and marked by the Registrar or Deputy Registrar, the deposition of the party or witness so examined, or the document so put in, is not to be withdrawn as evidence without the leave of the Court.

17. Where the case for relief made by a bill is a case of actual fraud, and the evidence, though failing to establish the fraud charged, yet shews some other ground on which the plaintiff is entitled to relief, the Court is, at the hearing, to have the same discretion as in other cases to allow an amendment and to grant relief according to the truth of the case.

Where the costs of one defendant ought to be paid by another defendant, the Court may order such payment to be made by the one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff.

Amending Decrees.

19. An application for amending a Decree or Decretal Order which has not been drawn up in conformity with the judgment pronounced, so as to make the same conformable thereto; and an application for correcting any other clerical mistake in a Decree or Decretal Order or error arising from any accidental slip or omission, may be made in Chambers on petition, and the Court may grant the same, if under all the circumstances the Court sees fit.

20. Where a Decree or Decretal Order as drawn up requires amendment in any other particular on which the Court did not adjudicate, the same may be amended in open Court on petition without a Re-hearing, if under all the circumstances the Court sees fit.

Opening Biddings.

21. On sales under a Decree or Order of the Court, the biddings are only to be opened upon special grounds, whether the application is made before or after the report stands confirmed.

Proof of Debts.

22. Every advertisement for creditors affecting the estate of a deceased person, which is issued pursuant to any Decree or Order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master shall direct, or to his solicitor, to be named and described in such advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form numbered 1 in the Schedule hereto, with such variations as the circumstances of the case require; and at the time of directing such advertisement a time is to be fixed for adjudicating on the claims.

23. No creditor need make any affidavit or attend in support of his claim (except to produce his security, if any), unless he is served with a notice requiring him to do so, as hereinafter provided.

24. Every creditor is to produce the security (if any) held by him, before the Master, at such time as is specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the Master directs, is to produce all other deeds and documents necessary to substantiate his claim before the Master, at his chambers, at such time as is specified in such notice.

25. In case any creditor neglects or refuses to comply with the preceding rule numbered 24, he is not to be allowed any costs of proving his claim, unless the Master otherwise directs.

26. The executor or administrator of the deceased, or such other party as the Master directs, is to examine the claims sent in pursuant to the advertisement, and is to ascertain, as far as he is able, to which of such claims the estate of the deceased is justly liable; and he is, at least seven clear days prior to the time appointed for adjudication, to file an affidavit, to be made by such executor or administrator, or one of the executors or administrators, or such other party, either alone or jointly with his solicitor, or other competent person, or otherwise as the Master directs, verifying a list of the claims, particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due, and proper to be allowed, and the reasons for such belief.

27. In case the Master thinks fit so to direct, the making of the affidavit referred to in the preceding rule numbered 26, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give.

28. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may, in his discretion, allow any of the claims, or any part thereof respectively, without proof by the creditors, and direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto, as he may think fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed.

29. Notice is to be given by the executor or administrator, or such other party as the Master directs, (1) to every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance; (2) and, to every such creditor as the Master directs, to attend and prove his claim, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with such notice, his claim, or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time.

30. Any creditor who has not before sent in the particulars of his claim pursuant to the advertisement, may do so four clear days previous to any day to which the adjudication is adjourned.

31. After the time fixed by the advertisement, no claim is to be received (except as before provided in case of an adjournment), unless the master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs.

32. Where any Decree or Order is made for payment by the Registrar to creditors, the party whose duty it is to prosecute such decree or order is to send to each creditor, or his solicitor (if any), a notice that the cheques may be obtained from the Registrar; and such party is, when required, to produce any papers necessary to enable the creditors to receive their cheques.

33. Every notice by this order required to be given is, unless the Master otherwise directs, to be deemed sufficiently given and served if transmitted by the post, prepaid, to the creditor, to be served, according to the address given by such creditor in the claim sent in by him pursuant to the advertisement, or, in case such creditor has employed a solicitor, to such solicitor, according to the address given by him.

34. The forms set forth or referred to in the schedule to these Orders, with such variations as the circumstance of each case require, are to be adopted for the respective purposes therein mentioned.

One Solicitor to Represent a Class.

35. Where, at any time during the prosecution of a Decree or Order, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor; and where the parties, constituting such class, cannot agree upon the solicitor to represent them, the Master may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties, constituting such class, insists on being represented by a different solicitor, such party is personally to pay the costs of his own solicitor, of, and relating to, the proceedings before the Master, with respect to which such nomination has been made, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated.

Costs on Appeals.

36. In the case of appeals from a report of the Master, the Court may, in its discretion, give the costs of the appeal, or any part thereof, to a successful appellant.

Orders to Revive.

37. Where an Order to Revive is served out of Upper Canada, the party so served is to have the same time to apply for the dis-

charge of the order, as a defendant so served has to answer a bill of complaint; but an application may be made for shortening the time, as in the case of answers to bills in like cases.

38. Where the Court authorizes publication instead of service, the Court is at the same time to appoint such time for applying to discharge the Order to Revive as seems proper.

Correspondence.

39. Necessary letters in the course of a cause or matter, between the solicitor and his Toronto agent, are, on taxation between party and party, to be allowed as attendances.

Interpretation.

40. The General Interpretation Order of 3rd June, 1853, is to extend to these Orders, and to all Orders heretofore passed, or to be passed hereafter.

41. The word "Master" in these Orders and in all future General Orders shall be deemed to include "Accountant" and "local Master," unless there is something in subject or context repugnant to such construction.

42. These Orders are to go into operation on the 1st day of January, 1866, as to all suits then pending or thereafter brought.

SCHEDULE.

FORMS.

No. 1.—*Advertisement for Creditors.*

[G. O. 22.]

Pursuant to a decree [*or* an order] of the Court of Chancery, made in [the matter of the estate of A. B., and in] a cause, S. against P. [*short title*], the creditors of A.B., late of ——, in the county of ——, who died in or about the month of ——, 18—, are, on or before the —— day of ——, 18—, to send, by post, prepaid, to E. F., of ——, the solicitor of the defendant C. D., the executor [*or*, administrator] of the deceased [*or as may be directed*], their Christian and sur-names, addresses and descriptions, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them; or, in default thereof, they will be peremptorily excluded from the said decree [*or*, order]. Every creditor holding any security is to produce the same before me, at my chambers, at, &c., on the —— day of ——, 18—, at —— o'clock in the ——noon, being the time appointed for adjudicating on the claims.

Dated this —— day of ——, 18—.

G. H., Master (or as the case may be).

No. 2—*Notice to Creditor to produce documents,*

[G. O. 24.]

(*Short Title.*)

You are hereby required to produce, in support of the claim sent in by you, against the estate of A. B., deceased [*describe any document required*], before me at my chambers, at, &c., on the —— day of ——, 18—, at —— o'clock in the ——noon.

Dated this —— day of ——, 18—.

G. R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. S. T.

No. 3.—*Affidavit of Executor or Administrator as to Claims.*

[G. O. 26.]

In Chancery.

(*Title*)

We, C. D., of, &c., the above-named plaintiff [*or* defendant, *or as may be*], the executors [or administrators], of A. B., late of ——, in the county of ——, deceased, and E. F., of, &c., solicitor, severally make oath, and say as follows:—

I, the said E. F., [solicitor] for myself, say as follows:—

1. I have, in the paper writing now produced and shewn to me, and marked A., set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said A. B., deceased, pursuant to the advertisement issued in that behalf, dated the —— day of ——, 18—.

And I, the said C. D., for myself, say as follows:—

2. I have examined the particulars of the several claims mentioned in the paper writing now produced and shewn to me, and marked A., and I have compared the same with the books, accounts, and documents of the said A. B. [*or as may be, and state any other inquiries or investigations made*], in order to ascertain, as far as I am able, to which of such claims the estate of the said A. B. is justly liable.

3. From such examination [*and state any other reasons*], I am of opinion, and verily believe, that the estate of the said A. B. is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing marked A.; and to the best of my knowledge and belief, such several amounts are justly due from the estate of the said A. B., and proper to be allowed to the respective claimants named in the said schedule.

4. I am of opinion that the estate of the said A. B. is not justly liable to the claims set forth in the second part of the said paper writing marked A., and that the same ought not to be allowed without proof by the respective claimants, [*or*, I am not able to state whether the estate of the said A. B. is justly liable to the claims set forth in the second part of the said paper writing marked A., or whether such claims, or any parts thereof, are proper to be allowed without further evidence.]

S . . . .

No. 4.—*Exhibit referred to in Affidavit*, No. 3.

A.

(*Short Title.*)

List of claims the particulars of which have been sent in to E. F., the solicitor of the plaintiff [*or* defendant, *or as may be*], by persons claiming to be creditors of A. B., deceased, pursuant to the advertisement issued in that behalf, dated the —— of ——, 18—.

This paper writing, marked A., was produced and shewn to ——, and is the same as is referred to in his affidavit, sworn before me this —— day of ——, 18—.

W. B., &c.

First Part.—Claims proper to be allowed without further Evidence.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount Claimed.	Amount proper to be allowed.
				$ c.	$ c.

Second Part.—Claims which ought to be proved by the Claimants.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount Claimed.
				$ c.

No. 5.—*Notice to Creditor to prove his Claim.*

[G. O. 29.]

(*Short Title.*)

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased. You are to file such affidavit as you may be advised in support of your claim, and give notice thereof to ——, Master in Chancery [*or as the case may be*], on or before the —— day of ——, 18—; and to attend personally or by your solicitor, at his chambers, on the —— day of ——, 18—, at —— o'clock in the —— noon, being the time appointed for adjudicating on the claim.

Dated this —— day of ——, 18—.

G. R., of, &c., solicitor for the plaintiff [*or* defendant, *or as may be.*]

To Mr. S. T.

No. 6.—*Notice to Creditor of Allowance of Claim.*

[G. O. 29.]

(*Short Title.*)

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of $——, [with interest thereon at $—— per cent. per annum, from the —— day of ——, 18—, *and* $—— for costs, *or as the case may be.*]

If part only allowed, add—If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file [*&c., as in Form No.* 5.]

Dated this —— day of ——, 18—.

G. R., of, &c., solicitor for the plaintiff [*or* defendant, *or as may be.*]

To Mr. P. R.

No. 7.—*Notice that Cheques may be received.*

[G. O. 32.]

(*Short Title.*)

The cheques for the amounts directed to be paid to the creditors of A. B., deceased, by an order made in this [matter *or*] cause, dated the —— day of ——, 18—, may be received at the Registrar's Office, in Osgoode Hall, Toronto, on and after the —— day of ——, 18—.

G. R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be.*]

To Mr. W. S.,
&c.

P. M. Vankoughnet, C.
J. G. Spragge, V. C.
O. Mowat, V. C.

SELECTIONS.

THE REPORT OF THE CAPITAL PUNISHMENT COMMISSION.

Murders of more moving incident or of fouler cruelty than usual, happening since the appointment of the Capital Punishment Commission, have led us, in various articles, to discuss punishment by death, in relation to the murderer, the people, and the crowd at the scaffold, and to adduce arguments for and against public hanging.

The commission has now made its report. It ought to be called a partial report, for on more than one main point intrusted to the commissioners for inquiry, and chiefly the operation of the existing laws, there is no report at all. While the commissioners were in fact appointed to inquire into "the provisions and operation of the laws in force in the United Kingdom under which the punishment of death may be inflicted, all that can be gathered from the report respecting the latter head is, that the commissioners "forbear to enter into the abstract question of the expediency of abolishing or maintaining capital punishment, on which subject differences of opinion exist among them." The consideration of the abstract question was not committed to them; what was committed to them was the concrete question, whether having regard to the operation of the existing laws,

"any and what alteration is desirable in such laws, or any of them." This included the question of the abolition or maintenance of capital punishment, according to what the commissioners might, upon the evidence to be received, conclude to be the effect of that punishment in protecting society, as it is constituted in the United Kingdom, from the crimes for which death is here inflicted. If differences of opinion have prevented the commissioners from agreeing to any report on this subject, separate reports even would have been better than this attempt to veil the impracticability or inefficiency of the commission as a body, by treating as abstract that which is really of vital practical moment.

Regarding the entire investigation which it was thus the duty of the commissioners to make, the report is confined to that half which refers to the provisions of the existing laws. Here, again, the report, in a perfunctory manner, is thrown off in a single paragraph of a few lines, telling the public that the crimes "now punishable with death in the United Kingdom are treason and murder." Was it required that distinguished noblemen, members of Parliament and lawyers should be nominated under the Queen's hand to declare what might be learnt from any passer-by? "We say *practically*," continues the report, "because in Scotland there remain many other offences which are still, in point of law, liable to be so punished." And the commissioners "strongly recommend" that "all such obsolete laws" be repealed. It is too much we are sorry to say, the practice of commissioners who shirk the burden of the question really proposed to them, to make a show of strength in a vigorous piece of advice to abolish some thing which has already abolished itself. The curious, however, will have the advantage of being able to see these relics of Scotch criminal law in an appendix.

Having forborne to enter into the "abstract question" by reason of the differences of opinion, and imparted the valuable and recondite knowledge about the punishment of treason and murder, the report suggests the alteration which it deems desirable in addition to the repeal of the obselete Scotch law. As to treason, the Treason Felony Act (11 & 12 Vict. c. 12), without abrogating the ancient law, introduced one more merciful. The maximum punishment under that law is penal servitude for life, which seems to the commissioners sufficiently severe in cases of constructive treason, unaccompanied by overt acts of rebellion, assassination or other violence. For treason of the last character, they are of opinion that the extreme penalty must remain.

The commissioners then arrive at the consideration of the crime of murder and its punishment. In order to get rid of the severity of the law existing for the legal imputation of malice—or, as it is commonly called, constructive malice—as distinguished from what the commissioners term "express," but which would be better termed "actual," malice, the report proposes to follow the example of the United States,* and divide the crime of murder into two degrees. This plan of classifying murder they think better than an alteration of the definition itself of murder, namely, unlawfully killing with malice aforethought. The plan involves, they argue, no disturbance of the present distinction between murder and manslaughter, and does not make it necessary to remodel the statutes relating to attempt to murder, nor interfere with the Extradition Acts, with regard to that crime. The report therefore recommends:—

"1. That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

"2. That the punishment of death be also retained for all murders committed in, or with a view to, the perpetration or escape after the perpetration, or attempt at perpetration, of any of the following felonies:—murder, arson, rape, burglary, robbery, or piracy.

"3. That for all other cases of murder the punishment be penal servitude for life, or for any period not less than seven years, at the discretion of the Court."

In this manner the commissioners seek to make a legal separation between murder with actual malice, and murder with constructive malice; leaving both legally murder as distinguished from manslaughter, or killing without malice aforethought. "It is established," remarks the report, "that no provocation by words, looks, or gestures, however contemptuous and insulting, nor by any trespass merely against lands or goods, is sufficient to free the party killing from the guilt of murder, if he kills with a deadly weapon, or in any manner showing an intention to kill, or do grievous bodily harm." Such an offence would, under the third of the commissioners' recommendations, be not punishable with death, but by penal servitude for not less than seven years. But this change would be technical rather than practical, for no man does now suffer death for such an offence of killing where there is no ground for charging actual malice, inasmuch as the jury would find a verdict, not of murder but of manslaughter; or if they were overborne by the authority of the bench, and so driven to find the prisoner guilty of murder, this would be so done as practically to insure a commutation of sentence at the hands of the Crown. If the minimum of punishment were the proposed seven years, a jury would still, in cases of the grossest provocation, depriving a person of self-control, and ending in an intention on his part to kill, prefer a verdict of manslaughter to one of murder in the second degree, with a view to reduce the punishment of imprisonment. An inconvenient result of retaining the same legal name for offences naturally different appears

* This distinction is abolished by the new penal code of New York.—Ed. *L. J.*

on the very face of the report. While a man goaded to fury and killing his enemy is to be guilty of secondary murder only, punishable with penal servitude, he is, according to the second recommendation, to be guilty of primary murder, punishable with death, if he kills a third person who interposes. For murder is to be still punishable with death if it be committed in, or with a view to, the perpetration of "murder," that is, murder of either degree. In truth, interference of a third person in a moment of phrenzy oftentimes turns the deadly weapon on him. But it is still the same frenzy only. What would Virginius, in the market-place, have done, if a lictor had seen the knife and tried to wrest it from his hand?

The frequent failures of justice in case of infanticide, owing, as was alleged by the report, to the difficulties of proof that the child was "completely born alive," have, the commissioners say, engaged their serious attention. They have arrived at the opinion that "an Act shall be passed making it an offence, punishable with penal servitude or imprisonment, at the discretion of the court, unlawfully or maliciously to inflict grievous bodily harm or serious injury upon a child during its birth, or within seven days afterwards, in case such child has subsequently died." But how in the world can the child have subsequently died unless it were "completely born alive?" The difficulty of proof, therefore, will remain, even if this ingenious suggestion be adopted.

That trifling with the most solemn award of the law, that stuff at the prisoner's blood, which used to exist and be called "directing sentence of death to be recorded," the commissioners propose should be restored. They "think the change desirable."

The balance of the many and weighty arguments which may be brought forward for and against hanging within the prison walls, before a selected assembly, instead of on a scaffold, in the face of the people, and which were touched on in two of the articles before referred to, has been formed, if at all, in the breast of the commission, for in the report there is no weighing of any reasons, on one side or the other, of this question. "The witnesses whom we have examined," say the commissioners, "are, with very few exceptions, in favour of the abolition of the present system of public executions, and it seems impossible to resist such a weight of authority; we therefore recommend that an Act be passed putting an end to public executions, and directing that sentence of death shall be carried out within the precints of the prison, under such regulations as may be considered necessary to prevent abuse, and satisfy the public that the law has been complied with." But the public which requires to be satisfied that the man—the right man—has been put to death in due form of law, and the public which requires to be impressed by seeing the sudden change of a man like themselves into a corpse by the hands of the servant of the law, are very different publics. To the one public the execution of the law is a belief in the vindication of the right of personal safety and the maintenance of civilized society; to the other public it is a sense of stone walls, hard unpaid labour, low diet, loss of animal pleasures, and the rope round the throat. We should like to have been informed what the proposed Act is intended to do to satisfy this public; or, in other words, what substitute is proposed to be offered to it by the Legislature for the present visible assertion of the extreme reach of criminal justice. No less should we like to have seen well discussed whether more men felt the ignominy of a public death at the gallows bitter, than took pride in the notoriety of being the public mark of a short period, from apprehension by a detective, to burial under the gaol-flags. By all means let evidence have its due weight. But when commissioners are appointed to inquire and report their opinion, they are expected to do something more than report the opinions of others. All the witnesses that the committee examined could not have amounted to a hundredth part of the persons in the United Kingdom who have reflected on the subject of public hanging. The examination of those who gave evidence ought to have been regarded as only furnishing materials for a judgment by the commissioners. This part of the report, therefore, will not carry with it the weight due to the reputation of the gentlemen whose signatures it bears.

Criminal appeal, and the mode in which the Crown is advised to exercise the prerogative of mercy by the Home Secretary, are "matters not confined to capital crimes only, but pervade the whole administration of the criminal law;" therefore the commissioners have thought them too general and comprehensive for the terms of their commission, and, with grave dutifulness, recommend these subjects to her Majesty for further investigation. Here, again, the commissioners have baulked the public, which considers that the question of an irreversible doom is greatly influenced by the degree in which the sentence can be purged of human fallibility.

On the whole, then, the world is not much the wiser for this report. Things of the highest importance to the law of capital punishment are passed over because the commissioners disagree among themselves, or because the things themselves disagree with their ideas of the terms used in their appointment. The information conveyed, where it has any practical application, is of no value. On one change proposed by them they have no opinion of their own. The other changes proposed are such as the administration of the law has already effected in its own course. It may be as well to confirm the latter changes by Legislation—except, by the way, the change which would make proof of a child's death necessary to save proof of its having been

born alive. The report is a sorry production for so promising a commission. The failure is accountable only on the supposition that the members were glad to get rid of a difficult and disagreeable subject, of little political significance, in any way that they could before Christmas, with more or less decency short of returning the commission to the Home Office avowedly unexecuted.—*Solicitor's Journal.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

Reid v. Miller.

Lands—Liability of for debts.

The liability of lands for debts under 5 Geo. II. ch. 7, is not affected by the death of the debtor. He, or his heir or devisee after his death, may sell and convey to a *bonâ fide* purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against lands issued upon it: and such purchaser will have a good title as against creditors.

Levisconte v. *Dorland*, 17 U. C. Q.B. 437, remarked upon.

[Q. B., T. T., 1865.]

Ejectment for the south half of lot number 19, in the fourth concession of the township of Grantham.

The case was tried at Niagara, in April, 1865, before Draper, C. J.

On all the facts, which were admitted,* the jury were directed to find for the defendants, leave being reserved by consent for the plaintiff to move to enter the verdict for himself.

In Easter Term *W. Eccles* obtained a rule *nisi* to enter the verdict for the plaintiff, pursuant to the leave reserved.

In this term *S. Richards*, Q. C., and *Atkinson* shewed cause. *Robert A. Harrison* supported the rule.

The authorities cited are referred to in the judgments.

Draper, C. J.—For the purpose of determining the question argued before us, the case may be greatly condensed. The Crown granted the premises in question in fee in 1799, and by various *mesne* deeds and conveyances, all duly registered, the title became vested in George Rykert, who died seised thereof in November, 1857. He left a will, the probate of which was not granted until the 22nd of April, 1864, and which probate was registered on the 5th of January, 1865.

George Rykert left three sons surviving him, viz, George, John Charles, and Alfred, who were their father's co-heirs. They made an agreement between themselves for the division of their father's estate, apparently not in compliance with the disposition as made by the will, between them. In order to effectuate their agreement, they joined in conveying the whole estate to a third person; and he, for the same purpose of giving effect to the agreement, conveyed the premises in question to John Charles Rykert in fee, by deed dated the 24th of April, 1858. John C. Rykert being in possession, by deed dated the 19th of April, 1859, for valuable consideration, conveyed in fee to Elijah Parnall, and he being in possession, by deed dated the 1st of August, 1859, mortgaged the premises in fee to Thomas Burns, to secure payment to him of $600, which he owed to Burns, with interest. And by deed, dated the 4th of March, 1861, Parnall mortgaged the same premises to Crysler and Durham, to secure $400 with interest, which sum he owed to them. By deed dated the 2nd of October, 1862, Crysler and Durham conveyed and assigned their mortgage to Burns; and by deed dated the 18th of January, 1864, Burns conveyed and assigned the premises to the defendant. On the same 18th of January, 1864, the sheriff of Lincoln, for a consideration of $1000, sold and conveyed the premises to the defendant in fee. In this deed it was set forth, and the parties to this suit admitted it to be true, that the sheriff sold under an execution then in his hands against the lands of Elijah Parnall and John C. Rykert. All the deeds made since the death of George Rykert were duly registered.

At the time of his death, George Rykert was indebted on two promissory notes, one for £1060, and the other for £530, both made by him jointly with his son John Charles and a third party, dated the 19th of December, 1856, and payable one year after date. The holder of these notes, on the 3rd of September, 1862, commenced an action against the executrix and executors of George Rykert, and on the 29th of the same month recovered judgment, and issued execution against the goods which were of the testator, which was returned *nulla bona;* and on the 4th of October, 1852, issued execution against these lands, on which the sheriff afterwards sold the premises, and conveyed them in pursuance of the sale to the plaintiff.

When Burns took the mortgage from Parnall, he had notice of the note for £1060.

The plaintiff's argument was rested upon the statute 3 & 4 Wm. & M. ch. 14, and upon the 5 Geo. II. ch. 7, which last, it was insisted, extended to *all* debts, the principle established by the former act as to specialty debts; and it was urged that the lands of a deceased debtor should by force of these acts be held to be so liable to and chargeable with *all* his just debts, as to enable the creditor, on obtaining judgment against the personal representative of such debtor, to take and sell his lands on an execution, although the heir of the devisee of the debtor had, even before the recovery of such judgment, sold them for valuable consideration to a purchaser who had no notice of the debt.

It is clear that during the lifetime of the debtor his lands are not bound by the *debt*, though liable to its satisfaction, and chargeable with it by judgment and execution. In *Doe McIntosh* v. *McDonell*, 4 O. S. 195, it was treated as a settled point, that lands are not bound under the 5 Geo. II., until the delivery to the sheriff of a writ against lands. Mr. Justice Sherwood read an unreported judgment given previously by him in a case of *Doe dem. Clarke* v. *Updegrove*, in which he concluded that "the words of the 5 Geo. II.,

* The facts appear more fully in the report from which this is taken but as they are sufficiently stated in the judgment of the Chief Justice they are not, from want of space, given here at length.—Eds. L. J.

and all legal inferences fairly drawn from its enactments, clearly prove that real estates are bound by the delivery of the writ of *fi. fa.* against them to the sheriff, precisely like goods and chattels, and that they are not bound by the judgment under that act for the purpose of sale, as they are by the laws of England for the purposes of extent under the statute of Westminster 2nd."

Whatever doubts may have existed in the minds of individual judges, I believe the law thus settled has ever since been acted upon. The debtor has been considered competent to sell his lands, notwithstanding judgment recovered against him. His devise of them will pass the estate, which if he die intestate will descend to his heirs, The doctrine contended for by the plaintiff's counsel would prevent the heir or devisee from selling, or rather from conveying a good title, so long as there was a debt of the ancestor unpaid, though no judgment had been recovered or even an action commenced.

The law does not so fetter an executor, however numerous the debts owing by his testator. He not only can convert the whole personal estate into money, but it is his duty to do so in order to pay the debts. He is not compelled by the force of law to stand idle until a creditor recovers judgment, and issues execution. His powers enable him to take measures to save the estate, by a prompt administration of it under certain rules. This authority, however, does not extend over lands. If there be no sufficient means in the executor's hands to pay debts, all having been exhausted in a due course of administration, and notwithstanding that there is not the slightest ground for supposing that the executor will ever have any further assets which he must administer, the creditor by simple contract of the testator must sue the executor, for he can in that way only reach the testator's lands. *Forsyth* v. *Hall*, Dra. Rep. 291, expressly decided that he cannot, under such circumstances, sue the heir, who need have no notice, and cannot intervene in the action. The executor, under such circumstances, pleads only *plene administravit*, and it was for some time held that to this plea it was allowable to reply that the testator had lands: a replication which, if true, entitled the plaintiff to judgment against the executor, and to execution against the lands. Even if a debtor dies intestate, leaving no personal estate whatever, still an administrator must be appointed, in order that there may be a defendant against whom the creditor can get judgment and obtain an execution against lands, for neither an executor nor administrator can sell them, nor according to the plaintiff's contention can the heir, except subject to be afterwards sold in execution to satisfy the ancestor's simple contract debts.

The question is not, however, new in our courts. In *Levisconte* v. *Dorland*, 17 U. C. Q. B. 441, it was discussed; and Sir J. B. Robinson, C. J., expressed his opinion upon it. The case merits a careful consideration. It was an action against the administrator of Enoch Dorland, on a simple contract debt of the intestate. The defendant pleaded *plene administravit*, to which the plaintiff, admitting the truth of the plea, replied that the intestate died seised of real estate. The defendant rejoined, admitting that the intestate died seised of certain land, but that one S. D., who was his father and heir-at-law, for valuable considerations, conveyed to the defendant by deed all the right which, as heir-at-law, he then had: that at the time of the death of the intestate, one H. held a mortgage on the said lands to secure a sum of £500, being the full value of the land; and the defendant, solely to prevent costs accruing against the estate of the intestate, and for no other consideration, conveyed by deed the equity of redemption which he held under the deed from S. D. of the said lands, which were all the real estate whereof the intestate died seised.

The court, consisting of Sir J. B. Robinson, C. J., McLean and Burns, J. J., held the rejoinder bad. The Chief Justice said, "The plaintiff is entitled to his execution against the estate of which Enoch Dorland died seised upon this judgment against his administrator, according to the decision in *Gardiner* v. *Gardiner*. * * * The heir of Enoch Dorland cannot by his conveyance to the defendant prevent the creditors of Enoch Dorland from having their debts satisfied out of the real estate." The decision is, however, at the conclusion, rested on this ground, "the plaintiff having admitted that the goods have been fully administered only desires judgment in order that he may have execution against the lands of which Enoch Dorland died seised, and the defendant as administrator cannot obstruct him in obtaining such execution, and has no interest in the question whether there are lands or not."

I fully concur in both these last propositions, though the conclusion I should have deduced from them is, as I had previously said in *Sickles* v. *Asselstine*, 10 U. C. Q. B. 203, that the plaintiff was wrong in his replication; and I should only have thought the defendant entitled to judgment, not for the goodness of the rejoinder, but for the fault of the replication; and as to the replication, such appears to have been the opinion of Burns, J., from what he says in giving judgment. I think, however, the judgment for the plaintiff may be sustained, on the ground that there is nothing in the rejoinder to shew that the conveyance made by the heir of Enoch Dorland was executed before the *fi. fa.* against the lands was placed in the sheriff's hands. *Gardiner* v. *Gardiner* had conclusively settled that lands could be reached through a judgment against the executor or administrator, and though I have never felt the force of the reasoning on which it is founded, I have always treated it as settling the question. The impropriety of the replication in *Levisconte* v. *Dorland*, has been distinctly adjudged; see *Hogan* v. *Morrissy*, 14 U.C.C.P. 441; and *Seaton* v. *Taylor*, 8 U. C. Q. B. 303; and *Sickles* v. *Asselstine*, 10 U. C. Q. B. 203, must be considered to be overruled. As to *Gardiner* v. *Gardiner*, it is deprived of some of the weight which it might otherwise possess, by the (to my mind) very satisfactory judgment of Sir J. T. Coleridge, in the Privy Council, in the case of *Bullen* v. *A'Beckett*, 1 Moore, P. C. C., NS., 223.

If indeed the necessary consequence of the decision in *Gardiner* v. *Gardiner* was, that the land of which a debtor by simple contract died seised was liable for the satisfaction of that debt, no

matter into whose hands it might pass, even those of a purchaser for full value and without notice, we must yield, and leave to the legislature to say whether the law should remain upon that footing, or whether it would not be advisable and even just to change it by an enactment of a similar character to the English statute 3 & 4 Wm. IV., ch. 104, which enacts that the real estate of a deceased person not charged by will or devised for the payment of debts *shall be assets* to be administered in equity for payment of his debts, whether due on specialty or by simple contract.

This statute was considered and expounded by the Master of the Rolls, in *Kinderly* v. *Jervis*, 22 Beav. 22, and there is so much force in his observations, and they so pointedly answer some of the arguments urged for the plaintiff, that I cannot forbear repeating them here, after premising that there is a strong affinity, both in object and in language, between that statute and the act of 5 Geo. II.

Sir J. Romilly says, "It was not the object, nor is it the operation of this statute, to make the simple contract debts of a deceased person in the nature of mortgages or specific charge on his real estate, but as the statute makes the lands *assets* for the payment of his debts, these debts constitute a general charge upon them, but not so as that a *bonâ fide* purchaser of the lands from the heir or devisee is bound to see to the application of the purchase money, as he would be in the case of a particular mortgage on any portion of the lands themselves." And he concludes, "Such assets are liable in the first place to pay the debts of the deceased debtor, and subject thereto they belong to his devisee or heir at law, but that the devisee or heir at law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor."

But for the decision in *Forsyth* v. *Hall*, it might have been thought that the creditor's remedy, under the statute 5 Geo. II., was at law, to get satisfaction from the heir or devisee of his debtor by simple contract. Whether in consequence of that decision the Court of Chancery would feel precluded from entertaining a bill against the heir or devisee for the administration of the real estate of such debtor as assets under the 5 Geo. II. has not, so far as I am aware, ever been expressly brought in question.

But however that may be, I cannot accede to the position that the death of the debtor affects the construction of the statute 5 Geo. II., or makes any difference as to the liability of or charge upon the lands of a debtor in his lifetime or after his death. No such distinction can be pointed out in the act itself, nor do I perceive that it is an inevitable result from the decisions already adverted to upon it. I am not disposed to carry the anomalies arising from those constructions further than they have irretrievably extended. No one has ever pretended that the words "that the houses, lands," &c., "belonging to any person indebted shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process," &c., prevents the debtor from selling his real estate to a *bonâ fide* purchaser for value, at least until judgment is entered up against him, or even until the writ of execution against his lands is placed in the hands of the proper officer to execute it. I do not feel bound by authority, nor yet compelled by any argument, to hold that the death of the debtor makes any difference or creates a different charge upon his lands. I think the language of Sir John Romilly strictly applicable, and that the statute creates only a general charge, which becomes particular in the lifetime of the debtor, either on judgment being entered against him, or, according to the case referred to, when the *fi. fa.* is delivered to the sheriff, and after his death in like manner upon judgment against his personal representatives (*Gardiner* v. *Gardiner*), or the delivery of a *fi. fa.* founded upon such a judgment.

In my opinion this rule should be discharged

Hagarty, J.—The position taken by plaintiff is strictly this:—Where the ancestor dies indebted on simple contract, and the heir, before any judgment obtained against any personal representative, aliens the estate, the creditor subsequently recovering judgment in the usual way can issue a *fi. fa.* lands, and sell the estate, without reference to any right acquired by the heir's alienees.

This is a very grave question, involving as it does the inevitable consequence that title can never be made by an heir or devisee as against any creditor of his ancestor, whether such creditor had or had not proceeded to perfect his claim by judgment, or even instituted any proceeding whatever to notify its existence to the world; and this too, even if the heir were in good faith selling a portion of the realty to pay off debts, as a purchaser would necessarily be at the peril of seeing to the application of the purchase money.

If this be the law, no lawyer could safely advise a client to purchase from an heir. Debts by note or account unheard of for years might start up, and form in fact a direct and specific lien on the estate so sold. Practically the result must be that the ancestor's lands could only be safely alienated under sale by legal process through the sheriff.

Executors and administrators can always in good faith sell the personal chattels, and pass a complete title thereto, subject of course to a full accounting for the value thereof. "It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of the testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, unto the hands of the alienee. The principle is, that an executor or administrator in many cases *must* sell, in order to perform his duty in paying debts, &c., and no one would deal with an executor or administrator if liable afterwards to be called to account."—Williams on Exrs., 5th ed., vol. ii., p. 838-9.

Lord Mansfield says, in *Whale* v. *Booth*, 4 T. R. 625, (note,) "The general rule, both of law and equity, is clear, that an executor may di-

pose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous if it were otherwise. * * It is also clear, that if at the time of alienation the purchaser knows they are assets, this is no evidence of fraud, for all the debts may have been already satisfied; or if he knows they are not all satisfied, must he look to the application of the money? No one would buy on such terms."

The plaintiff's counsel urges, that since 5 Geo. II., ch. 7, and the decisions of our courts thereon, lands must be regarded as chattels for satisfaction of debts, and liable to the like remedies therefor. If we concede this to him, and even carry it a step beyond the doctrine established in *Gardiner* v. *Gardiner*, and hold the lands to be assets in the widest sense of the term in the hands of the executor or administrator, out of which (that is, by sale of which) the latter can satisfy the debt, we would still have to place the lands in a far worse position than pure personalty; as the latter could be certainly sold to raise money to pay debts, and the purchasers hold them by an undoubted title, while the real estate could in practice never be safely realized, subject, as it is urged, to a specific lien to the extent of all unpaid debts.

It is too late to question the doctrine laid down in *Gardiner* v. *Gardiner*, after its universal adoption for thirty years. But we are not bound to go beyond its boundaries, and add another heavy burden to be borne by heirs and devisees, nor do I feel pressed by any difficulty suggested at the bar as to the manner of reaching the real estate, or compelling an accounting from the heir.

The plaintiff relies chiefly on some expressions used by the judges in *Levisconte* v. *Dorland*, 17 U. C. Q B. 437. I do not consider that the point now before us presented in that case. It was there only necessary to decide against an attempt by an administrator to answer the plaintiff's replication of lands and claiming judgment against them, by setting up a mortgage on the land prior to testator's death to its full value, and that the heir at law conveyed it to the administrator (the defendant), who to save costs released the equity of redemption. I concur in the decision against this rejoinder, and think the plaintiff should have had judgment, leaving him to all remedies thereunder.

From an early period our courts have decided that lands are not bound until delivery of execution process against them to the sheriff. I speak not now of the effect of the statutes recently repealed as to registering judgments.

The statute 5 Geo. II., chap. 7, makes no especial provision for suits against personal representatives, heirs or devisees, beyond what they can gather from the words, "lands," &c., "belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may *be assets* for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity," &c., "for seizing, extending, selling or disposing of any such houses," &c., "towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts."

If the statute have, as it were, converted lands into mere personalty for the payment of debts, giving them all the incidents of chattels, then an executor or administrator can deal with them as chattels, and turn them thus into money, and the *bona fide* purchaser acquires indefeasible title thereto. Our courts deny this application of the statute. It remains to be considered if a power of sale remains with the heir or devisee.

The fee cannot, I think, remain in abeyance, but on the death of the ancestor vests at once in the heir-at-law. The latter, I may assume, enters into possession. There is no will speaking of debts or creating any charge on the lands. The heir proposes to sell. A purchaser makes the usual searches in the county registry, finds the title clear, examines the sheriff's office, finds no execution process, causes search to be made for judgments, finds nothing; and then in good faith, knowing of no debts, purchases for value from the heir.

We are now told that if two or three years afterwards a promissory note endorsed by the ancestor be discovered, or any claims be advanced for wages, &c., &c, and a suit be commenced, and judgment ultimately recovered against an executor or administrator, that this land, so sold and in the hands of an innocent purchaser, has been always specifically liable for this debt, and can be sold on execution process on the judgment.

I hope that this will not be found to be the law of the land; and in the absence of any decision on the express point, I must at once express my dissent from any such position.

It is suggested that if the law be not so, then a fraudulent heir may at once by a sale defeat the creditors of his ancestor.

A fraudulent executor or administrator may possibly effect the same injustice; and in the case of executors no security would be forthcoming to redress the wrong. I presume a court of equity has ample powers to interfere when required for the administration of an estate, and if there be any legal difficulty in proceeding at law against an heir, the equity jurisdiction can hardly fail to compel an account.

The difficulty that presses on me is this: Had our courts, when deciding that lands could be sold on a judgment against executors or administrators, advanced a step further, and determined that, as the statute in their judgment made them assets, subject to like remedies and process as personal estates, they could be sold as personalty by the executors, then the remedy would be complete in practice. I think, if I could overcome the first difficulty, which is disposed of by *Gardiner* v. *Gardiner*, and hold that the heir's estate could properly be divested by process in a suit to which he was not a party, I would have felt myself easily drawn to the conclusion that as mere personalty the executor could sell. In *Thomson* v. *Grant*, (1 Russ. 540.) Sir Thomas Plumer says: "The executor's right of retainer over personal property is clear;

and by the act of Geo. II., plantations in Jamaica are converted with respect to the payment of debts, into personal assets, and as such are possessed by the executor. The property is personal assets and in all respects to be administered as such." But see as to this, *Bullen* v. *A'Beckett*, already cited. Such a state of the law would not help the present plaintiff, as if the executors could sell they could make a perfect title.

I concur in the result of the Chief Justice's judgment. The case cited before Sir J. Romilly is much in point. I refer also to *Pim* v. *Insall*, 1 McN. & G. 449, 458, *Re Hamer's Devisees*, 2 DeG. McN. & G. 366.

The statute on which these decisions rest is of course much more explicit in its directions than the 5 Geo. II., ch. 7. But I do not at present see any practical difficulty in our court of equity administering the estate, and fully effectuating the legal rights of the creditors against the lands, just as the English courts act under 3 & 4 Wm. IV.

Morrison, J., concurred.

Rule discharged.

COMMON PLEAS.

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

Reeves v. Eppes.

Issue Books—Practice.

Con. Stat. cap. 22, sec. 203, which enacts that the *nisi prius* record shall be passed and signed, does not supersede the rule of court requiring the service of an issue-book with the notice of trial; and such issue-book must therefore still be served. [C. P. M. T., 1865].

On the 16th of October, 1865, notice of trial for the assizes to be held at Belleville, in and for the county of Hastings, on the 3rd day of November then next, had been served on the defendant's attorney without any issue-book; but on the 2nd day of November the issue was served. It was at once returned with a notice that the defendant would apply to set aside the notice of trial, on the ground that no issue-book had been served with the latter, and that if the plaintiff proceeded with the trial, the defendant would move to set aside the verdict obtained thereat.

The plaintiff did, notwithstanding this notice, take a verdict on the 8th day of November, before the Chief Justice for Upper Canada, in the absence of the defendant.

J. B. Read obtained a rule *nisi* in the Practice Court returnable in this court, calling upon the plaintiff to shew cause why the notice of trial and all the proceedings thereon should not be set aside for irregularity with costs, on the ground that no issue-book had been served therewith, or had been delivered until a day or two before the day of assizes; or why the verdict obtained should not be set aside for irregularity with costs on the grounds above mentioned.

J. A. Boyd shewed cause.—Rule 19 of the rules made in Easter term, 5 Vic., dispensed with the necessity of serving issue-books. Afterwards the 19 Vic. cap. 43, sec. 154, enacted that the *nisi prius* record should not be sealed or passed; but by section 313 the courts were authorised to make new rules for the purpose of carrying the act into effect, in pursuance of which the rules of Trinity term, 1856, were made. By these all former rules were annulled, and rule 33 required issue-books to be served, and gave the forms in the schedule. By 22 Vic. cap. 22, sec. 203, it is enacted that the *nisi prius* record need not be sealed, but shall be passed and signed by the clerk or deputy clerk of the Crown. From the 19 Vic. till the 22 Vic. it was properly required that issue-books should be served, because the defendant had no means of knowing in what shape the record would be made up; but after the passing of the act, 22 Vic. cap. 22, the necessity ceased, for the record could not be returned until passed and signed by the proper officer, and "*cessante ratione, cessat lex*," and therefore there is no necessity for serving the issue-book. He cited *Carruthers* v. *Rykert*, 7 U. C. L. J. 184; *Boulton* v. *Jones*, 10 U. C. L. J. 46; *Harrington* v. *Fall*, 16 U.C.C.P.; *Jones* v. *Elliott*, 1 U. C. L. J. N. S. 156; *Scott* v. *McGregor*, Tay. Rep. 110; *McLean* v. *Nelson*, Rob. & Har. Dig. Tit. "Record;" *Lucas* v. *Peatman*, 7 U. C. Q. B. 20; *Bonter* v. *Pretty*, 9 U. C. C. P. 273; *Jones* v. *Holdsworth*, 16 L. T. 325.

J. B. Read, contra, contended that it was still necessary to serve issue-books. He cited *Skelsey* v. *Manning*, 8 U. C. L. J. 166; *Smith* v. *Jennings*, 9 Dowl. 154; *Doe dem Cotterrill* v. *Wyld*, 2 B. & A. 472; *Codrington* v. *Lloyd*, 8 A. & E. 449; *Combe* v. *Pitt*, 3 Burr. 1682.

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

When the *nisi prius* record was allowed to be made up and entered for trial *ex parte* without being examined and certified by the officer having the custody of the original pleadings, the defendant had no means of knowing whether it had been correctly made up, until it was entered. Hence arose the necessity for having issue-books served with the notice of trial. By our old practice the record was always examined and passed. This the legislature has so far revived as to require it to be passed and signed; but, we think, it did not by implication annul the rule of court requiring the issue-book to be served. We incline the more to this opinion from the fact that by the 313th section of the 19 Vic. cap. 43, which authorised the making of these rules, they were required to be laid before both Houses of Parliament, and had no effect till three months thereafter; but that afterwards they should be of like force and effect as if the provisions contained in them had been expressly enacted by the Parliament of this province. We assume the legislature had these rules in view, and that it was intended to superadd to them *that the record should be passed and signed.* The argument for the plaintiff was based upon the maxim, *cessante ratione legis, cessat ipsa lex;* but this maxim applies to common law, not to statute law, (Dwarris on Statutes), and is not of universal application.

We were asked to grant this rule without costs, if our opinion were adverse to the plaintiff. We have considered this, and think we should not be exercising a wise discretion in allowing the plaintiff to question with impunity a long and well-established practice. On the contrary, we think that if he chose to do it, to

cover or extenuate his own omission, he must take the consequences. We say omission, from the fact that it was not put on the footing he now puts it in the first instance, because he seems to have been impressed with the necessity of serving the issue-book before the trial; for he did serve it, though too late.

The rule will therefore be made absolute, and with costs.

Rule absolute with costs.

Davidson et al v. Reynolds et al.

Exemption Act (23 Vic. c. 25 s. 4, sub-sec. 6)—Horse ordinarily used in debtor's occupation.

A horse ordinarily used in the debtor's occupation, not exceeding in value $60, is a "chattel" within the meaning of the Exemption Act, 23 Vic. cap. 25, sec. 4, sub-sec. 6, and is therefore not liable to seizure for debt.

[C.P., M.T., 1866].

This was an action against the defendant Reynolds, sheriff of the county of Ontario, and his sureties, on their covenant under the statute.

Two breaches were assigned; 1st. That on an execution sued out of the County Court against the goods and chattels of Donald McMillan *et al.*, endorsed to levy $144 72 damages, and $26 for costs and writs, delivered to him in December, 1864, when they had goods, &c., out of which he might have made the money, he did not nor would not levy the money, but made default; 2nd. That on the same writ he did levy the money, but falsely returned that he had levied $5 91, and that the defendants had no more goods and chattels, whereof he could levy the residue or any part thereof.

The cause was tried at the last assizes for the city of Toronto.

The plaintiff's proved that, among other things, the sheriff's bailiff had seized a pair of horses, harness and sleigh, which the defendants in the execution had been using on their farm; that the bailiff had allowed McMillan to drive away the horses on the pretence of finding security, and that he had sold them: the sheriff was unable to produce them. The other goods and chattels brought enough to pay the sheriff's charges and leave $5 91 over.

There were two points in dispute at the trial; 1st. Whether McMillan took the horses away by leave of the plaintiffs or sheriff's bailiff; and, 2nd. Whether one of the horses could not have been selected by the debtors as exempt from seizure, its value with the harness and sleigh not exceeding $60.

The learned judge being of opinion that it was exempt, directed the jury to say, whether it was by plaintiff's leave or by leave of the sheriff that the horses were taken away, and to find the value of the better horse as the damages of the plaintiffs, and also to find the value of the other horse, sleigh and harness. The jury found that it was with the leave of the sheriff's bailiff the horses were driven away, and they assessed damages for the plaintiffs at $75, the value of the best horse, and the value of the other horse, harness and sleigh at $50.

Mc.Michael had leave reserved to move to increase the damages by $50, if the court were of opinion that the horse, not exceeding in value, $60, was not exempt from seizure.

In Michaelmas term a rule *nisi* was accordingly obtained to shew cause why the verdict should not be increased by adding $50 pursuant to leave, on the ground that the articles so valued by the jury were not exempt under the statute.

During the term *Robt. A. Harrison* shewed cause, and contended that a horse was such a chattel as might be exempt from seizure, if ordinarily used in the debtor's occupation, as the evidence fairly shewed this was.

Mc.Michael contended that animals are not within the exemption of the sixth sub-section of the fourth clause of the statute.

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

We are called upon to determine whether this horse was exempt from seizure by the 6th sub-section of section 4 of the 23 Vic. cap. 25. The words are, "Tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of sixty dollars."

We take the word "tool" to mean an instrument of manual operation, particularly those used by farmers and mechanics. We think the word "implement" has a more extensive meaning, including, with tools, utensils of domestic use, instruments of trade and husbandry; but both words, we think, exclude the idea of animals. The word "chattel" has a legal, well-defined meaning, and is more comprehensive than the other two, and includes animals as well as goods movable and immovable, except such as have the nature of freehold. "Chattels personal are horses and other beasts, household stuff," &c.: Co. Lit. 118 b.; Off. Ex. 79, 81.

A horse, ordinarily used in a debtor's occupation, of the value of $60 or under, could properly, we think, have been selected by him out of any larger number as exempt from seizure under this sub-section. The jury have found that the horse, sleigh and harness were of the value of $50, and in regard to amount were within the exemption.

We are of opinion that a horse, ordinarily used in a debtor's occupation, of the value of $60 or less, as this horse was, is a chattel which he might select out of a larger number seized as exempt under this clause of the statute.

The debtor has taken the horse, and so we think he may be held to have selected it, as he had the right to do.

The rule will be discharged.

Rule discharged.

COMMON LAW CHAMBERS.

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

Bank of British North America v. Laughrey et al.

Garnishee proceedings—Service of order in case of foreign insurance companies—Sufficiency of affidavit—C. L. P. A. sec. 288—Stat. 23 Vic., cap. 33.

Held 1. That a debt due by a corporation having its head office in England, cannot be attached by service of the attaching order upon an agent of the corporation in Upper Canada.

Held 2. That Statute 23 Vic., cap. 33, does not extend to the service of attaching orders, but only applies to the service of process, &c.

Semble, that an order to attach should not be granted unless the amount of the debt be in some manner described in the affidavit for the debt, and that at all events, a summons to pay over should not be granted unless the amount be so stated.

[Chambers, July 15, 1865.]

This was an application for an order to pay moneys alleged to be due from the garnishees to the judgment debtors, on policies of insurance.

The attaching orders had been issued by Mr. Justice John Wilson upon an affidavit in each case, made by the attorney for the judgment creditors, to the effect that the garnishees were indebted to the judgment debtors upon policies of insurance against fire, and stating that the garnishees were resident within the jurisdiction of the court.

S. B. Harman, showed cause. He in each case filed an affidavit of F. H. Heward, Esq., the agent of the company in Toronto, in which he swore that the company is an English company, having its head office in Liverpool and not within the jurisdiction of the court. Mr. Harman thereupon contended on the authority of *Lundy* v. *Dickson*, 6 U. C. L. J. 92, that the debt, if any, could not be attached, as there were no means by law provided for the service of the garnishees.

Robt. A. Harrison, supported the summons, and argued that the service upon the Toronto agent of the companies was sufficient, under the C. L. P. A. taken in connection with the Statute 23 Vic., cap. 33, which was passed since the decision of *Lundy* v. *Dickson*. He also argued that the garnishees having at all events appeared by counsel, should not be allowed to take the objection that they had not been properly served, and had thereby waived the irregularity, if any, in the service, referring to *Ward* v. *Vance*, *Thompson*, garnishee, 9 U. C. L. J., 214.

Morrison, J.—In the case of *Lundy* v. *Dickson*, Sir John Robinson held that where the garnishee is a foreign corporation, service of an attaching order on an agent in Upper Canada of the corporation, is insufficient to bind the company; The C. L. P. A. only authorising the service of a writ of summons upon the agent of a foreign corporation, for the purpose of commencing an action. But Mr. Harrison contended that under the provisions of Statute 23 Vic., ch. 33, sec. 7, passed after the C. L. P. A., the service in this case is one binding upon the company; and that if not within the letter of the statute, such a service is within the spirit and intention of it.

Whatever may have been the intention of the Legislature, the act itself does not extend the provisions of the C. L. P. A.; but in the case of foreign insurance companies, it appears to me, rather restricts the service of process upon such corporations, to certain cases.

The 5th clause enacts that before any such (foreign) insurance company shall transact any business, it shall file (if transacting business in Upper Canada) in one of the Superior Courts a copy of its charter and power of attorney to its principal agent or manager under its seal and signed by the president and secretary and verified by the oath of the agent or manager; which power must expressly authorise such agent, manager or sub-agent, as to risks taken by such agent to receive process in all suits and proceedings against such company in this Province, for any liability incurred herein, and must declare that service of process on the agent, for such liability, shall be legal and binding to all intents and purposes, and waiving all claims of error by reason of such service.

The 6th sec. enacts that after a copy of such charter and such power are filed, any process in any suit or proceeding against the company, for any liability incurred in this Province, may be served upon such manager, &c., in the same manner as process upon the proper officer of any company incorporated in this Province, and proceed to judgment and execution, &c.

Under these provisions, which are solely applicable to fire insurance companies not incorporated within the limits of this Province, the only service, it seems to me, authorised upon their agents, is that of process in certain actions and under certain circumstances, and in my opinion, these clauses cannot be extended to the service of a garnishee order and summons.

I note that in the affidavits upon which my brother Wilson granted the attaching orders, the attorney for the plaintiffs swears that the company is within the jurisdiction of this court; which statement was essential to their obtaining the orders. The ground for that allegation is not stated in either of the affidavits. On the other hand, the agent, Mr. Heward, upon whom the attaching orders were served, swears that the company is an English one, having its head office in Liverpool, England, and not within the jurisdiction of this court; and on the argument it was not really disputed that the company is as described by Mr. Heward.

I may also remark that the amount of the debt alleged to be due by the company, is not stated in the affidavits upon which the attaching orders were granted. Each affidavit merely states that the company was indebted to the judgment debtor upon a policy of insurance against fire. Neither affidavit states the amount of the insurance, nor that the property insured was destroyed by fire, nor that any adjustment took place, &c. I am rather inclined to think, that upon such an affidavit, the order ought not to have been made, at least the summons to pay over should not have been granted. Richards, J., in *Melbourne* v. *Tulloch*, 3 U. C. L. J. 184, refused to grant a summons to pay over, where the amount was not stated.

I am of opinion that the attaching orders should be rescinded, and the summons discharged with costs.

Order accordingly.

Robinson v. Shields.

Set-off of judgments—One in Superior Court and the other in a Division Court—Allowed.

Held, that a judgment in a Division Court may be set off and allowed against the judgment of a Superior Court of Record.

[Chambers, July 19, 1865.]

C. McMichael obtained a summons calling on the plaintiff, his attorney or agent, to shew cause why satisfaction should not be entered on the roll in this action to the amount of $108.97, being the amount of certain judgment for $100

damages, and $8.97 costs, recovered in the Eleventh Division Court for the United Counties of York and Peel against the said plaintiff Robinson by the said defendant Shields, the above defendant entering satisfaction or giving receipt therefore upon grounds disclosed in papers and affidavit filed.

The only affidavit filed was that of the defendant, in which he swore that he did, on the 18th day of May last past, recover against the above named plaintiff a judgment for the sum of $100, and costs of suit, which said costs amount to $8.97 cents, in the Eleventh Division Court for the United Counties of York and Peel; that on the said 18th day of May a writ of execution upon the said judgment was duly issued out of the said Division Court by the clerk thereof, which said writ was directed to Robert Broddy, a bailiff of said court, and commanded him to levy the sum of $108.97, damages and costs, of the goods and chattels of the said defendant; that on the 19th day of the said month of May, the said bailiff returned the said writ of execution *nulla bona*; that the above named plaintiff in this cause recovered a judgment of this Honorable Court on the 3rd day of July, 1865, against deponent for the sum of $468.49, damages and costs; that deponent was desirous of setting off against the plaintiff's judgment in this cause the said judgment recovered by deponent in the Division Court; that if not allowed to set off the said judgment against the plaintiff's judgment herein, that he, deponent, would lose the whole amount of said judgment; that no part of said judgment and costs recovered in said Division Court had been paid.

Robert A. Harrison showed cause and contended that as Division Courts are not Courts of Record, a judgment in a Division Court cannot be set off against a judgment in a Superior Court of Record.

D. McMichael supported the summons, and argued that the right invoked is an equitable one, and ought to be allowed without reference to the question whether or not the judgments proposed to be set off were judgments of Courts of Record. He referred to *Harrison* v. *Bainbridge*, 2 B. & C. 800.

Richards, C. J.—I am told there is no precedent for this application, still I think it must be granted. The right to set off judgments is an application to the equitable jurisdiction of the Court, and in a case like the present ought to be admitted. No question arises here as to the attorney's lien. The summons, therefore, will be absolute.

Summons absolute.

Cunningham v. Cook et al.

Trespass qu. cl. fr.—Injunction—When to be granted—When refused.

The plaintiff's claim to a writ of injunction in trespass to realty can only be supported on his showing a legal right to the premises in question, that the defendants are infringing that right, and that the remedy which he could obtain by judgment and execution in the suit would be inadequate, as, in the meantime, great, if not irreparable injury might, and probably would be done to his, the plaintiff's property.

Where defendants, in answer to an application for an injunction, showed a decree in Chancery and a vesting order displacing the only right plaintiff set up as the foundation of his application for the writ, his summons was discharged with costs.

[Chambers, August 2, 1865.]

On the 23rd day of May, 1865, the plaintiff issued a writ of summons out of the Court of Common Pleas against the defendants, commanding them to enter an appearance in the said Court at the suit of the plaintiff.

It was endorsed that the plaintiff claimed one hundred pounds damages, and one pound five shillings costs, and also that the plaintiff intended to claim a writ of injunction to restrain the defendants from removing the earth and stones from off lot number six in Oliver's survey in the town of Guelph, in the county of Wellington, being the lands and tenements of the plaintiff, and from committing any further waste or spoil thereon, and that in default of defendants' appearing, the plaintiff might besides proceeding to judgment and execution for damages and costs, apply for and obtain such writ.

By an endorsement on this writ it appeared that all the defendants except Cook and Oak were served by the plaintiff with the writ on the 25th of May, and Oak on the 27th of May. The service was abandoned, and on the 7th of June all the defendants except Cook were served by James Cunningham, and Cook was served on that day by the plaintiff.

On the 25th of July, 1865, the plaintiff in person obtained a summons returnable on Tuesday the 1st of August, calling on the defendants to shew cause why a writ of injunction should not issue to restrain them from the commission of all acts of trespass on lot number six in Oliver's survey in the town of Guelph, in respect of which this action is brought.

This was granted on an affidavit of the plaintiff's originally sworn on the 25th of July; but being defective in the description or addition of the deponents, was allowed to be resworn, and the case to proceed as if originally right.

In this affidavit the plaintiff swore that in 1856 he purchased a house and a quarter of an acre of land in the town of Guelph, being number six, Oliver's survey, from Michael Allen, and "*ever since remained in possession* of said lot, save and except about eighteen months the said lot was in possession of my daughter Elizabeth." That some time in March, 1862, he again became the owner of the said lot.

That in October, 1863, the said lot was sold by order of the Court of Chancery for a debt claimed as due to Buchanan, Harris & Co., and the lot was purchased by one Watson for the *plaintiff's* (meaning it is presumed plaintiff in the Chancery suit) executors, but Isaac Buchanan, the managing executor of Buchanan, Harris & Co., "told me," (the plaintiff) that unless he got a clear title he was not compelled to take it or pay for it.

The affidavit then stated that a vesting order was applied for in the Court of Chancery; that the Chancellor stated that if he granted a vesting order he could not grant a title deed, as he considered Allan was the person to grant that; that no judgment was given in plaintiff's hearing on that occasion, and plaintiff had never since heard of his granting any order, and had never been served with any such order.

That on the 22nd of May last, plaintiff found defendants Pearson and *Robert* (should be George) Oaks quarrying stones on the said lot, and they told him that defendant Emslie had set them there, which defendant Emslie confirmed, and said that he bought the lot for his father-in-law, John Cook, who is another of the *plaintiffs* (should be defendants) in this cause, and that he was agent for Cook, and immediately after defendant Kaye claimed to be agent for Cook, and helped to commit the trespass on the lot, and helped to commit a trespass on the lot above mentioned.

That on the 7th of June last the plaintiff was speaking to Cook, one of the said *plaintiffs* (should be defendants), and he denied having purchased the lot or ordered the trespass, and said no person had ever acquainted him about the purchase or the trespass.

Plaintiff represented all the defendants as poor and some of them insolvent, and swore that taking them altogether, although they might have plenty of time to remove all the earth and quarried stones off the said lot, he (plaintiff) would not be in a position after the assizes at Guelph to get his costs without damages; that Emslie and others of the defendants still continue damaging the said lot, and unless prevented by injunction they would do more injury than plaintiff could collect from them on recovering judgment.

The plaintiff also swore that he believed defendant Emslie, (when he should have the stones all quarried and sold) intended to go to the United States.

In reply the plaintiffs put in a vesting order entitled evidently in the cause and causes to which the plaintiff in the first paragraph of his affidavit refers, dated the 2nd of June, 1864, "Upon the application of the plaintiff, Isaac Buchanan, the purchaser of the lands hereinafter mentioned, in the presence of the defendant John Thomas Cunningham in person, it is ordered that the parcel of land and premises situate in the town of Guelph, being composed of town lot number six, being part of the subdivision of lot D, division A, according to a map thereof filed in the registry office of the county of Wellington, is hereby vested in the said Isaac Buchanan, his heirs and assigns for ever, for all the estate, right, title, and interest of the defendants therein and thereto.

The present plaintiff and William Reilly are two of the defendants named in the entitling of the order.

The defendants have filed affidavits, 1st. Of Alexander J. Cattanach, Esq., stating that Buchanan, Harris & Co., for the purpose of setting aside a conveyance of the lands and premises referred to in plaintiff's affidavit, which had been made by plaintiff to one Reilly his son-in-law, as fraudulent and void against creditors. On the 8th of March, 1862, a decree was made declaring that the said conveyance should be set aside, and such proceedings were thereupon had, that the said lands were sold for the payment of the claims of Buchanan, Harris & Co., and other creditors of the plaintiff, and were bought by Isaac Buchanan. Application was then made to the Chancellor for an order vesting these lands in the purchaser, and the present plaintiff was served with notice of the application, and he appeared and opposed it on the ground that Reilly was entitled to compensation for improvements. Reilly's solicitor, though also served with notice, did not appear. To this affidavit was attached an agreement dated the 5th of September, 1864, executed by Isaac Buchanan and by the plaintiff, which, however, need not be further noticed.

2nd. Of Donald Guthrie, Esq., stating that the lot six Oliver's survey, Guelph, was, under a decree in Chancery in a cause of Buchanan against Reilly, the plaintiff, and others, sold by public auction, and purchased on the behalf of said Isaac Buchanan, who subsequently obtained the vesting order above set out; that about the 15th of May last, the said Reilly, who had for some time been in possession of the said lot by tenants, and in receipt of the rents, delivered, in pursuance of the vesting order, to the deponent, as attorney for Isaac Buchanan, the key of the dwelling-house on the lot, which key deponent delivered the same day to the defendant Kaye as agent for the defendant Cook, who had agreed to purchase the interest of Isaac Buchanan in the lot, and as deponent was informed and believed, Kaye put the defendant Emslie in possession; and that Buchanan had deeded his interest in the lot to Cook.

3rd. Affidavit of Emslie confirming the statement of his being put into possession by Kaye, and stating that the house and lot were unoccupied when he took possession and that whatever the defendant Ellen Oak and Pearson did on the lot was by his (Emslie's) orders. He denied any intention of leaving Canada.

4th. Affidavit of Kaye corroborating the foregoing statements.

N. Kingsmill shewed cause.

Plaintiff in person supported the summons.

Draper, C. J.—The plaintiff's claim to the writ of injunction can only be supported on his shewing a legal right to the premises in question, and that the defendants are infringing that right, and that the remedy which he could obtain by judgment and execution in the suit would be inadequate, as in the meantime, great, if not irreparable injury might, and probably would be done to his (the plaintiff's) property.

The plaintiff apparently sues for an injury to his possessory right in this land, asserting a purchase (not a title deed) and a long possession thereunder, though broken by an interval of 18 months, and that subsequently he again became owner of the lot.

Coupling the statements contained in the first paragraph of his affidavit with those in the affidavits Nos. 1 and 2, filed for defendants, I gather that the eighteen months excepted by him elapsed after he had given the conveyance to his son-in-law Reilly, which conveyance was set aside as fraudulent as against creditors.

I should not be surprised to find that plaintiff's daughter Elizabeth was wife of Reilly, nor that the plaintiff imagined that the effect of setting aside the conveyance to Reilly was to revest the title in himself generally, instead of its operating only to prevent Reilly's title so derived from interfering with the satisfaction of plaintiff's creditors.

However this may be, the decree and vesting order deprive plaintiff of such legal right as he must shew to entitle him to an injunction, by displacing the only right he set up as the foundation of his application for that writ, and this makes it unnecessary to consider other and formidable objections to his succeeding.

Summons discharged, with costs.

See *Bacon* v. *Jones*, 4 M. & Cr. 433-6; *Attorney-General* v. *The Sheffield Consumers' Gas Co.*, 17 Jur. 677; *Dalgleish* v. *Jarvis*, 2 McN. & Gord. 231; *Gillings* v. *Symes*, 15 C. B. 362; *Hill* v. *Thompson*, 3 Mer. 622; *Spottiswoode* v. *Clark*, 2 Phil. 154; *Stephens* v. *Keating*, *Ib.* 333; *In re Birmingham Canal Co.*, 18 Ves. 515; *Barker* v. *North Staffordshire Railway Co.*, 12 Jur. 589.

Roszel v. Strong.

Bail—Exoneretur—Sufficiency of surrender—Power of judge in Chambers.

Held, 1. That under the C. L. P. A., s. 37, a judge in Chambers has no power to order an *exoneretur* to be entered on a bail piece unless he be "a judge of the Court in which the action is pending."

Held, 2. That a surrender made to the sheriff elsewhere than at the goal, so long as within the limits of his county, is sufficient for the purposes of that section.

[Chambers, August 24, 1865.]

Robert A. Harrison, on behalf of Eli Robins and Mathias Robins, special bail for the defendant in this cause, obtained a summons on reading a copy of the bail piece, certified by the clerk of the court having the custody thereof, the certificate of surrender under the hand and seal of office of the sheriff of the county of Lincoln, the affidavit of service of due notice to the plaintiff's attorney of such surrender, and other affidavits and papers filed calling on the plaintiff to show cause why an *exoneretur* should not be entered on the bail piece, and why thereupon the said bail should not be discharged, and why the proceedings, if any, in the action commenced by plaintiff against the bail, should not be stayed on payment of the costs of the writ and service thereof.

It appeared that the original action was commenced in the Court of Common Pleas; that defendant was arrested, and that on the 24th of October he put in special bail; that the special bail afterwards surrendered him to the sheriff of the county of Lincoln at St. Catharines; that the sheriff proceeded from Niagara, where the goal is situate, to St. Catharines, at the request of the bail, for the purpose of receiving their principal into custody, and that subsequent to the surrender the sheriff took fresh bail for defendant; and that an action had been commenced against the bail, and writ had been served.

W. Atkinson showed cause, and argued that no legal surrender was shewn; that the sheriff could not legally accept a debtor in discharge of bail elsewhere than at the county gaol, and that the bail, therefore, were not discharged, and so not entitled to an *exoneretur*. He referred to statutes 2 Geo. IV., cap. 1, s. 12; 4 Wm. IV., cap. 5, s. 1; 8 Vic., cap. 13, s 27; Con. Stat. U. C., cap. 24, s. 34; and to *Linley* v. *Cheeseman*, Dra. Rep. 55; *Blackman* v. *O'Gorman*, 5 U. C. L. J. 161.

Robert A. Harrison supported the summons, contending that the statute now in force (Con. Stat. U. C., cap. 22, s. 37) did not require the surrender to be at any particular place in the sheriff's bailwick in order to be valid; that the sheriff might refuse to receive the body of the debtor elsewhere than at the gaol, but that if he see fit to waive that privilege the surrender is in all respects valid, and if so, there is nothing to prevent the sheriff accepting fresh bail, or even permitting a voluntary escape, in which event, though the sheriff might be liable, the bail would still be discharged.

The summons was first argued before Draper, C. J., who on consideration declined to adjudicate, on the ground that he was not "a judge of the Court (C. P.) in which the action was pending, within the meaning of s. 37 of Con. Stat. U. C., cap. 22.

It was afterwards argued before Richards, C. J. (C. P.), who held the surrender sufficient, and made the summons absolute.

CHANCERY.

Re Hamilton.

Application by legatee to administer estate of deceased—General Order XV.—Notice of motion not referring to affidavits filed.

[December 18, 1865.]

This was an application under No. XV. of General Orders of 3rd June, 1853, on behalf of a legatee under the will of the deceased, for an order for the administration of the testator's estate.

Downey, for the executors, objected that the notice of motion did not shew that any affidavit had been filed.

Osler, *contra*, urged that under the wording of the General Order above referred to, and the form of notice of motion as given in schedule H to said order, it would appear that the order is to be granted on proof by affidavit of the service of the notice of motion, and on proof by affidavit of such other matter (if any) as the Court may require, and contended that it was therefore unnecessary to file any affidavit before serving the notice of motion.

Mowat, V. C.—On the day following said, that the practice of filing an affidavit or affidavits and referring thereto in the notice of motion was too firmly established to admit of alteration. The motion was therefore refused with costs.

Order accordingly.

ENGLISH REPORTS.

(*From Weekly Reporter.*)

CHANCERY.

Low v. Routledge.

Copyright—Alien—Colony, laws of—Residence.

An alien friend, coming into a British colony and residing there for the purpose of acquiring copyright during and at the time of the publication in England of a work composed by him, and first published in this country, is entitled to copyright in England in the work so published, though he may not, under the laws in force in the colony where he is residing, be entitled to copyright there.

An alien, coming into a British colony, becomes temporarily a subject of the Crown; he thus acquires rights both within and beyond the colony, and the latter cannot be affected by the laws of the colony into which he comes. [L. J., Nov. 10, 24, 1865.]

This was a suit by which an injunction was sought to restrain the defendants from publishing or selling any copies of a book called "Haunted Hearts," in which the plaintiffs claimed the copyright.

A bill having the same object was filed by the plaintiffs on the 17th of June, 1864, a demurrer to which was, on the 18th of July, 1864, allowed by Vice-Chancellor Kindersley, on the ground that in the entry of the proprietorship of the book in question, in the register at Stationer's-hall, the name of the plaintiff's firm was different from the name given in the bill; and that in the same entry the date of publication of the book was untruly stated. On this occasion his Honour expressed a strong opinion in favour of the plaintiffs, on the main question in that, as well as in the present case, viz, whether an alien resident in Canada, for the purpose of acquiring copyright, can acquire copyright in a work published by him in England. This decision is reported 12 W. R. 1069, where the facts of the case will be found.

On the 2nd of March, 1865, Vice-Chancellor Kindersley, on the motion of the plaintiffs, granted an interlocutory injunction in the terms asked by the bill. From this order the defendants appealed to the Lords Justices, but their Lordships desired that the appeal motion might stand over until the hearing of the cause, which they permitted to be brought on in the first instance before themselves.

The cause, therefore, now came on before their Lordships on motion for decree, and on appeal motion.

Bailey, Q. C., and *Hardy*, for the plaintiffs — The case is governed by *Jeffreys* v. *Boosey*, *infrà*. Unless it is held that actual domicil is required to give an alien power of acquiring copyright in this country, any period of residence in the British dominions, however short, and with whatever intention, will be sufficient to satisfy the requirements of the Copyright Acts. An alien coming to this country owes temporary allegiance to its Sovereign, and this is a sufficient ground for the right; the circumstance that an author comes into the British dominions solely with a view of acquiring copyright makes no difference in the nature of his temporary allegiance or its consequences; he must obey the laws of this country while here, and he must consequently have the benefit of those laws.

The Acts of the Canadian Legislature cannot affect a right in this country, though they might operate to exclude the work from Canadian copyright. The authorities show that the courts here have protected the foreign copyright of books published here by foreigners resident abroad; and if the defendant's argument is to prevail, a foreigner pulishing a work abroad would be in a better position than if he came here and published it. The International Copyright Acts regard only two classes of works, viz., those published abroad and those published in this country; they take no cognizance of the author or his residence.

Shayter, Q. C., and *Schomberg*, for the defendants.—The authoress has clearly no copyright in Canada, under the Canadian Copyright Act, 4 & 5 Vict. c. 61 (Canada). The 5 & 6 Vict. c. 25, does not apply to Canada, because at the time of passing that act that colony had an independent legislature. The 3 & 4 Vict. c. 35, which confers a legislature upon Canada, provides that it shall enact laws not being repugnant to an act of Parliament made or to be made; but these words, "to be made," can only be taken to extend to the acts of the Imperial Parliament in existence from time to time at the date of the Canadian enactment. The spirit of prophecy is not to be attributed to the Canadian legislature. The English Copyright Act could not repeal by a side wind the Canadian Copyright Act passed the year before. The general words, "all colonies," in the interpretation clause of the English Copyright Act do not include a colony to which the term did not, at the passing of the Act, strictly apply, by reason of its having an independent legislature. The authoress of this book is therefore in the same position as a foreigner publishing in this country; the rights of an alien, by the common law, are merely to hold personal property, and to protection; but he can claim no permanent or statutory right, such as copyright. The authoress in this case claims not merely the temporary protection of the law, but all the privileges of a Canadian born.

Bailey, Q. C., in reply.—If a Canadian born were to publish a book in England while residing in Canada, he would unquestiably have copyright here; our case is precisely similar. Again, we can surely be in no worse position than a foreigner coming over to England for the purpose of publication. Though the authoress might have no copyright in Canada, she is as much under the allegiance of the Crown there as if she were in England, and is therefore entitled to all the rights of a British subject.

The following authorities and statutes were referred to:—*Delondre* v. *Shaw*, 2 Sim. 237; *D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 288; *Bentley* v. *Foster*, 10 Sim. 329; *Cocks* v. *Purday*, 5 C. B. 860; *Ollendorff* v. *Black*, 4 De G. & Sm. 209; *Buxton* v. *James*, 5 De G. & Sm. 80; *Boosey* v. *Davidson*, 13 Q. B. 257; *Chappel* v. *Purday*, 14 M. & W. 303; *Boosey* v. *Purday*, 4 Ex. 145; *Boosey* v. *Jeffreys*, 6 Ex. 580; *Jeffreys* v. *Boosey*, 4 Ho. Lds. Cas. 815; *Calvin's case*, 7 Rep. 1; *Donegani* v. *Donegani*, 3 Knapp. 63; *Adam's case*, 1 Moo. P. C. 460; *Boucicault* v. *Delafield*, 1 H. & M. 597, 12 W. R. 101; *Brook* v. *Brook*, 6 W. R. 110, 751, 3 Sm. & G. 481; *Hope* v. *Hope*, 5 W. R. 287, 8 D. M. G. 743. 8 Anne, c. 19; 3 & 4 Vict. c. 61 (Canada); 5 & 6 Vict. c. 45 (Copyright Act); 1 & 2 Vict. c. 59; 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12 (International Copyright Act); 28 & 29 Vict. c. 63. Phillips's Law of Copyright, Appendix; 1 Blackstone's Comm. 269; Thomas's Universal Jurisprudence, 340.

Nov. 24.—Turner, L. J.—The sole question we have to determine is whether an alien friend coming into one of the British colonies (in this case into Canada), and residing there during and at the time of the publication in this country of a work composed by the alien, and first published in this country, is entitled to copyright in this

country in the work so published. This question depends upon the statute 5 & 6 Vict. c. 45, ss. 2, 8 & 29. [His Lordship read them]. Looking to these sections, there can, I think, be no doubt the provisions of this statute extend to Canada, and if this be so, it is obviously very difficult to say that an author in Canada is not entitled to the benefits given by the statute. The meaning of the word "author" is in no way limited by the statute, and on the contrary the provisions of the statute favour the most extended constructions of that word. The sixth section more especially favours this extended construction; it provides for the delivery for the use of the British Museum of a printed copy of every book within one month after the day on which the book shall first be published within the bills of mortality, or within three months if the book shall first be published in any other part of the United Kingdom, or within twelve months after it shall first be published in any other part of the British dominions, thus evidencing that books published in any part of the British dominions were intended to fall within the provisions of the statute. It was said, however, for the defendants, that the same word "author," which is contained in this statute was also contained in the statute of Anne, the first copyright statute, and that strong opinions were expressed by the judges and by the Law Lords in the House of Lords in the case of *Jeffreys* v. *Boosey*, that the word "author" in the statute of Anne means an author resident in England at the time of publication, and that the same construction ought to be given to the word "author" in 5 & 6 Vict. c. 45, now under our consideration. But there is no provision in the statute of Anne that the statute shall extend to the colonies: in the Act we are now considering it is expressly so provided.

Several other arguments were also urged on the part of the defendants. It was first said that the statute now in question does not extend to colonies like Canada having legislatures of their own. I have not, however, any doubt whatever on this point. The word "colonies" in the statute must extend to all colonies in the absence of a context to control it, and I can find no such context. A more plausible argument on the part of the defendants was this. It was said—and I assume it for the purposes of the argument, and for that purpose only—that by a Canadian statute an alien coming into Canada for the purpose of publishing a work, and publishing there, would not be entitled to copyright in Canada in the work so published; and it was insisted that an alien coming into Canada would acquire only such rights as are given by the law of Canada, and would not therefore be entitled to copyright; and some cases were cited in support of this argument. On examining these cases, however, they will be found to decide no more than this—that, as to aliens coming within the British colonies, their civil rights within the colonies depend upon the colonial laws; they decide nothing as to the civil rights of aliens beyond the limits of the colonies. This argument on the part of the defendants is, in truth, founded on the confusion between the rights of an alien as a subject of the colony and his rights as a subject of the Crown. Every alien coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects. He has obligations and rights, both within and beyond the colony into which he comes. As to the rights within the colony, he may well be bound by its laws, but as to his rights beyond the colony he cannot be affected by those laws, for the law of a colony cannot extend beyond its territorial limits. Now in this case the question is not what were or are their rights in this country; and the law of this country leaves no doubt upon that question. By the 25th section of 5 & 6 Vict. c. 45, it is enacted that all copyright shall be deemed to be personal property; and in *Calvin's case* it was decided that an alien friend may, by the common law, have, acquire, or get, within this realm, by gift, trade, or other lawful means, any treasure or goods personal whatsoever as an Englishman, and may maintain any action for the same. That case, I think, is in all respects applicable to the case before us, and I agree, therefore, in the opinion of the Vice-Chancellor, and think that the motion to dissolve the injunction must be refused with costs, and that there must be a decree according to the prayer of the bill, with costs to be paid by the defendants.

Knight Bruce, L.J.—I am of the same opinion.

COURT OF EXCHEQUER.

Miller v. Biddle.

Promissory note—3 & 4 *Ann*, c. 9—*Days of grace.*

A note was made in favour of A. B. simply, and not either to order or bearer. It was payable by instalments, the whole amount to become payable upon default in payment of the first instalment.

Held, (per Bramwell, Channell, and Pigott, BB., Pollock, C.B., dissentiente), that the note was a promissory note within the statute of Ann, and that days of grace must be allowed upon the first instalment.

[Nov. 16, 18, 1865.]

This was an action upon a note, and was tried in the Mayor's Court before the Recorder of London. The note was in the following form:—

"£260 London, 22nd January, 1865.

"We jointly and severally promise to pay to Henry Miller, Esq., the sum of £260 by the following instalments, namely, the sum of £130 on the 22nd day of May, 1865, and the sum of £130 on the 22nd day of August, 1865. In default of payment of the first instalment the whole amount payable under this note to become due and payable.

"C. Madder,
"W. Biddle"

The writ in this action was issued on the 23rd of May, for the whole amount of the note. The Recorder directed a verdict for the defendants, on the ground that they were entitled to three days of grace from the 22nd of May, but reserved leave to move to enter a verdict for the plaintiff, if the court should be of opinion that days of grace ought not to be allowed.

Philbrick in this term obtained a rule *nisi* accordingly.

Warton now shewed cause.—The defendants are entitled to days of grace on each instalment

It makes no difference that the note is not payable to order or bearer: *Smith* v. *Kendal*, 6 T.R. 123; nor that it is payable by instalments; *Oridge* v. *Sherborne*, 11 M. & W. 374; nor that the whole becomes due on default: *Carlow* v. *Kinealy*, 12 M. & W. 139. Even if this be not so, and the whole amount became payable by default on the 22nd of May, the defendants are then entitled to days of grace upon the whole. He cited also *Rawlinson* v. *Stone*, 3 Wills. 4; *Bentley* v. *Northouse*, M. & M. 66; *Milne* v. *Graham*, 1 B. & C. 192; *Hill* v. *Lewis*, 1 Salk. 132; *Brown* v. *Harradan*, 4 T. R. 148, Byles on Bills, 191n.

Keane, Q. C., (*Philbrick* with him), in reply.—This is not a promissory note within the statute. A promissory note must be for the payment of a sum certain; and this is not so. but a promise to pay one of two different sums according to circumstances: *Carlos* v. *Fancourt*, 5 T. R. 482.

Cur. adv. vult.

Nov. 18.—Pollock, C.B., now delivered the judgment of the court.*—This case was tried before the Recorder of London, when a verdict was found for the defendants. The question arose on a promissory note, not made payable to bearer or to order, but simply to Miller; which note was to be paid by instalments, with the condition that if any instalment was not paid upon the day when it was due, the whole should immediately become payable. The court granted a rule to shew cause in ignorance that there is a case of *Carlow* v. *Kinealy*, (*ubi supra*), which, in their opinion, decides the express point. That decided that a promissory note payable by instalments, subject to a condition that on default being made in payment of the first instalment, the whole amount should become immediately payable, is within the statute of Ann, and negotiable. A prior case (*Oridge* v. *Sherborne*, *ubi supra*) had decided that a promissory note, made payable by instalments, is within the statute, and that the maker is entitled to days of grace, where the note is negotiable. Upon the authority of these cases the majority of the court are of opinion that this rule should be discharged. As I dissent from view, I think it my duty to express my dissent for the purpose of giving the parties a right to appeal. The statute of Ann, in my opinion, applies to negotiable instruments only, and I think there is a great difference between holding that a negotiable instrument falls within the provisions of that statute, and holding that the same rule applies to an instrument not negotiable. Moreover, I observe that the court, in *Carlow* v. *Kinealy*, considered that the point before them had been decided by *Oridge* v. *Sherborne;* but I am of opinion that that was not so. If it had been I think those cases would have been binding, but in my opinion we are not justified in deciding on the authority of those cases. I am very much inclined to believe that the opinion of Lord Kenyon (*Smith* v. *Kendal*, *ubi supra*) is the correct one, and that this is a mere contract, and that the statute applies only to negotiable instruments. Then we have been referred to the custom of merchants, but the custom of merchants has nothing to do with a mere contract; if it had, every case would have to be decided according to it. But I doubt whether there is any custom of merchants relating to a bill drawn in such a way that in default in payment of one instalment the whole becomes due. The statute of Ann was passed to apply the custom of merchants to promissory notes; but in such a case there is no custom to apply. For these reasons I dissent from the opinion of the court. That dissent will not operate, but I do my duty in expressing that dissent, and having done so I pronounce the judgment of the court that this rule be discharged.

Rule discharged.

* Pollock, C.B., Bramwell, Channel, and Pigott, BB.

UNITED STATES REPORTS.

DISTRICT COURT OF THE U. S. FOR THE NORTHERN DISTRICT OF NEW YORK.

In Admiralty.

Councer v. The Steam-tug "A. L. Griffin," &c.

A libel for the loss of a vessel on the Canadian shore of Niagara river, having been referred to a master, he reported that at the time of the loss the vessel was *worth* a certain sum of "dollars in gold, or Canadian currency," and that gold or Canadian currency was at such time, at a premium of forty-nine per cent. over United States legal tender notes. *Held*, that the value being reported at a certain sum in foreign currency, the damages were to be estimated at the value of that sum in United States notes and the use of the word "gold" in connection with Canadian currency did not require any different rule than would have been applied had the value been stated in the foreign currency alone.

This action was brought to recover the damages sustained by the libellant in the loss of the scow "Andrew Murray," on the Niagara river at the mouth of Chippawa Creek, in Canada West, on the 14th day of December, 1863.

After the hearing, upon pleadings and proofs, an interlocutory decree was made, referring it to a commissioner "to take the necessary proofs, and report the amount of damage which the libellant had sustained by reason of the loss of his scow," &c. In pursuance of such decree of reference, the Commissioner reported "that on the 14th day of December, 1863—on which day the said scow 'Andrew Murray' was lost—she, the said scow 'Andrew Murray,' was worth, including equipments, at Chippawa, the sum of nine hundred and fifty dollars in gold, or Canadian currency, and that the interest on nine hundred and fifty dollars from the 14th day of December, 1863, to and including the date of this report, is the sum of forty-three dollars and forty-three cents," and also, "that on the 14th day of December, 1863, gold, or Canadian currency, was at a premium in the city of Buffalo of forty-nine per cent. over United States legal tender notes." The Commissioner's report was dated on the 24th of July last.

Upon the coming in of this report, it was insisted by the counsel for the libellant that, in estimating the damages of the libellant, the forty-nine per cent. reported by the Commissioner as the difference between Canadian currency and United States legal tender notes should be added to the value of the property

lost, and the interest on that value as reported by the Commissioner; while the counsel for the respondent insisted that, by the Act of Congress, the dollar of the U. S. legal tender note was in law the exact equivalent of the gold dollar, and that therefore the premium reported and claimed could not be allowed.

G. B. Hibbard for libellant.

A. P. Nichols for respondent.

The opinion of the court was delivered by

Hall, D. J.—The Commissioner has reported the value of the property lost, and not the amount of the libellant's damages; and the value thus reported he states to be the value in Canadian currency or gold, at the time and place of the loss—that is, at the mouth of Chippawa creek, in Canada, in December, 1863. The report also shows, or rather assumes, that Canadian currency and gold were of equal value; and states that both of them then bore a premium of 49 per cent. in this city. The report shows in substance that the value of the scow, at the time and place of the loss, was $950, in the currency of Canada, and that the dollar of Canadian currency was then worth $1.49 in the currency which then was and now is the universal if not the legal standard of value in the United States.

Whether this currency is or is not the present legal standard of value it is not necessary now to inquire, for the counsel for the libellant and the counsel for the respondent alike assumed, as the basis of their respective arguments, that the decree in this case might be legally paid in the United States legal-tender notes, and that the libellant could not require its payment in the gold and silver coins which formerly constituted the only legal tender money of the United States. *Consensus facit legem.*

Assuming, then, that the decree in this case may be discharged by the actual offer, in proper form, of United States legal-tender notes in payment, the question is how, upon the Commissioner's report, the damages of the libellant are to be computed? In thus stating the question I intend to avoid the discussion, in detail, of the several exceptions taken to the Commissioner's report, for such exceptions relate, in form at least, to that portion of the report which states the value of the libellant's scow at the time and place of loss, and not to the fact that the Commissioner has not reported in direct terms the amount of the libellant's damages.

The report does not state the actual damages of the libellant, but simply furnishes the *data* upon which those damages can be computed according to the rule of damages or computation which may be adopted by the Court.

It assumes that the proper measure of damages for the loss referred to, is the actual value of the property lost at the time and place of the loss, with legal interest, and then states that value in Canadian currency, and computes interest thereon. The use of the word "gold" in connection with "Canadian currency" although the American gold dollar may in fact have been in the contemplation of the Commissioner, does not require that any effect should be given to the report, which would not have been required if the value had been stated in "Canadian currency" only.

Canadian currency is a foreign currency; and though the Canadians use the term dollar as the designation of the unit of their currency, as we do in reference to our own currency, it does not legally or necessarily follow that their dollar is the equivalent of ours. In fact the report shows that one hundred dollars of their currency was, at the time of the loss, of the value of one hundred and forty-nine dollars of ours; and therefore to indemnify the libellant for his loss by a payment in our currency, it is necessary to give him one hundred and forty-nine dollars of such currency for every one hundred dollars of the value of his property estimated in the currency of Canada.

Much of the appearance of difficulty, which at the hearing cast doubt upon this question, is undoubtedly due to the fact that the currency of Canada, like that of the United States, is a decimal currency, with the dollar as a unit; and that the coined dollar of the two governments is supposed to be of equal value.

Whether it is so or not is not a question of law, but of fact, and the question under consideration must be decided upon the principles which would have governed it, if the loss had occurred in Bordeaux or Odessa, and the value of the property lost, at the time and place of loss, had been reported in francs or rubles. That the loss occurred within a mile of the line dividing the United States and Canada, and that values are expressed in dollars and cents there as well as here, can make no difference in the principles of law applicable to the case; and if we look at the equities of the case, it must be apparent that the legal rule is the equitable one. If the loss had occurred at Schlosser, instead of at Chippawa, on the opposite shore, the damages to be recovered would have been determined by the value of the scow and her equipments at Schlosser, in the currency of the United States; and certainly there can be no equity in adopting a different rule, and taking from the libellant nearly one-third the sum necessary to be paid for his actual indemnity, simply because the loss occurred near the opposite side of the river.

If the loss had occurred in Russia, and the proof had shown the value of the property in rubles, at the time and place of the loss, it would hardly have been claimed, against the general current of authority, that the libellant would not be entitled to a decree for the actual value here, in the existing American currency, of the number of rubles which his vessel was worth in Russia, and the amount of damages in this case must be computed upon the same principles: Story's Conflict of Laws, § 307, 314; Story on Promissory Notes, § 390, note 1; Parsons on Bills and Notes, 648, 1.

A decree in accordance with this opinion will be entered.

Affirmed by Mr. Justice Nelson, on appeal, August, 1865.

See the case of *The Ship Rochambeau*, 26 Boston Law Reporter, p. 564, in which Judge Ware, of the District Court of Maine, held that a seaman, who had shipped on board of an American ship at St. John's, New Brunswick, for a voyage to London and back, and afterwards serving on

board under such contract, might recover, in the United States, double his stipulated wages, gold then being at a premium of 100 per cent.—*American Law Register.*

GENERAL CORRESPONDENCE.

Fi. Fa. lands from County Court on transcript from Division Court — Return of nulla bona.

To the Editors of the U. C. Law Journal.

Gentlemen,—The 252nd section of the Common Law Procedure Act contains these words: "Nor shall any execution issue against lands and tenements until the return of an execution against goods and chattels."

Under this provision if an execution is returned *nulla bona* in a Division Court, a transcript filed in the County Court, and a writ of *fieri facias* against lands immediately issued thereon, without first issuing any *fi. fa.* goods out of such County Court, would the *fi. fa.* lands thus issued be valid?

An answer in your next issue with reference to any case in point would be of interest to many readers.

Yours truly,

A Barrister.

Kingston, January 2, 1866.

[We cannot think that an execution against goods need in such case be issued from the Court above before the issue of an execution against lands. The objection of the provision is to ensure the goods and chattels of the debtor being exhausted before recourse is had to his lands, and this end is attained by the execution from the Division Court. We are not at present aware of any case directly in point, but it was held in *Farr* v. *Robins*, 12 U. C. C. P. 35, that a transcript from a Division Court to a County Court should contain a statement that the *fi. fa.* goods had been issued and returned "in order to avoid any conflict with or departure from section 252 of ch. 22 of Con. Stat. U. C."—Eds. L. J.]

Alleged inefficiency and defects of Division Court system—Abrogation of—Suggestions as to collection of small debts—Credit system.

To the Editors of the Law Journal.

Lindsay, Jan. 30, 1866.

Gentlemen,—It appears that we are likely to have some legislation during the approaching session of Parliament, as to our Division Courts; and the tendency or inclination of those who have so far moved in the matter in the way of introducing bills, seems to be towards enlargement and extension of the jurisdiction of the *present* Division Court.

In reference to the above I have some suggestions which I should like to have brought before our law-makers, and take the liberty of asking you to give them a place in the columns of your Journal.

I quite agree with those who are agitating for a change of the law in respect to these courts, "that some alteration is required," but I strongly disapprove of the extending of their jurisdiction. One strong objection to these courts, as at present constituted, is, to my mind, that their jurisdiction is *too extended already.* If we are to have them continue, then it would be much better to have their jurisdiction reduced or that some proper mode of allowing appeals from decisions given or pronounced should be introduced.

My theory involves no less than their entire *abolishment.*

Let the Division Courts be entirely abolished. Give the County Courts jurisdiction in all matters above $40. There is now a remedy by which servants can in a summary manner recover before a magistrate their wages not exceeding $40. Give to magistrates a similar jurisdiction, to try and dispose of in a summary manner all matters of tort which can, under the present law be tried and disposed of in the Division Court, subject to the same appeal as at present exists, in reference to their adjudication in matters of wages. This would provide us with a remedy for every class of debts and wrongs, except debts below $40 not being for wages; and as to them it appears to me that it would be a great advantage to the country that, so far as possible, the present system of small credits should be put an end to, and the *cash* system introduced. I think that even though a change in the law, somewhat as above, might not work out absolutely so great a reformation, yet it would most undoubtedly have a strong tendency in that direction. It may be said that it would be unjust to deprive the honest man of the means of getting goods which his necessities may require by any change such as that suggested. I think no such effect would of necessity be produced. He now

gets goods on the strength of his credit to the extent of his small wants, which credit is often but fictitious and imaginary, then he would get them (if his circumstances were such that he could not possibly at the moment pay cash, but being known to be an honest man) on the pledge of his *character* alone, and this latter would be a much greater security than what the creditor now has. Of what value to the creditor, is the Division Court, who has a number of small debts due him? he sues, obtains judgment, incurs costs, which the fruits of those small debts which he succeeds in collecting are often times inadequate to cover! and then follow judgment summonses and so forth, creating further costs and dragging from his work the unfortunate debtor, most likely a man labouring from day to day at a few shillings per day, whereby he and his family are deprived of what to them is of great consequence—a whole day's labour! and no benefit whatever in most cases results to the judgment creditor.

Under our present Exemption Act, which has the effect (and I think may properly) of relieving *all* the property which this class of debtors possess from execution, what is the use of continuing Division Courts, if their continuance is only to enable *judgments* to be recovered for amounts under $40.

The procedure of the County Court as to cases which would thus be brought within it might be simplified and rendered less expensive, by allowing cases to be tried by the judge alone or by a jury, as is at present the case. A writ to be issued specially endorsed and if no appearance, judgment; if an appearance, then there need be no pleadings, the endorsement on the writ and the appearance being quite sufficient. These are mere matters of detail which at present do not require to be dwelt upon more at length. But before closing I should like to draw your attention to one other benefit, which would arise from an alteration such as the above, namely to our County Judges, who at present have far more labour thrown upon their hands than they should have. Their Division Court circuits would be ended, and further, they would thereby be relieved of what is by far the most harrassing and wearing portion of their labours, and there would be much less likelihood of their being made to bear the brunt of the dissatisfaction and odium of suitors which they so frequently find the only reward or acknowledgement of all the labour they spend in determining small causes under our present system.

Yours truly,

Dike.

Insolvent Act of 1864—*Where meetings to be held.*

To the Editors of the Law Journal.

Gentlemen,—In the last number of your valuable journal, you reported a judgment given in an insolvency case by his honor Judge Jones, of the County of Brant, in which he decided that all meetings subsequent to the first meeting of creditors must be held in the county town. Whether the learned Judge intended that his decision should be understood to apply to all cases, even of *voluntary* assignment, does not clearly appear; but I apprehend his remarks must have been made with reference to cases of *compulsory* liquidation only.

The whole scope of the Insolvent Act indicates, clearly, the intention of the Legislature to give to creditors and insolvents every facility in winding up the estates of the latter; and that such would not be the case if in every instance all parties must meet in the county town, is immediately apparent. Since the first meeting of creditors is permitted by section two of the said Act, to be called at the usual place of business of the insolvent, or, at his option, at any other place which may be more convenient for them; why may not the convenience of the creditors be consulted in all subsequent proceedings. It is presumed that in the choice of an assignee by the creditor, due regard will be had as to the place intended for subsequent meetings.

Again, section eleven, the section which relates to procedure generally, requires all notices to be published in a newspaper published at or near the place where the proceedings are being carried on. Can it be that the Legislature intended meetings to be held in the county town only, and still thought it necessary to add—if such newspaper be published within ten miles of such place?—within ten miles of a county town! It will be observed that the term employed is not courts, or office, or town, but *place*. Was such general language used for the purpose of including the place where the first meeting might be

held, as well as subsequent meetings in the county town?

Whatever may be the proper construction, the question is one that occurs daily; and it is to be hoped that its importance will excite discussion among the profession, and at length elicit the true reading of the statute.

Yours truly,

Lex.

Millbrook, Jan. 30th, 1866.

[The above letters were received too late to permit of any thing but their mere insertion in this number.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. U. C.

Corporation of Longueuil v. Cushman.

New trial—Practice.

Where a plaintiff is disappointed in procuring testimony he should withdraw his record or take a nonsuit, and a defendant in the like case should apply for a postponement. If instead of doing so he chooses to go to trial upon weak or insufficient evidence, he will not be relieved from an adverse verdict. In applying for a new trial for the discovery of new evidence, the nature of such evidence must be stated. (24 U. C. Q. B. 602.)

Q. B. Miller v. McGill. U. C.

Voluntary conveyance—27 Eliz. ch. 4—Registration.

O., requiring money, mortgaged land to B. in 1854, for £50, to enable B. to obtain it for him, which mortgage was registered in the same year. B. having done nothing, O., in 1856, got him to assign the mortgage to S., who paid B. £25, but neglected to register the assignment until 1864. In the meantime O. conveyed, for value, to M., to whom B., for a nominal consideration, conveyed his interest. *Held*, 1. That the mortgage to B., being voluntary, was void under the 27 Eliz. ch. 4, as against the conveyance for value to M., and that the fact of its being first registered could not affect its validity in this respect. 2. That the assignment by B. to S. was fraudulent and void under the Registry Law as against M., a subsequent purchaser for value who had first registered. (24 U. C. Q. B. 597.)

C. P. Nicholls v. Lundy. U. C.

Interpleader—28 Vic., ch. 19—Duty of County Court Judge under.

The judge of a County Court has no power under 28 Vic., cap. 19, to refer an interpleader issue to be tried before the judge of the County Court from which the execution issued, *reserving to himself the question of costs and all other questions*: he must either dispose of *the whole* proceedings himself or order them to be disposed of before the judge of the court from which the process issued; and where such a reference had been directed, on appeal from the decision of the judge who acted thereunder and tried the issue, *Held*, that such procedings were *coram non judice*. (16 U. C. C. P. 160.)

U. S. Eshelman v. Lewis.

Resulting Trust—Agent.

1. A resulting trust cannot be set up to affect the title of a purchaser for a valid consideration without notice of the trust. 2. A person whose money is invested in the purchase of land by an agent, is not obliged to take the land and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and claim the money instead of the property. 3. *Downey* v. *Garard*, 12 H. 52, affirmed. (*Pitt. Leg. Journal*, Dec. 20, 1865.)

C. P. Nov. 18, 1865.

Galli v. Mongruel.

Practice—Act—Service on defendant out of jurisdiction.

A defendant, not being a British subject, and residing out of the jurisdiction, was served abroad with a writ giving him fourteen days for appearance, and also with a notice of the writ. The memorandum on the notice stated that if the debt and costs were paid in seven days from the service thereof, further proceedings would be stayed. The defendant had, by letter admitted the debt and service of the notice, but as the notice did not give the defendant the fourteen days limited for his appearance in which to pay the debt and costs, the Court refused to give the plaintiff leave to proceed. (10 W. R. 106.)

CHANCERY.

M. R. June 26.

Greetham v. Colton.

Will—Construction—Charge of debts—Insufficiency of personalty—Power of sale—Instructions for will.

A charge of debts upon land devised to a trustee gives him a power of sale, although it is expressly made "in case the personal estate should be insufficient;" and the trustee is not bound to show that the personal estate is insufficient. [See act of last session "to amend the law of property and trust in Upper Canada."]

A will consisting of memoranda intended as instructions for a more formal will, will be construed liberally, and the Court will consider how the conveyancer would have carried out his instructions. (13 W. R. 1009.)

V S. Nov. 8, 1865.

Duly v. Walder.

Conveyance by heir-at-law.

An heir-at-law is bound to join in the conveyance of real estate which his ancestor has contracted to sell, although he has no legal estate and no interest in the purchase money. (41 W. R. 45.)

V. C. K. Nov. 9, 1865.

HITCHIN v. HUGHES.

Practice—Pro confesso—Computation of time—Long vacation.

In giving notice of motion to take a bill *pro confesso*, the long vacation will count in the computation of the three weeks. (14 W. R. 93.)

V. C. K. Nov. 24, 1865.

Re LAWRENCE'S TRUST.

Practice—Trustee—Service.

Where a trustee pays money into court, and, in his affidavit, appoints a place for service on him of any legal proceedings, and he is not there to receive service, the Court will not deem such service good unless he cannot be found elsewhere on search made. (14 W. R. 93.)

V. C. S. Nov. 21, 1865.

DABBS v. NUGENT.

Account—Jurisdiction.

The Court will endeavour to assume jurisdiction in matters of account where its doing so will promote substantial justice between the parties. Where three actions at law have been brought by the plaintiff against the defendant in matters relating to the employment of the plaintiff by the defendant, and these actions are consolidated by an order obtained by the defendant, the Court, if it assumes jurisdiction over any of the actions, will assume jurisdiction over all. (14 W. R. 94.)

V. C. W. Nov. 21, 1865.

In re VARLEY'S TRUST.

Evidence—Petition—Affidavits sworn before presentation.

Affidavits in support of a petition for payment of money out of Court, sworn before the petition is presented. but after the payment into Court, will be admitted as evidence. (10 W. R. 98.)

SPRING ASSIZES, 1866.

EASTERN CIRCUIT.

The Hon Mr. Justice John Wilson.

Kingston	Tuesday	20 March.
Brockville	"	3 April.
Perth	"	10 "
Ottawa	"	17 "
Cornwall	Thursday	26 "
L'Original	"	3 May.

MIDLAND CIRCUIT.

The Hon. Mr. Justice Hagarty.

Belleville	Monday	19 March.
Napanee	Tuesday	27 "
Whitby	"	3 April.
Cobourg	Monday	9 "
Peterborough	"	16 "
Lindsay	Friday	20 "
Picton	Tuesday	8 May.

HOME CIRCUIT.

The Hon. Justice Adam Wilson.

Milton	Tuesday	20 March.
Hamilton	Monday	26 "
Welland	"	9 April.
Niagara	Friday	13 "
Barrie	Tuesday	24 "
Owen Sound	"	8 May.

OXFORD CIRCUIT.

The Hon. the Chief Justice of the Common Pleas.

Guelph	Tuesday	20 March.
Stratford	"	27 "
Berlin	"	3 April.
Woodstock	"	10 "
Brantford	"	17 "
Cayuga	Monday	7 May.
Simcoe	Thursday	10 "

WESTERN CIRCUIT.

The Hon Mr. Justice Morrison.

Goderich	Tuesday	20 March.
Sarnia	"	27 "
London	"	3 April.
Chatham	"	17 "
Sandwich	Monday	23 "
St. Thomas	Tuesday	1 May.

CITY OF TORONTO.

The Hon. the Chief Justice of Upper Canada.

Monday, 19th March.

YORK AND PEEL.

Monday, 9th April.

APPOINTMENTS TO OFFICE.

COUNTY CROWN ATTORNEY.

MICHAEL HAYES, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Crown Attorney for the County of Perth, in the room of Egerton Ryerson, Esquire, deceased. (Gazetted Jan. 6, 1866.)

POLICE MAGISTRATE.

JOHN CREIGHTON, Esquire, to be Police Magistrate for the City of Kingston, in the room of Thomas W. Robinson, resigned. (Gazetted, Jan. 27, 1866.)

NOTARIES PUBLIC.

HAMILTON DOUGLAS STEWART, of the Town of Barrie, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Jan. 13, 1866.)

WILLIAM H. McCLIVE, of St. Catharines, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted Jan, 13th, 1866.)

WILLIAM MAURICE COCHRANE, of Port Perry, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Jan. 13, 1866.)

ALEXANDER ROBERTSON, of Belleville, Esquire, to be a Notary Public in Upper Canada. (Gazetted Jan. 27, 1866.)

CORONERS.

ERASTUS JACKSON, of Newmarket, Esquire, to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Jan. 13, 1866.)

TO CORRESPONDENTS.

"A BARRISTER" — "DIKE" — "LEX" — under "General Correspondence"

"ATTORNEY," too late for this number.