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DIARY FOR SEPTEMBER.

1. Saturday..... Paper Day, Common Pleas.
2. SUNDAY..... 13*th Sunday after Trinity.*
3. Monday..... Last day for notice of Examination in Chancery, Sandwich and Whitby. Paper Day, Queen's Bench. Last day for notice of Trial in County Courts.
4. Tuesday..... Chancer Examination Term, Toronto, commences. Paper Day, Common Pleas.
5. Wednesday ... Paper Day, Queen's Bench.
6. Thursday ..... Paper Day, Common Pleas.
8. Saturday ..... TRINITY TERM ends.
9. SUNDAY ..... 14*th Sunday after Trinity.*
10. Monday..... Last day for notice of Examination in Chancery, Chatham and Cobourg.
11. Tuesday..... Last day for service of Writ for Toronto Fall Assizes. Quarter Sessions and County Court sitting in each County.
16. SUNDAY ..... 15*th Sunday after Trinity.*
17. Monday..... Last day for notice of Ex. in Chancery, London & Belleville.
18. Tuesday..... Chancery Examination Term, Sandwich & Whitby, commences
21. Friday ..... Last day for declarations for Toronto Fall Assizes.
23. SUNDAY ..... 16*th Sunday after Trinity.*
24. Monday..... Last day for notice of Examination in Chancery, Brantford and Kingston.
26. Tuesday..... Chancery Examination Term, Chatham & Cobourg, commences.
29. Saturday..... Last day for notice of Trial for Toronto.
30. SUNDAY ..... 17*th Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

SEPTEMBER, 1860.

NOTICE TO SUBSCRIBERS.

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

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

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

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

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

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

THE COMMON SCHOOL ACT—EXTRA-JUDICIAL OPINIONS.

The Act of last Session (cap. 49) "to amend the Upper Canada Common School Act," discloses a new feature in legislation upon which we feel bound to remark. So singular, and if acted on, so mischievous a provision as that contained in the 23rd section may well invite discussion. The few remarks we purpose to make are offered with a view to draw the attention of our readers to the Act, rather than with a design to discuss the subject of it at this time.

In looking over the Act we were met at the first step with a common error in the framing of statutes: the preamble does not fully embrace the whole subject matter of the act. Preambles are not necessary in a well drawn act; they are seldom as clear and accurate as they ought to be and are often incorrect, as in the example before us:—

"Whereas it is expedient to amend the law respecting *Common* Schools, &c.," is the preamble. The 23rd sec. goes beyond it and amends (or purports to amend) the law respecting *Grammar Schools*, and the last clause of the act embodies a great error in legislation, that of leaving the courts to find out and determine what provisions of previous acts are repealed, instead of at once expressly stating what clauses were intended to be repealed.

In another place we have spoken of the very objectionable form of enactment that "*so much* of a previous act *as is inconsistent with the provisions of this act is repealed.*"

But let us look at sec. 23—it is as follows:—

"It shall be lawful for the Chief Superintendent of Education, should he deem it expedient, to submit a case on any question arising under Grammar or Common School Acts to any Judge of either of the Superior Courts for his opinion and decision."

We object to this provision, believing it unsound in principle as well as inexpedient. It places the Judges of our Superior Courts—men holding the highest offices in the country—in the position of being legal advisers to the Chief Superintendent of Education—called upon to pass an opinion upon every case he "*deems it expedient to submit*" to them.

We ask—is it right to call upon these high functionaries to give an opinion upon any case got up by any individual, whatever may be his position officially or otherwise? How is the Chief Superintendent to collect and ascertain the facts—how is the clause to be worked? Is he to seek the interpretation of any word or clause on which a difficulty as to the application suggests itself, *to require an interpretation so comprehensive, a paraphrase so clear, as to provide for every case which may arise?* Our Judges are able men and sound lawyers no doubt, but they will scarcely be able to accomplish such a feat. Is the Chief Superintendent to give his own version of specific cases as they arise, and is the Judge to act upon that functionary's *ex parte* statement of the facts? We cannot understand how the material for "the case" is to be obtained. We know of no machinery for taking evidence to ground a case for a judicial decision, and we cannot suppose that any clandestine method is contemplated. We do not mean the word "clandestine" to be understood in an offensive sense; but any plan of collecting facts for such a purpose, not in

accordance with common law principles, may well be called clandestine. If the decision of the Judge were to have any weight it might condemn or operate injuriously against a party affected by the question, without his being heard —an infringement on the first principles of common justice.

But suppose a case laid before and acted upon by a Judge—what is to be the legal effect of his "decision?" What does it adjudicate? Between whom does it decide? Will parties be justified in acting on such a decision? Will it oust the courts of jurisdiction upon action brought respecting the same subject matter? Will it preclude the parties injured, or supposing themselves injured, from seeking redress through the ordinary tribunals? Surely not. What then — is the Chief Superintendent really authorized to take opinions upon abstract questions and supposed or possible cases, and the Judges to pronounce upon and explain "the true intent and meaning" of the language, or to trace out the proper procedure for the Chief Superintendent, in the exercise of his very large powers? In other words, is Sir John Beverley Robinson, or Chief Justice Draper, for example, to write a treatise upon the muddy portions of the School Act for the Chief Superintendent of Education?

Judicial opinions are not given *ex parte*, nor without hearing all parties concerned, and judicial decisions are not made upon such foundations. What then is meant? Surely not that the Chief Superintendent may quietly obtain and privately keep in the archives of his office the secret opinions of the Judges? That can hardly be: it would humble the Judges to the dust.

But, secret or open, there is an additional objection to taking the opinion of any Judge in the way proposed. It places him in a false position; and a Judge who is committed by a deliberately pronounced opinion does not often alter it. We do not mean to say that any opinion would be adhered to from improper motives; far from it. But there is a certain feeling incident to our common nature, though the individual may be insensible to its influence, which would render it exceedingly dangerous to the due administration of justice that a Judge should (on the mere motion of an irresponsible agent, whenever such agent deems it expedient) be placed in a position of saying to-day what it may be to-morrow argued that he was wrong in saying.

Why should a Judge be thus committed to an opinion upon "a case," without the advantage of having that case sifted and debated before him previously to his being called upon for a decision?

Let us not be understood, from what we have said, as assuming that any one of the Judges would feel it to be his duty, or that he was acting in the execution of his judicial powers, for which alone he was appointed, in furnishing materials to enable an oracle of the Common School Law to propound dogmas or give responses to the enquiring public. We unhesitatingly say that the man who penned that clause is a dangerous man, or is grossly ignorant of the fundamental principles of law. Nothing can be more constitutionally dangerous or foreign to the genius of the laws of England than requiring a Judge to give an opinion to any person or department on any matter not formally in litigation. No person or officer should be allowed to act on any opinion given as to a case that *might* arise. If the School Department may obtain a judicial opinion, why not the Crown Law Department, the Finance Ministers' Department, or any branch of the Executive, before engaging in some criminal prosecution or political scheme? But our space will not permit us to pursue this view of the matter further at present. So having opened the question to our readers, and especially to our professional readers, let us add: We have been speaking of what the framer of the 23rd section may possibly have had in his wise head, namely, to make it "competent" for the Chief Superintendent to submit a case to any Judge of the Court of Queen's Bench, the Court of Common Pleas, or of the Court of Chancery in Upper Canada. But we venture to doubt (if such was the object) that it has been attained—to doubt that such is the meaning of the clause—and gravely to doubt that it is capable of being acted on at all, and, even if otherwise perfectly unobjectionable, that a Judge of any of the three named Courts would feel that he was acting with authority in deciding any such case, or that he had any jurisdiction in the matter.

The language used is, "may submit a case to any Judge of *either* of the Superior Courts," &c. We of course assume that the Courts meant are "Superior Courts" *of Upper Canada;* but as there happens to be three Superior Courts, which two out of the three are meant? It is obvious from the language used in two places in the clause ("either of the Superior Courts") that two only (and the Judges of such Courts) were intended by the Legislature to be invested with the jurisdiction, and that to two only of the three can the Chief Superintendant apply.

If the Chief Superintendant submits a case to Mr. Justice X, of the Common Pleas, can that Judge undertake to say that he is a Judge of one of the two Courts intended? or Mr. Justice Y, of the Queen's Bench, undertake to say that he is certainly a Judge of one of the two favored Courts? and the same may be said of Vice-Chancellor Z.

We find it expressly provided by enactment, to give definite meanings to certain words and expressions, that

"the words Superior Courts shall mean the Court of Queen's "Bench, the Court of Common Pleas, *and* the Court of "Chancery;" and that "the words *Superior Courts of "Common Law* shall mean the two former, and that Court "of Equity shall mean the Court of Chancery." In using therefore the words Superior Courts the Legislature employed an expression the definite meaning of which had been already legislatively fixed, and which in that sense is found mentioned throughout the whole body of our statute law. In other acts of the last session of Parliament the expressions are used in accordance with their defined meanings.

The word *either*, then, taking in the idea of the two Courts, and the particular two not being defined, unless two Judges of two Superior Courts acted together (which is not provided for), there would be no certainty that the one proposing to act was not a Judge of the third Court, not included in the jurisdiction conferred. We doubt, therefore, whether the clause can or ought to be acted on. We shall see But perhaps we are taking too serious a view of the matter, and after all that the Legislature merely intended to crack a joke with the Judges, taking care that if "my Lords" should take the thing in dudgeon that no one amongst them could certainly say the legislative joke was pointed at him. In that aspect, the Chief Superintendant had better bottle up his little "cases."

THE "INFERIOR JURISDICTION" OF THE SUPERIOR COURTS.

"Inferior Jurisdiction Cases" are abolished by the Act of last session, (cap. 42,) "to repeal *certain* provisions of the Common Law Procedure Act." Henceforth the several Courts will do their own work proper.

We are amongst those who thought there was no real value in the provision. Many instances occurred, in which suitors suffered severely both in time and pocket, in consequence of their claims being entered in "the Inferior Jurisdiction." We indicated a long time since, what was the true solution of "the three lists." Apart from the inconvenience and loss to the public, the Judges of the Superior Courts, already overburdened with work, had, at the whim or caprice of practitioners, a large share of business thrown upon them, a result that never could have been contemplated by the Legislature.

But the right to bring these suits was objectionable in principle, and ran counter to the steady current of modern legislation in favor of decentralization. We believe the time is fast approaching when any suit, whatever the subject matter, may be entered in the first instance in a local court, capable of course of being removed by *certiorari*, or, as is the case now in respect to actions against Justices of the Peace, subject to the defendant's right to object to the jurisdiction.

The 4th sec. of the Act furnishes evidence of the feeling in favor of the disposal of plain cases in the County Court, irrespective of amount, for it enables every case in which the amount of demand is *ascertained* by the signature of defendant to be transferred to the County Courts for trial; and this clause, if we rightly remember, was added to the original bill in the Upper House.

It would have been much more simple to have at once given primary jurisdiction to the County Courts in such cases, instead of doing it in a roundabout way. There can be no real distinction between a liquidated demand for $100 and $400—on a promissory note for example, when the powers to enforce the judgment, and the officers through whom it is to be enforced, are the same in both tribunals, Superior and Inferior.

The Act before us is a good specimen of the great and manifest improvement in the form of recent enactments. It harmonises with the excellent foundation we have in the consolidation (we had almost said code) for Upper Canada. It does not interfere with the order of provisions in the Consolidated Statute, and the alterations it makes are easily noted therein. Moreover, it is not defaced by that abomination of abominations, a long and illogical preamble, and no more words appear to be used (with the exception of sec. 4, which is rather verbose and ill arranged) than are necessary to convey the meaning.

Sec. 1, blots completely out of the Consolidated Statutes every provision respecting the "Inferior Jurisdiction." The plan of making a clean sweep in this way is the very best, and saves a world of doubt and difficulty in construction. A large proportion of the cases before our courts, upon the meaning of statutes, grew out of the plan of altering the law, and virtually killing off a number of provisions, but leaving them still upon the statute book—a parcel of rubbish to fructify litigation at the expense of unfortunate suitors. A common method was to add a general clause, providing that "all acts and parts of acts inconsistent with this act, shall be, and are hereby repealed"—a convenient mode certainly, for ignorant, lazy, or stupid persons, but not a method to which a man acquainted with his subject, and anxious to do it justice, would resort.

There can be no question that law practitioners alone are fully qualified to judge of the fitness of an act relating to the administration of the law, and so to shape it that it may harmonize with existing provisions—but as all men fancy that they know how to poke a fire or boil potatoes, so they all seem to fancy that they know how to frame all kinds of laws.

And with this class of legislators the clause we speak of is "*a love of a clause.*" We heard one of our Judges who is noted for "his sayings," suggest the form of an act for fusing law and Equity—brief and comprehensive. We record it for the benefit of "all whom it may concern."

BE IT ENACTED AS FOLLOWS:—

SEC. 1—LAW AND EQUITY ARE FUSED.

SEC. 2—THE JUDGES SHALL FRAME RULES TO CARRY OUT THE FOREGOING PROVISION.

SEC. 3—ALL LAWS INCONSISTENT WITH THIS ACT ARE ABROGATED.

The 2nd and 3rd secs. of the Act before us, adopt a convenient method in making alterations in detail. It was first introduced, we believe, by the late Hon. Robert Baldwin. It substitutes new clauses for two of those repealed—so that the connection will remain unbroken in the Common Law Procedure Act, as consolidated, and the alterations may be readily made on the face of the book.

The 4th sec. enables a Judge of either of the Superior Courts of Common Law, to send a case down for trial in a County Court.

1st.—When the amount of the demand is ascertained by the signature of the defendant.

2nd.—In any action for any debt that in the opinion of a Judge may be safely tried in a County Court.

The second ground gives a wide margin for the exercise of judicial discretion, and may be made legitimately to embrace one-third of the business now set down for trial at the assizes. It will, however, depend upon the plaintiff's attorney whether this clause be much acted on. Probably the chief inducement to the practitioner to avail himself of its provisions, will be the saving in time.

THE U. C. CHANCERY REPORTS.

We observe that the reporter of the Court of Chancery has issued No. 1 of vol. 8, of the Chancery Reports. It is the commencement of the series, at the reduced rate of £1 5s. 0d., recommended by the Law Society. The subscription price hitherto was £2 10s. 0d., and the object of the reduction is to increase the circulation of the Reports among the legal practitioners in Upper Canada.

We believe that as respects the Upper Canada Common Law Reports, neither the Law Society nor the Reporters have been disappointed. The increase in the number of subscribers has, we understand, been nearly as much as was anticipated when the reduced price was proposed. The price is now really so moderate as to place the Reports within the reach of every practitioner.

We perceive that the Reporter of the Court of Chancery has, in carrying out the objects of the Law Society, gone further than the Reporters of either of the Courts of Common Law. He offers to furnish *students* and *articled clerks* with his Reports, at the price of 15s. per volume, and the Chamber Reports of his Court, at 5s. per annum. For this, Mr. Grant, the Reporter, deserves the thanks of every law student and articled clerk in Upper Canada, who we hope, will testify their approbation by subscribing for the Chancery Reports.

No lawyer can, in the present state of the law, practise successfully without a law library. The sooner the library is commenced the less onerous will be its formation in the end. Students emulous of success in the profession, should make it an inflexible rule to read the Reports of the Courts of Upper Canada, and not only to read them but to purchase them for the sake of reference and as the nucleus of the libraries, which in after years they must acquire. Better far for a law student to deprive himself of trifling luxuries in order to a make permanent and substantial investments of his spare means, than to waste them in idle pursuits. We know of no better investment for law students and articled clerks than the Reports of our Courts.

Reports of the Court of Chancery are now offered at a price so low, that no law student or articled clerk can excuse himself for the want of them.

UPPER CANADA MUNICIPAL REPORTS.

The third number of these Reports has been issued, and contains many valuable cases on the Municipal and School laws of Upper Canada, to which extensive and useful notes are appended, illustrative of the various points of law decided in the judgments reported. The publication has, we learn, been most successful.

NEW RULES.

QUEEN'S BENCH AND COMMON PLEAS.

TRINITY TERM, 24 VIC., 1860.

1st. It is ordered, that from and after the first day of this present Trinity Term, 24 Victoria, Rule No. 155, of this Court of Trinity Term, 1856, be rescinded, and that the following be substituted therefor:—No. 155, In any action of the proper competence of the County or *Division Courts* respectively, in which final judgment shall be obtained for a plaintiff without trial; *or in which plaintiff shall obtain execution on proceedings in the nature of a final judgment,* no more than County or Division Court costs, as the case may be, shall be taxed without the special order of the Court or a Judge, but this Rule shall not extend to costs on *interlocutory proceedings.*

2nd. It is also ordered that Rule No. 16, of Trinity Term, 20 Vict., be rescinded and the following substituted therefor:—The offices of the Clerks of the Crown and Pleas shall be kept open as follows, that is to say, during Term from ten in the morning till four in the afternoon, and (except between

the first day of July, and 21st day of August) at other times from ten in the morning until three in the afternoon, Sundays, Christmas Day, Good Friday, Easter Monday, New Year's Day, and the birthday of the Sovereign, and any day appointed by General Proclamation for a General Fast or Thanksgiving, excepted and between the first day of July and twenty-first day of August, both days inclusive, when the said Offices shall be open from half-past nine in the forenoon until twelve o'clock noon.

JNO. B. ROBINSON, C. J.
WM. H. DRAPER, C. J. C. P.
A. MCLEAN, J.
ROBT. E. BURNS, J.
WM. B. RICHARDS, J.
27th August, 1860. *JOHN H. HAGARTY, J.*

AUTUMN CIRCUITS, 1860.

EASTERN CIRCUIT.

The Hon. Sir JOHN B. ROBINSON, Baronet, Chief Justice.

L'Original	Wednesday	3rd October.
Ottawa	Tuesday	9th October.
Perth	Friday	19th October.
Brockville	Friday	26th October.
Cornwall	Friday	2nd November.

MIDLAND CIRCUIT.

The Hon. Mr. JUSTICE BURNS.

Whitby	Monday	1st October.
Peterboro'	Monday	8th October.
Cobourg	Monday	15th October.
Picton	Wednesday	24th October.
Kingston	Monday	29th October.
Belleville	Wednesday	7th November.

HOME CIRCUIT.

The Hon. Mr. JUSTICE McLEAN.

Owen Sound	Wednesday	3rd October.
Barrie	Tuesday	9th October.
Milton	Tuesday	16th October.
Hamilton	Monday	22nd October.
Welland	Tuesday	6th November
Niagara	Tuesday	13th November.

OXFORD CIRCUIT.

The Hon. Mr. JUSTICE HAGARTY.

Simcoe	Tuesday	2nd October.
Brantford	Monday	8th October.
Cayuga	Tuesday	16th October.
Woodstock	Monday	22nd October.
Stratford	Monday	29th October.
Berlin	Monday	5th November.
Guelph	Monday	12th November.

WESTERN CIRCUIT.

The Hon. CHIEF JUSTICE OF THE COMMON PLEAS.

Chatham	Wednesday	3rd October.
Sandwich	Tuesday	9th October.
Sarnia	Monday	15th October.
St. Thomas	Friday	19th October.
London	Wednesday	24th October.
Goderich	Tuesday	6th November.

TORONTO ASSIZES.

The Hon. Mr. JUSTICE RICHARDS.

Toronto	Monday	8th October.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM 24 VIC.

The following gentlemen were called to the degree of Barrister at-law:—

Alexander Mair, of Markham; T. H. Spencer, LL. B., of Toronto; John Livingston, LL. B., of Toronto; D. Blain, LL. B. of Toronto; Thos. H. Bull, B.A., of Toronto; J. A. McCollôch, of Stratford.

The following gentlemen having passed their examinations at Osgoode Hall, have been sworn in Attorneys-at-Law:—Messrs. Macneil Clarke; O. J. McKay; John Finn; J. Fox Smith; R. B. Bernard; A. L. McLellan; J. K. Galbraith; R. S. Applebe; T. H. Bull; T. B. Pardee; William Grant; William Lilly; Edward Stonehouse; P. A. Hurd; R. C. Scatcherd; G. P. Land; John Michael Tierney.

JUDGMENTS DELIVERED.

COURT OF ERROR AND APPEAL.

Present: The CHIEF JUSTICE OF UPPER CANADA; Mr. CHIEF JUSTICE DRAPER; Mr. JUSTICE MCLEAN; Mr. JUSTICE BURNS; Mr. VICE-CHANCELLOR SPRAGGE; Mr. JUSTICE RICHARDS; Mr. JUSTICE HAGARTY.

Saturday, August 25, 1860.

Whitehead v. *The Buffalo and Lake Huron Railway Company.*—This was an appeal from a decree pronounced by the Court of Chancery. The plaintiff filed a bill in the court below, claiming compensation from the defendants for a large quantity of work done by him for the defendants, and materials for the same provided, pursuant to certain verbal and written contracts made between the plaintiff of the one part, and Captain Barlow, acting for and on behalf of the defendants, of the other part. In the same bill plaintiff also claimed damages for the interruption by the defendants, of his works, on several occasions, and prospective damages for money that plaintiff might have made out of the contracts if allowed by defendants to fulfil them. The court below pronounced a decree in favor of the plaintiff for $50,000 for work done, materials, &c., and ordered a reference to the Master to inquire into the damage sustained by plaintiff in consequence of the interruptions and as to prospective damages. Against this decree defendants appealed. Held, per Robinson, C. J., that the decree should be varied only as to the prospective damages. *Held*, per Draper, C. J., that the relief should be reduced to the value of the work done and materials provided. McLean, J., concurred. Spragge, V.C., concurred with Draper, C.J., but thought that the work should not be estimated by the schedules annexed to the contracts. Richards, J., concurred with Draper, C.J., and thought the schedules binding. Hagarty, J., was of the same opinion as Richards, J. Decree varied as above, and appeal dismissed.

Hurd v. *Lewis.*—Appeal from the Court of Queen's Bench. The question raised was as to the construction of a will. Appeal dismissed with costs.

Henderson v. *Fortune.*—Appeal from the decision of the Court of Queen's Bench, as reported in 18 U. C. Q. B., 520. *Venire de novo* awarded.

Mann & Hobson v. *The Western Assurance Company.*—Appeal from the decrees of the Court of Queen's Bench, as reported in 18 U. C. Q B., 190 Dismissed with costs.

Shaw v. *The De Salaberry Navigation Company.*—Appeal from the decree of the Court of Queen's Bench, as reported in 18 U. C. Q. B., 541. Dismissed with costs.

Boulton v. *Gillespie.*—Appeal from the Court of Chancery. The question raised was, whether plaintiff by taking certain securities as the price of lands sold, had or had not waived his lien for the purchase money. Appeal allowed, and plaintiff's bill in court below, dismissed.

COMMON PLEAS.

Monday, August 27, 1860.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Trent Road Company v. *Marshall.* — Defendant's rule discharged. Plaintiff's rule made absolute to increase the verdict as to £36 11s. 0d.

Trustees of School Section No. 6 of York v. *Hunter.*—Rule *nisi* to enter a non suit made absolute.

Wallace v. *Adamson.*—Rule *nisi* to set aside verdict found for defendant, and to enter same for plaintiff, discharged.

Weaver v. *Bull.*—Demurrer. Judgment for plaintiff. *Held*, that School Trustees, prior to the passing of the Act of Last Session, had no power to determine as to the question of personal liability of School Trustees, and had no power to award costs of the arbitration to be paid by the Teacher or the Trustees.—*Quære*—As to the effect of the Act of Last Session on the right of determining the question of personal liability?

Edinburgh Life Assurance Company v. *Clarke.*—Rule absolute for a new trial without costs.

QUEEN'S BENCH.

Tuesday, August 28. 1860.

Present: ROBINSON, C. J.; McLEAN, J.; BURNS, J.

Van Buren v. *Bull*—Trover. *Held*, that arbitrators before the recent School Act, had no power to award costs. 2—Or to award that the Trustees should pay the amount awarded within 30 days, or be personally liable. 3.—That the authority of the arbitrators was at an end when the award was made. 4—That it was not any part of the arbitrators duty to decide whether the Trsutees had or had not exercised their corporate powers.

Burns v. *Boyd.*—Judgment for defendant on demurrer.

Whitehouse v. *Roots.*—*Held*, plea bad—replication good.

Wallace v. *Hewett.*—Rule to enter verdict for plaintiff discharged.

Gaston v. *Watson.*—Action for negligent fire. Rule *nisi* to enter nonsuit pursuant to leave reserved, made absolute.

PRIVILEGES OF ADVOCATES.

(*Concluded from page* 174.)

INJUNCTION.

We next proceed to consider the proposal to give to the Common Law Courts power to protect by injunction property, whether real or personal, the title to which is in contest in an action at law, from alienation, waste, or injury, till the right shall have been determined.

We must, in all humility, confess that we are at a loss to conceive that any substanttal objection can be offered to a proposal so obviously reasonable.

It is plain that such a power should exist somewhere. A man in possession of land the title to which is contested, *á fortiori* a man in possession without a title, ought not to be permitted, pending proceedings to eject him, to commit waste to the damage of one who claims with a better title. A man who is in wrongful possession of a chattel, for the loss of which money may be a very inadequate compensation to the rightful owner, ought not to be left at liberty to make away with it while an action for its recovery is pending.

At present, protection in this respect can only be obtained by recourse to a court of equity, while the recovery of the thing itself can only be effected in a court of law: two suits with twofold expense, where one would suffice!

And no question here can be raised as to the competency of the tribunal.

It would be strange indeed, if it could be doubted that the Court which in an action of ejectment or detinue has to to determine the right to the corpus of the estate or chattel, was also capable of deciding whether the defendant should be restrained from committing waste or making away with the thing in dispute until the right was determined.

We now pass on to consider the instances in which it is proposed to confer new jurisdiction on courts of law irrespective of any pending action.

And, first, as to the proposed power of restraining by injunction the impending violation of any legal right. We must here beg it may be borne in mind that it is not proposed in this branch of the subject to confer on courts of law powers in respect of any rights which are not strictly of a legal character. Throughout the contemplated amendments it has never been proposed, where title to property was complicated by equitable rights to withdraw the decision from the courts of equity. This being kept in view, we must confess ourselves altogether at a loss to conceive why, when legal rights alone are involved, a court of law, whose special and proper province it is to determine such rights, should be without power to protect them from violation. And it must be observed that this anomaly in our judicial system is rendered the more striking and discreditable to our jurisprudence by the partial jurisdiction already extended to the legal tribunals by the act of 1854.

As the law now stands, if a single act of wrong has been committed, a court of law, on an action being brought, has power to grant an injunction to prevent a repetition of the wrong. If a nuisance were about to be created which would seriously lessen the value of a man's property, as, for instance, if a local board were about wrongfully to bring the main sewer of the district close to a man's premises, no protection could be afforded by a court of law, But if the thing has once been done, and the whole expense incurred, not only may damages be recovered for the present injury, but the nuisance may be abated for all future time. If out of a thousand trees growing on an estate a single tree be wrongfully cut down, an injunction may be obtained from a court of law to prevent the cutting down of the remaining 999. But if, with the certainty of impending injury, the party whose rights are about to be invaded should come to a court of law for protection before the axe has been laid to the root of the first tree, he would be told that while, if he had waited till one tree was cut, the Court would have protected him as to all the rest, the Legislature has not thought fit to entrust the Court with powers for the protection of the first, but has committed that to the exclusive keeping of a court of equity. We cannot but think that this state of things (arising as it does out of the partial manner in which the recommendations of our second report as to injunction were carried into effect) is an anomaly in our judicial system which almost borders on the ludicrous, and is a serious reproach to our legislation.

We must be forgiven for saying that we cannot comprehend the alarm which the proposal to remove it has occasioned. The jurisdiction is one which, reference being had to the subject matter, falls properly within the province of the common law courts. It is one which these courts already possesses and exercise in an ulterior stage. The competency of the Courts or of their procedure cannot come into controversy. The question has been concluded by the Legislature itself in conferring powers which presuppose all the qualifications both in the judges and their procedure which are necessarily for the exercise of those now proposed to be given. We cannot but think that the objection to this extension of jurisdiction has arisen principally from its having been overlooked that it is only proposed to confer it where damages can now be recovered in an action, and where, therefor, strict legal rights are involved, and that the powers proposed to be conferred by the present Bill are neither more nor less, in substance and degree, than those created by the Act of 1854: the difference consisting simply in this, that they may be exercised before the mischief instead of after it has commenced.

DOCUMENTS.

The only other instance in which authority is proposed to be given to a court of law, independently of a pending action, is the power to order the delivering up of documents which on the face of them appear to give a right of action at common law, but which, by reason of circumstances which, if an action were brought, would constitute a defence, ought not to be available, and, on the contrary, ought to be given up or cancelled.

The ground on which a party liable to be prejudicially affected by such a document has a claim to have it given up or cancelled, is that the document, remaining in the hands of the opposite party, after all just claim to enforce it is gone, may one day be brought forward, after the evidence by which it would have been defeated has ceased to exist.

It is plain that power to afford relief from such a possibility, and to protect a person so circumstanced from having such a danger from hanging over his head for years, ought to exist somewhere. It has hitherto been confined to courts of equity alone. The reasons for proposing to extend it to the courts of law, are, first, that the documents in question would be enforceable in a court of law alone; secondly, that the matter of defence, on which the claim to have the document annulled arises, would be capable of being pleaded and tried at law if an action were brought upon it; thirdly, that the common law procedure for trying the facts, if contested, is indisputably superior to that of a court of equity.

NEW EQUITABLE JURISDICTION AT LAW.

We have now past in review the several cases of equitable jurisdiction proposed to be conferred by the Bill. It remains for us to deal with a few general objections put forward against the measure as a whole.

The principal of these is founded on a misapprehension which it is important to clear up. It seems to be supposed that equitable title to property is sought to be brought within the jurisdiction of the legal tribunals. This is evidently pointed at in the two cases, prominently put forward in the objections of the equity judges, in which fraudulent plaintiffs with legal titles are supposed to bring ejectment in a court of law for the purpose of avoiding the discussion of adverse equitable rights before an equity court.

This is a very serious misapprehension. It overlooks the fact that, with reference to equitable defences, the action of ejectment—the only action in whsch the right to real estate can be enforced—was not included in the Act of 1854;* and that, with the exception of the comparatively small matter of relief from forfeiture for non-payment of rent and for omitting to insure, this action is not proposed to be touched by the present Bill. So large a proportion of property in this country being held in trust, and trusts being the peculiar province of courts of equity, however serious the inconvenience arising from the occasional conflict of jurisdiction may be, it is not proposed that powers should be given to courts of law to entertain equitable considerations on a trial of title. If our last report be referred to, it will be seen that our recommendation as to the power to grant conditional relief is confined to cases in which equitable defences are already admissable, but in which the presence of a condition prevents the Court from entertaining a plea. This, of course, does not apply to ejectment in which no equitable plea is admissible. The present Bill does not include ejectment, so for as title to property is concerned. The imaginary cases put farward by the equity judges as illustrative of the mischievous operation of the enlarged equitable jurisdiction could not therefore arise.†

We cannot but think that much of the opposition offered to this measure has been founded on the notion that it was sought to withdraw by it questions upon equitable title to property from the jurisdiction of a court of equity. It is desirable that this misapprehension should be dispelled as speedily as possible. No such thing has been suggested, or is contemplated by the present measure. Of course, if it should be thought that the language of the Bill leaves room for the possibility of a different construction, nothing would be more easy than so to frame the enactment as to limit its operation to the extent designed.

Another objection insisted on by the equity judges is that a plaintiff having a mere legal as opposed to an equitable right will now have a choice of courts, and will naturally take his cause to the court in which equity is the least likely to be well administered. Assuming for a moment the inferiority of the legal courts in dealing with equitable questions (on which a word presently), we must be forgiven for observing that this argument rests on a fallacy. A plaintiff having only a legal right to insist on has no choice of courts; he can bring his action in a court of law alone. If he went to a court of equity, he would be told that, having a remedy at law, he had no business there. The position of such a plaintiff will nowise be altered. But let us look to the other side of the case. Take the case of an honest plaintiff bringing an action on a legal claim, which he believes to be well founded. Having brought his action in the only court to which he can resort, why, because his adversary sets up an equitable defence, is he to be forced to become defendant in a new suit before a different tribunal? Or, take the perhaps still more striking, case of a defendant, in an action at law, having a defence on equitable grounds alone, which he is desirous of setting up in the court where the action is pending. Why is he to be driven to the necessity of going to a second court, and there instituting a second and more expensive suit? Why, if his equity depends on the performance of some condition, is he to be driven to another court to obtain the relief which performance of the condition might just as well secure to him in the first?

The equity judges assert that "no solid reason can be given for the proposed transfer of jurisdiction." We, on the other hand, submit that abundant reason is to be found in all the evils attending on a double jurisdiction and a twofold litigation—two suits relating to the same subject matter of dispute, in two separate courts, separate pleadings, separate sets of counsel, fresh fees of court, all harassment, expense and delay of a suit in chancery needlessly superadded to the simpler proceedings of an action at law. Surely, it cannot seriously be disputed that if the necessity for resorting to a second court can be dispensed with—wherever justice can be done in one court and one suit—there is every reason for relieving the suitors from the inconvenience, the expenses, and the delay of a double litigation.

We guard ourselves by saying "where justice can be done." We readily admit that where what the objectors not inaptly term the "machinery" of the courts of common law is inadequate to deal with questions of equity, a sufficient reason exists for maintaining the divided jurisdiction. We admit that to a certain extent, the objection to conferring equitable jurisdiction on the courts of law on this ground is well founded. But to this extent care has been taken that the jurisdiction shall not be exercised. The objection becomes unfounded and unjust when it overlooks a distinction which the framers of the Bill have not been unmindful to observe. It is true, as is urged by the equity judges, that there are cases in which equitable rights cannot properly be determined without more parties being brought before the court than the parties immediately in presence in an action at law. It is true that a court of law has no procedure for bringing such further parties before it. Possibly it may not be desirable that it should have. Actions to recover real property excepted, as to which the

* See *Neave* v. *Arye*, 24 L. J., C. B. 207; 16 C. B. 328, S. C

† We may also here observe, in passing, that the third case but by the equity judges by way of objection namely, that of an equitable mortgagor bringing defenue for deeds deposited by way of equitable mortgage, with a view to avoid a court of equity, is equally ill-founded. The plaintiff would be defeated at law. The action could not be maintained under such circumstances.

present question does not arise, the cases which come before courts of law are seldom of sufficient magnitude to make the multiplying of parties desirable; as the so doing, however necessary in order to settle the rights of all concerned has a natural tendency, except where great interests are involved, to bring about the result that, by the time the rights of all parties concerned are adjusted, there remains but little to be divided amongst those who are found to be entitled. Be this as it may, the objection of the equity judges, founded on the inability of the common law courts to bring other parties before them, has, as regards the present measure, no application. It is not proposed to admit equitable defences in cases to which the objection relates. By the operation of the 86th section of the Common Law Procedure Act of 1854 and the 12th clause of the present Bill, courts of law will not be called upon to entertain questions of equity where the equitable rights of parties other than the immediate parties to the action at law are involved. It is suggested indeed, that a court of law might fall in error in deciding whether, in any particular case, the equitable rights of other parties do or do not come into question. But it may be answered, first, that in the more simple cases of equity which present themselves in actions at law, no serious difficulty on this score is likely to arise; secondly that the supposition that the judges would have any difficulty in deciding such a matter is an assumption of incapacity in them which ought not lightly to be made; thirdly, that the objections, if good for anything, would apply equally to the equitable pleas already permitted to be pleaded; lastly, that in the exercise of the existing jurisdiction no such difficulty has in point of fact been experienced.

MACHINERY.

The question as to the adequacy of the "machinery" of the common law courts being thus reduced to its proper limits, we have no hesitation in affirming that the procedure of these courts, enlarged and amended as it has been in modern times, is abundantly sufficient to enable them to exercise the powers proposed in a perfectly satisfactory manner.

With reference to matters of equity brought forward in pleading, no question as to the adequacy of the proceedure can arise. The facts on which the equity arises being set forth in the pleading, the effect of them, if admitted, is at once for the court. If not admitted, the facts will be tried by a jury in the ordinary way. And it may be here incidentally observed, that if in the same action there should also be issues of facts relating to matter of common law to be tried, it is more convenient that both sets of issues should be tried and disposed of in the same inquiry, than that one set of facts should be tried in a court of law, the other in a court of equity. No one, we apprehend, will question the superiority of the common law procedure over that of equity for the trial of issues of fact; and it may be observed in passing, that as, in the discussion of questions of equity, wheresoever they may be raised, questions of disputed fact will frequently arise, this superiority of the common law proceedure for the decision of questions of fact is so far in favour of the transfer of jurisdiction.

As regards equitable matters arising on application to the court, as for relief on conditional equity, or for protection of property, either on apprehended injury or during the pendency of an action, the efficiency of the machinery cannot seriously be questioned. The application would be by motion founded on an affidavit setting forth the facts. If any difficulty should arise in the ulterior stages of the discussion, the court would have ample means of completing the inquiry by an issue or reference to a master. The only difference, we apprehend, between such a proceeding and that of a court of equity would be, that the latter would require a written or printed statement of the case, which would be echoed by an affidavit. The common law process, while it is equally efficacious, is the simpler and less expensive of the two.

The question of the competency of the common law judges to administer equity is one on which, for obvious reasons, we are reluctant to touch. We may, however, be permitted to observe that in the simpler questions of equity which are likely to come before courts of common law, we cannot anticipate any serious difficulty. While, on the one hand, it may be admitted that, where more complicated rights are involved, such as arise upon intricate questions of real property, of trusts, the administration of estates, and the like, the principles and rules of equity constitute an elaborate and special system of jurisprudence, a perfect knowledge of which it may require special study and practice to acquire, yet it must not be forgotten that one of the principal merits of this system is that its leading rules—at least, where unembarrassed in their application by the intricacies and subtleties of real property law—rest on the plain and simple principles of rational justice, as distinguished from the more technical and arbitrary rules of positive law.

More especially is this the case with reference to the grounds on which equity relieves against legal rights sought to be enforced in actions at law. To suppose that common law judges or practitioners either are unacquainted with or will be unable to master a system so simple, would seem to be a gratuitous and unwarranted assumption. No such difficulty has hitherto arisen in administering the powers either of auxiliary or substantive equity heretofore conferred. So far as we are aware, one instance only has occurred of an appeal from the decision of any court of law on an equitable plea, and in that instance the appeal was unsuccessful.

We believe the apprehension of incompetency in this respect to be wholly unfounded. The large knowledge of the law essential to the administration of equity has never been questioned in equity judges; and we are at a loss to understand why credit should not be given to common law judges for capacity to possess a corresponding knowledge of equity in the limitation of legal rights. When we reflect how many of the great equity judges who have presided in the court of chancery and in the House of Lords have been taken from the common law courts, we are surprised that capacity should be denied to the collective ability of the common law judges, assisted by a bar inferior to none in learning and attainments, to deal with the simple questions of equity which are likely to arise incidentally in proceedings at law.

Before we quit this subject, we must advert to an argument prominently put forward, namely, that the effect of thus conferring equitable jurisdiction on common law courts will be to restore in substance the ancient equity jurisdiction of the Court of Exchequer, abolished in recent times by the Legislature. That this view of the matter is altogether erroneous may readily be shown. It assumes that the jurisdiction of the Court of Exchequer as a court of equity was exercised by it incidentally to proceedings pending before it as a court of law. Nothing can be more incorrect. The Court of Exchequer in equity was as distinct from the Court of Exchequer as a court of common law, as the Court of Exchequer now is from the Court of Chancery. The jurisdiction was distinct; all suits were distinct; the proceedure was distinct; the officers of the court were not the same; the practitioners were a separate and distinct class. A party seeking protection or relief from an action pending on the common law side of the court was obliged to file a bill in equity, and was in all respects in the same position as if he had gone into chancery. All the evils of the double jurisdiction arose, without any of those benefits which may be anticipated from enabling full justice to be administered in a single court. Other causes therefore, making it desirable that the Court of Exchequer as a court of equity should be done away with, its abolition took place, but without the slightest reference to any inconvenience arising from a blending of jurisdiction such as is now proposed. To represent the two cases as analogous is to confound things essentially distinct and having nothing in common but a name.

COURT OF APPEAL.

Lastly, as to the objection taken to the measure with reference to the proposed Court of Appeal. It is said, "the appeal is to be a court of error—a very competent tribunal for determining the points of law which remain when a jury has solved the questions of fact, but rigid in the extreme in its rules of procedure, and utterly incompetent to dispose of the mixed questions of fact and law that continually arise on appeals from courts of equity." We have here again a serious misapprehension. It is assumed that the Court of Exchequer Chamber, the proposed Court of Appeal, will be simply a Court of Error in the strict sense of the term; that is to say, a court confined to error appearing on the face of the record, and bound by some rules of procedure differing from those of the court in which the proceedings originated. This is an entire mistake. The Court of Exchequer Chamber, when exercising the appellate functions conferred upon it by the recent Procedure Acts, is no longer a mere Court of Cessation. It is a Court of Appeal in the fullest sense of the term; that is to say, it is invested with all the powers, both as to substantive law and procedure, which are possessed by the court from which the appeal comes, and can even draw inferences of fact where the court below could do so.

While upon this subject, we cannot but express our surprise that the objectors should have overlooked the fact that from the decisions of the Court of Exchequer Chamber on appeal there is an ulterior appeal to the House of Lords, where the presence of so many equity authorities will secure the correction, if necessary, of the decisions of the common law tribunals and ensure the administration of equity according to its established and undoubted rules.

We conceive that we have thus made good the propositions which we undertook to establish; that starting from the incontestable position that every court should have power to carry on a suit properly commenced in it to final adjudication and completion, as also to protect rights which are clearly within the compass of its jurisdiction, we have shown that the powers which it is proposed to confer on the common law courts are essentially necessary to this end; that they have been already partially given, and so far beneficially exercised; and lastly that, so far as it is now proposed to go, the procedure will be fully equal to the purpose.

CONCLUSION.

The equity judges declare that "no attempt should be made to alter our tribunals until a careful revision has been made of our whole law." But is not this to put off the work to the Greek Kalends? We readily agree that the bringing the conflict of law and equity into unison would be better dealt with as a part of the substantive than of the ancillary law; and would be best affected by abrogating from the body of our law rights which ought not to be, and which equity does not allow to be enforced, instead of by seeking to attain the end by a fusion of jurisdiction and procedure. But who is there among us so sanguine as to expect that this great work of the revision of the whole body of our law will be undertaken, much less accomplished in our days? In the meantime the suitor bandied to and fro from law to equity, and from equity to law, suffers what he feels and knows to be—with whatever complacency legal practitioners may from habit be brought to look on the matter—a practical and substantive grievance. To whatever extent, though it may be but a partial one, that grievance can be abated—to whatever extent the great desideratum of uniformity in the law as administered by the judicial tribunals of this country can be effected,—to that extent, at least, the practical good should be secured, although the means resorted to may not be such as a scientific jurist might deem the most eligible. At all events, if any immediate, though but partial remedy can be applied, it would surely be unwise to refuse to accept it because it is not presented as a part of a general revision of the whole body of our laws, of which no reasonable hope presents itself even in the indefinite future.

We have the honour to remain, my Lord,

Your obedient and faithful servants,

A. E. COCKBURN.
SAMUEL MARTIN.
G. BRAMWELL.

The Right Honourable the Lord Chancellor.

THE LAW OF EVIDENCE.

A Bill was some time since introduced into the Upper House of Parliament, by Lord Brougham, to enable the accused parties in criminal cases to offer themselves as witnesses, and, in that event, render them subject to cross examination like other witnesses. This bill having been received unfavourably, his Lordship has just introduced a fresh one, by way of substitute for it, which proposes to accord this faculty to accused persons in cases of misdemeanour only. The principle involved in both bills is a most important one, being at variance with the theory and practice of English law from the earliest times; and the question is a branch of a more general one, which has recently been discussed at the Juridical Society, viz. whether the rule of law which prohibits the examination and cross-examination of accused persons in criminal cases is a sound one. It is a question of great difficulty and importance, and much may be urged on both sides.

The advocates on the one side argue as follows:—The rule of law which excluded from bearing testimony not only the parties to suits, but so many witnesses, on the several grounds of infamy, interest in the event of the suit, &c., has been condemned in modern times as wrong in principle. That rule was energetically attacked by Bentham, who laid down as a sacred principle of judicature, that it is the duty of courts of justice to use all available means of getting at the truth of the matters in question, and consequently reject no medium which could tend to help them to that truth; and the Legislature has adopted this view by abolishing, first, the incompetency of witnesses, and afterwards that of of the parties in civil causes, leaving the case of the accused parties on criminal trials almost the sole remaining fragment of the ancient rule, which ought to follow the fate of the others. One reason given for the rule—namely, that the allowing the examination of accused persons would induce a vast amount of perjury—is a weak and insufficient one, and leads to this injustice, that the witnesses for the prosecution depose on oath against the accused, while his mouth is stopped from contradicting them. The accused, being the person best acquainted with the fact of his own guilt or innocence, is naturally the best source to apply to for information on the subject. If he is guilty, a well-conducted cross-examination will wring the fact from him, to the furtherance of public justice; while, if he is innocent, he has nothing to fear from any cross-examination, however severe. And lastly, in accordance with these views, we find that a rigid interrogation of the accused forms an important part of every criminal trial in France and other continental countries.

On the other side it is urged that the rule laid down by Bentham, however sound as a general principle, is not of universal application, and must be understood with these limitations—first, that by the means of getting at the truth of the matters in dispute must be understood such means as are likely to extract it in causes in general, and not merely in some particular ones; and, secondly, that those means be not such as would give birth to collateral evils outweighing the benefit of any truth they extract. Instances might easily be quoted from Bentham's works in which he has admitted, though perhaps unintentionally, the existence of these exceptions; and numerous ones are to be found in the judicial practice of all countries where evidence, valuable in itself, is rejected on the ground of the great mischiefs that would result from

receiving it; such as secrets of State, confidential communications made by clients to their counsel evidence to remote to be received without forming dangerous precedents, &c. Admitting, therefore, that an interrogation of the accused would in *some cases* extract truth, which would be sought for in vain without it—an admission which, as all systems have their advantages and disadvantages, may be made in favour of torture, judicial expurgation, trial by ordeal, &c.—still, if the *general* effect of the practice would be to give birth to any collateral evils outweighing the advantage derived in those particular instances, the practice should have no place in an enlightened system of judicature. It is a fallacy to look on the accused in the light of a witness; the line of demarcation between them has always been recognised even under the most conflicting systems—as, for instance, the English one, which will not allow the accused to be questioned: and the French one, which, while it subjects the accused to a severe, and often most unfair, interrogation, does not put him on his oath, or treat him as a witness in any respect. And there is good reason for this. The accused, whose conduct is the subject in question before the tribunal, and whose life or liberty depends upon the result of the proceedings, stands in a very different position, and does not speak under the same sanctions of truth as the witness, who is a third person coming before it to give information on the matters in dispute. The latter has not the same strong interests to pervert the truth, and speaks with the terror of a prosecution for giving false testimony before his eyes—a terror at which the man whose life or liberty is at stake would only smile. The reason for rejecting the testimony of accused persons is not, as suggested, to prevent individuals incurring the guilt of perjury; for oaths, however beneficial, are not essential to the existence of a court of justice, and the reasons for receiving or rejecting such testimony would equally apply whether they were in use or not. The argument, that under the existing practice a prisoner's mouth is stopped, is a mis-statement of the law; for he is not only allowed, but invited, to say what he pleases in his defence; and, what is more, is accorded a favour which is accorded to no other litigant party, namely, that if he makes an exculpatory statement of facts, the jury are to take into their consideration, and acquit him if they believe it; whereas all other litigants are held strictly to prove their allegations by evidence. The rejection of the testimony of accused persons rests, chiefly at least, on a different principle from that of interest, being founded on the maxim, which runs through the whole English law, "Nemo tenetur seipsum prodere"—a maxim framed not with the view of sheltering guilty persons, as is sometimes represented, but of protecting innocentones, and carrying out the general policy of the laws. There is an essential difference between civil and criminal cases. A civil cause is a dispute between private individuals, who may dispose of their own rights as they please; a criminal one is an affair between the accused and society, whose laws he is charged with having broken; and public policy requires that his conviction should be based, not merely on a preponderance of probability, as in civil cases, but on a moral certainty of his guilt, which can only be expected from independent testimony borne against him, or his own voluntary statements. It is also a mistake to say that an innocent person has nothing to fear from cross-examination, especially when we remember that it would necessarily be conducted by a person vastly his superior in legal knowledge, and probably in natural capacity likewise, and who might or might not conduct it honestly and fairly. Such a process would often extract falsehood instead of truth; for when a man is suspected of crime, there is a natural tendency in the human mind to run after real or supposed admissions of guilt, and jump to conclusions from them; while weakness of nerves would frequently lead innocent men, but very rarely criminal ones, to falter and become confused in their answers; and to expect that even innocent men would not, under the tremendous pressure upon them, occasionally yield to the temptation of giving false or equivocating answers, and so work their own destruction, is putting too severe a strain on frail human nature. But although evidence extracted from the accused against his will cannot generate that moral certainty on which alone it is safe to act, it can, and is pretty sure to, generate sympathy in his favour, and thus shake public confidence in the administration of the law; while the opposite course, of holding the prosecution strictly to proof of the charge, encourages confidence in the law, and the hearty co-operation of society in its enforcement. The practical result of the suggested course would be to put the burthen of proof on the wrong party; so that when a man became suspected of a crime, instead of searching carefully for evidence against him, as is the case at present, all efforts would be made to escape the necessity of adducing proof by extracting from his own lips something to his prejudice; and mistaken convictions, especially where prosecutions are unfounded, or the result of malice or conspiracy, would be the frequent consequence. For these, and perhaps other reasons, the English law deems it the safest course to allow every accused person to defend himself in his own way, and enable him to say to his accuser, "If I have done evil, bear witness of the evil."

But while, on these grounds, we deem the rule of our law, which prohibits the examination of accused persons, a sound one, we do not look on its present practice as faultless. An accused person ought to be allowed the most ample latitude in defending himself, and this, it appears to us, he does not receive at present, when he is defended by counsel. By the common law, when a prisoner is defended by counsel, in cases where that course is allowable, his own mouth is, unfairly we think, stopped at the trial. A similar practice has been adopted in cases of felony since the Prisoners' Counsel Act, and a construction has been put on that statute which goes far to neutralise its benefits. Several judges have held, that when a prisoner is not defended by counsel, the jury may weigh the credit of any statement he makes in his own defence, although not supported by evidence; but that counsel appearing for him are bound by the same rule as parties and counsel in civil cases, namely, not to state as fact any matter which they are not prepared with evidence to substantiate—a ruling, the effect of which, in many cases, amounts simply to this, that a prisoner, by employing counsel, causes his defence to be suppressed, except so far as it can be suggested in a hypothetical form. It is remarable, that on charges of high treason the prisoner is asked by the Court, after his counsel have spoken, whether he wishes to add anything for himself.

The principle of Lord Brougham's bill, as already stated, is only an off-shoot of a more general one, It is to be observed that that bill does not empower the prosecution to examine the prisoner as a witness in chief against himself, and thus essentially ignores the principle of Bentham, that *every* medium of testimony ought to be resorted to. It also affirms the anomalous position, that a party may be a competent witness for one side, although not for the other—an absurdity which might fairly be supposed to have become extinct with the other ancient rules of incompetency. The bill is avowedly founded on the notion that the accused should be allowed to contradict on oath what is advanced against him on oath, overlooking the immense difference in the respective positions of the accused and the witness; and the recent case of the Rev. Mr. Hatch is cited as an instance where an improper conviction would have been averted had that course been open to the accused. It is, however, by no means clear that there was any defeat of justice in that case, for it has been suggested that it was lost, not through any defect in the law, but in consequence of the counsel for the defendant injudiciously refusing to call witnesses on his behalf. Moreover, although the principal witnesses was afterwards convicted of perjury, partly on the testimony of Mr. Hatch himself, the rest of the evidence against

that gentleman, coupled with the admissions made by himself on oath, on the trial of the witness, which it is assumed, he would have made on his own if he could have been examined on that occasion, formed an ample case for the jury. Be this, however, as it may, the making laws to meet unusual or extreme cases has been looked on in every age as the characteristic sign of short-sighted and weak legislation; and is in violation of the well-known rule of our own jurisprudence—"Ad ea quæ frequentius accidunt jura adaptantur," (2 Inst. 137); as well as of the Roman law—"Jura constitui oportet in his quæ *ἐπὶ τὸ πλεῖστον* i. e. ut plurimum accidunt, non quæ *ἐκ παραλόγου*, i. e. ex inopinato." (Dig., lib. 1, tit. 3, l. 3.)

We have just stated our views on the general question, and on Lord Brougham's bill as a part of it. That many of our readers will disagree with us in the above conclusions is probable enough; but there is one matter connected with the subject on which we trust we shall have the concurrence of all reflecting persons—namely, that as the bill proposes to effect an organic change in a system which has existed and, rightly or wrongly, been lauded for centuries, the expiring month of a session of Parliament, whether accompanied or not by the heat of the dog-days, and the annually recurrent nuisance of the Thames, is not the fit period for its introduction far less for its discussion.—*Jurist.*

DIVISION COURTS.

OFFICERS AND SUITORS.

Seizure under Execution in the Division Courts.

(*Continued from page* 178.)

3. This sub-section specifies particularly a variety of articles, and needs no remark.

4. The same may be said of this sub-section.

5. Exempts certain animals, and food "*therefor*," that is, for *all* the animals named.

6. "Tools and *implements* of, *or chattels* ordinarily used in the debtor's occupation, to the value of $60." The wording of this sub-section is somewhat vague, and may lead to difficulty in carrying it out. Our impression is, that in the case of a *farmer*, ploughs, harrows, scythes, spades, forks, and such like articles come clearly within the meaning of *tools* of a farmer's occupation; as cultivators, fixed threshing machines, reapers, &c., would be within the meaning of the word *implements*. All certainly would be included under the terms *implements of husbandry*. But this section goes further, and exempts *chattels* ordinarily used in the debtor's occupation. Now "chattels" is the most comprehensive word that could be used, and to particularise, would in our judgment exempt cattle, or other animals used to work a farm, to grind for a tanner, for a brick maker, or to turn a lathe for a turner, and might (save the mark,) exempt a lawyer's or doctor's books, such property in no case exceeding the value of $60. "Goods" and "Chattels," are nearly alike in import, and are commonly found together, but "chattels" is the more technical and appropriate word, and where there is a difference, is the most extensive in meaning. Chattels in its largest sense signifies all a man's moveable property—all that is not real estate. It must not be lost sight of however, that it is chattels *ordinarily used* in the *debtor's* occupation, that are exempt.

Sec. 5. Limits the operation of the preceding clause, by providing in effect, that if the execution be upon a judgment recovered for the price of any particular chattel mentioned in sub-secs. 3, 4, 5, and 6, it may be seized and sold on such execution, notwithstanding the general exemption. The words are, "Nothing" and "shall exempt from seizure in satisfaction of a debt contracted for such identical chattel, any article enumerated in sub-secs. 3, 4, 5, and 6." That is, if execution for the price of a stove, a cow, or a horse, &c., sold to the debtor, the identical stove, cow, or horse, &c., may be seized, and sold to satisfy the judgment. We take it if the stove, cow, or horse, &c., be exchanged or traded for some other chattel before execution, such last mentioned chattel cannot be seized for the execution, it would operate only on the *identical* property, the value or price of which was the subject of the suit in which execution issues.

Sec. 6. Gives the debtor the right to select out of any larger number, the several chattels which are exempt. This seems to apply to the property enumerated specifically in sub-secs. 1, 2, 3, 4, and 5 only. The time when this selection is to be made is not provided for; it will probably be held that it must be made at the time of seisure, or at the earliest practicable time after notice of seizure comes to the debtor.

We have now gone over minutely, the several clauses of the Act; some persons may think we have gone too much into detail, but our remarks are mainly intended for officers, and we know what suits them, what they desire, and to inform them, and serve them is our object.

A word of caution to Bailiffs.—Upon nearly every one of the exemptions, a question of *fact* may be raised. An action may be brought against a bailiff, the defendant can have the case tried by a jury, and every one knows that there is a prejudice against officers, and that juries are not likely to set too high a value on property that is declared exempt from seizure under a certain amount; but a question of value is not the only one that can be brought before a jury for decision; so that bailiffs who would be safe, should act with great caution and some liberality, in computation towards debtors.

If a debtor have no property besides that exempted, the Bailiff will be justified in returning the execution no goods, but it is recommended that to the usual forms of a "*nulla bona*" return, the words "*liable to seizure*," should be added.

At the time of seizure if there be several chattels of the description exempted, three or more cows for example, the Bailiff should ask the debtor if he wishes to select a particular one, under his right to retain one cow, and if so, to do it.

If any question as to value arises, and that the Bailiff thinks the debtor claims to retain more than would be covered by the value amount of exemption; the former may well ask the latter to put a value on each chattel, and if he refuses to do so, when reasonably requested, the circumstance of his refusal may be urged against the debtor in any after proceeding by him against the Bailiff.

The effect of exempting particular subjects is to make the act of seizing them under an execution the same as if seized without an execution at all: and Bailiffs and their sureties would be responsible for the wrongful act.

It will not do to quit the subject without referring to cases where the landlord makes a claim for rent.

(*To be continued.*)

Replevin in the Division Courts.

We direct attention to the Replevin Act of last session (cap 45) which confers jurisdiction on the Division Courts to issue writs of Replevin when the value of the property taken or detained does not exceed forty dollars. The enactment is as follows:

"6. In case the value of goods or other property or effects distrained, taken or detained does not exceed the sum of forty dollars, the writ may issue from the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained taken or detained.

"7. But the matter shall be disposed of without formal pleadings, and the powers of the courts and officers and the proceedings generally in the suit shall be as nearly as may be the same as in the other cases which are within the jurisdiction

of Division Courts, and this act and the act relating to replevin shall so far as any such suit is concerned be read as if they formed part of the act respecting Division Courts. (Consolidated Statutes for Upper Canada, cap. 19.)

This new and important jurisdiction furnishes another proof of the necessity for an early issue of a new set of Rules—for as proceedings are to be "as *nearly as may be* the same as in the other cases within the jurisdiction of the Division Courts," it is obvious that to secure anything approaching uniformity of procedure general rules and appropriate forms must be provided.

Clerks will notice that they are not authorised unless in the instances mentioned in the act to issue a writ (sec. 1) without a judge's order, and until procedure in the courts and rules are given on authority, doubtless the judge granting the order would send with it a form for the writ—like all the writs it should be signed by the clerk and issued under the seal of the Court.

This new jurisdiction materially enlarges the duties of officers, yet but little can be said with advantage till a practice is settled. All we can do at present is to give the practical proceedings in suing out the writ from a Court of Record and replevying goods under it at least so much and in such a shape as may be necessary to help officers to a better understanding of the subject.

It will be observed that the 7th section incorporates the acts relating to replevin so far as any suit brought in a Division Court is concerned.

Suppose, then, the goods of a party are wrongfully taken or detained, and he desires to obtain possession of them—in other words to replevy—the following steps are taken in the Superior Courts.

The person claiming the property his servant or agent makes an affidavit setting forth the facts of the wrongful taking or detention, the value and description of the property and that the person claiming is the owner or is lawfully entitled to the possession thereof.

On this affidavit application is made to a Judge for an order for a writ of Replevin to issue and the Judge either grants the order on an *exparte* application or a rule or order calling on the defendant to shew cause why the writ should not issue.

When the order is granted it is taken to the clerk who files it and issues the writ. The party obtaining it, then takes it to the sheriff to be executed, and at the same time and before any action is taken on the writ he must give a bond to the sheriff, himself and at least two securities, in treble the value of the property to be replevied, conditioned for his prosecuting the suit with effect and without delay, that he will make a return of the property, if such is adjudged and will pay such damages as the defendant may sustain by the issuing of the writ if he fails to recover judgment, and will observe and keep all rules and orders made in the suit.

The sheriff upon being satisfied in respect to the bond at once proceeds to replevy the property and delivers it into the possession of the claimant or his agent. He then makes a return of the writ with a statement or schedule annexed thereto giving the names, residence and additions of the sureties, date of the bond, the name or names of the witness or witnesses thereto, and the number, quantity and quality of the articles of property replevied.

If only a portion of the property is replevied the statement should also mention the articles not replevied and the reason why not.

As the act provides that in Division Courts the matter shall be disposed of without formal pleadings, the claimant or defendant will not require to take any further action in the matter until the trial. The cause will be entered by the clerk in his books, and included in the list for trial in the usual manner.

The foregoing summary applies to the usual class of cases but in some instances the property to be replevied or a portion of it, cannot be found in the sheriff's bailiwick, for which contingency provision is also made in the Replevin Act, the nature of which together with other matters relating to this action, necessary to be known by clerks and bailiffs, we shall treat of in a subsequent number.

Replevin Bond and Affidavit.

The following we have received from a valued correspondent, a County Judge, of whose extensive experience we shall be happy to avail ourselves in matters of Division Court practice. We take the liberty of publishing his letter with the forms accompanying it.

To the Editors of the Law Journal.

Dear Sirs,—Having been called upon yesterday to allow the issue of a writ of Replevin out of one of the Division Courts of this County, under the sixth section of the Act of last Session, 23rd Vic., ch. 65, I found it necessary to frame a form of writ. As I have taken some pains to make the form of writ given in the Replevin Act applicable to the Division Courts, and as the form may be useful to the readers of the *Law Journal*, I take the liberty of enclosing it for publication. I also enclose a form of affidavit for the writ which I have drawn up for the use of my clerks. I have endeavoured to embrace in it all the cases of wrongful taking and detention likely to occur in practice, and to make the allegations as concise as possible.

Urgent cases requiring the issue of a writ without a Judge's order, under the 2nd section of the Act, are not likely to occur in the Division Courts, and therefore I have not made the affidavit applicable to such cases; but the attention of the clerks might be called to the additional allegations required by that section.

Cases under the 3rd section are likely to occur frequently, but unless there is great urgency, a Judge's order should be obtained for the writ, as a precaution against informality or irregularity in the proceedings. The form of affidavit sent, is or may be made applicable to cases coming within that section.

I would suggest that you should, in an early number of the *Law Journal*, inform the Clerks and Bailiffs of their duties under this Act; such directions with regard to these duties, as you have given to guide them in the performance of their other duties, would be very useful.

FORM OF WRIT OF REPLEVIN.

No. —, A.D. 1860.

In the —— Division Court of the County of ——.

[Seal of Court.]

You are hereby commanded that without delay you cause to be replevied to (A. B.), his goods, chattels, and personal property following, that is to say (here describe the property as in the affidavit), which said (A. B.) alleges to be of the value of —— dollars, and which (C. D.) hath taken and unjustly detains (or unjustly detain) as it is said, in order that the

said (A. B.) may have his just remedy in that behalf. And to summon the said (C. D.), by serving a copy of this writ upon him, to appear at the sittings of this Court to be holden at ——, in the Township of ——, in the County of ——, on the —— day of ——, A.D. 1860, at the hour of —— in the forenoon to answer to the said (A. B.) in an action for unjustly taking and detaining (or unjustly detaining) his goods, chattels, and personal property, aforesaid. And to return this writ and what you shall have done in the premises, to the Clerk of the Court forthwith. And herein fail not.

Given under the seal of the Court this —— day of ——, 1860.

—— ——,

To —— Bailiff of the said Court. } *Clerk.*

FORM OF AFFIDAVIT FOR WRIT OF REPLEVIN.

In the —— Division Court of the County of ——.

I, A. B,, of ——, make oath and say:

1st. That I am the owner of (describe property fully), at present in the possession of C. D.

Or, That I am entitled to the immediate possession of (describe property), as *lessee*, (*bailee* or *agent*,) of E. F., the owner thereof, (or as Trustee for E. F.,) (or as the case may be,) at present in the possession of C. D.

2nd. That the said goods, chattels, and personal property are of the value of —— dollars.

3rd. That on or about the —— day of ——, the said goods, chattels, and personal property, were lent to the said C. D., for a period which has expired, (or were delivered to the said C. D., for a special purpose, namely, ——,) and that although the said goods, chattels, and personal property have been demanded from the said C. D., he wrongfully withholds and detains the same from me, the said A. B.

Or, That on or about the —— day of ——, the said C. D., wrongfully took the said goods out of my possession, (or out of the possession of E. F.,) and withholds and detains the same from me.

Or, That on or about the —— day of ——, the said C. D., fraudulently obtained possession of the said goods, chattels, and personal property, by falsely representing that ——, and now wrongfully withholds and detains the same from me.

Or, That the said goods, chattels, and personal property were on the —— day of ——, last, distrained or taken by the said C. D., under color of a distress for rent, alleged to be due by me, to one E. F., when in fact no rent was due by me to the said E. F. (or as the case may be).

4th. That the said C. D. resides (or carries on business), at ——, within the limits of the —— Division Court of the County of ——. (Or that the said goods, chattels, and personal property were distrained,) (or taken and detained,) (or detained,) at ——, within the limits of the —— Division Court, of the County of ——.

Sworn, &c.

NOTE.—(If the property claimed, consists of a single article, the name of the article may be substituted for the words goods, chattels, and personal property, and the verb altered to the singular number.)

WINDSOR, 11th August, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—You will please excuse the liberty I have taken in asking your opinion on the following questions:

1st. Has the Judge of a Division Court a right to extend time on an execution in Bailiff's hands, under ordinary circumstances?

2nd. Is it lawful to grant a *new trial* after a judgment has been rendered on an interpleader? Some of our Judges have decided they have not the power to do so, while others contend that they have.

Please answer in your next issue and oblige

Your obedient Servant,

E. S. WHIPPLE.

[1st. We do not think that the Judge of a Division Court has any power, under ordinary circumstances, to extend the time for payment of an execution in the Bailiff's hands. After an execution is once issued, the party in whose behalf it is sued out has, in our opinion, alone the right to exercise such control over it.

2nd. We are of opinion that the Judge has the power of granting a new trial in interpleader matters as in other cases.

The section of the Act which regulates the practice in interpleader cases states, that the order of the Judge "shall be enforced in such manner as any order made in any suit brought in such Court, *and such order shall be final and conclusive between the parties.*" This might seem to lead to the inference that the parties would not be entitled to a second hearing, but when taken in connection with the 84th section of the Division Court's Act of 1850, wherein it is also provided, that every order and judgment of any Division Court "shall be final and conclusive," but goes on to provide that "the Judge shall also, *in every case* whatever, have the power, if he shall think fit, to order a new trial;" we think that the opposite conclusion must be arrived at.

Upon principle, also, we shall hold the same opinion, as it is in accordance with the true spirit of the law to give every facility for arriving at a just decision on any matter in dispute, and it would manifestly lead to an injustice being done to suitors, if an exception were made in the instance of an interpleader issue.

The decision of a Division Court Judge is made to be final or without appeal, because the jurisdiction being so limited it was assumed that he would be fully competent to form a correct opinion on any subject coming before him, but could never be intended by the Legislature to deny him the power of doing suitors as ample justice, in every case, as they might have in the higher Courts.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

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

THE CORPORATION OF THE TOWNSHIP OF WHITBY v. HARRISON.

Collector of Taxes—Action against his surety—Delivery to him of roll—Oath of office—Township of Whitby—Division of by 20 Vic., ch. 113

To an action against a surety for a collector of taxes for moneys received and not paid over, defendant pleaded that no roll properly certified was received by the collector, but that he collected the moneys wrongfully and without authority. It appeared that a roll was delivered to him signed by the clerk, but not otherwise certified. *Held* sufficient authority.

Defendant also pleaded that the collector had not taken the oath of office. *Held*, that the proof of such issue lay upon him.

The bond was taken to "the Municipality of the Township of Whitby," and afterwards the Township was divided by 20 Vic., ch. 113, *into Whitby* and East Whitby. *Held*, that the bond was properly sued upon in the name of the Corporation of Whitby.

This was an action brought by the plaintiff to recover from the defendant, as surety for one Thomas Hodgson, collector for the township of Whitby for the year 1857, a sum of money for rates and assessments for that year collected by the said Hodgson, and not paid over to the treasurer of the municipality.

The case was tried at Whitby, before *Hagarty*, J., and a verdict entered for the plaintiffs for £2,000 debt, and damages assessed by consent at £100, subject to the opinion of the court; and it was agreed that if the court should be of opinion that the plaintiffs were entitled to recover, the amount of damages should be settled by a reference.

C. S. Patterson for the plaintiffs.

Richards, Q. C., contra, cited, *Kepp* v *Wiggett*, 10 C. B. 35; *Webb* v *James*, 7 M. & W. 279.

The facts of the case, and the questions to be decided, are sufficiently stated in the judgment.

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

The *nisi Prius* record shews that the plaintiffs took issue on all the defendants pleas. Upon the 1st, 2nd and 3rd pleas the plaintiffs were entitled to a verdict, for they only denied the making of the deed sued on, and the collection of any money, and set up payment of all that was collected, of which payment no proof was given.

Ther. as to the 4th, 5th and 6th pleas, on which issues in fact were joined.

The 4th Plea is that no collector's roll properly certified under the hand of the clerk of the council, was received by the collector before the time he collected the rates for 1857, or any of them, as in the declaration alleged, nor was any such roll ever delivered to him, but he collected the moneys wrongfully, without having received his collector's roll or any collector's roll for the township, or any part thereof, and without any authority for so doing.

The evidence, it seems, was that the collector did receive the roll signed by the clerk, but not *certified* otherwise than by such signature being placed at the foot of it. We think the substance of that issue was, that the collector received the taxes wrongfully and without authority, which it hardly lies in the surety's mouth to urge, if he did collect and receive them; but however that may be, we think the signature of the clerk sufficiently verified the roll to enable the collector to receive the money, for his signature at the end sufficiently authenticated the roll as that on which he was to make his collections.

The fifth plea is in substance that the collector had never taken the oath of office which he was required to take, and that the defendant had no notice of that omission until long after the money was collected.

It is not stated in the case whether the collector did take the oath or not. The affirmative of the issue was with the plaintiff's, but the burthen of proof, notwithstanding, we think, lay with the defendants, for it would be presumed that the collector did his duty in this respect till the contrary is shewn, * and there being no evidence on the subject, the verdict should be for the plaintiff.

The sixth plea is, that before the County Council had appointed any day later than the 14th of December, 1857, for the return of the collector's rolls, or for paying over the money collected, the collector had failed in collecting the taxes mentioned in the condition of the bond: that on the 19th of December, 1857, the township council authorized by resolution the collector to continue to levy unpaid taxes to the 15th of January, 1858, and that on the 29th of January, and before any other resolution on this subject had been passed, the County Council of Ontario by by-law extended the time for the return of the collector's roll to the 1st of March, 1858, and thereby extended the time for the collectors of municipalities paying over the rates to that day; that the said by-law was passed without the knowledge of the defendant, and that he never consented to the extension of the time given by such by-law.

This plea and the fifth are pleaded as equitable defences.

According to the statements of the evidence contained in this case, the sixth plea was proved, and without regard to its sufficiency the defendant was therefore entitled to a verdict upon the issue on that plea.

An objection was taken, that though the bond was taken to "the municipality of the township of Whitby," it cannot be now enforced in the name of the Corporation of the Township of Whitby, on account of the change made by statute 20 Vic., ch. 113, which divided the Township of Whitby into East Whitby and Whitby, after the making of this bond. That act was to take effect upon the 1st of January, 1858, so that the change was after this bond was executed, namely, on the 16th of November, 1857.

We see no other way that the bond could have been sued upon than as it has been.

* See Thy Ev., sec. 339; Williams v. East India Company, 3 East 192.

The plaintiffs in our opinion are entitled to have a verdict entered for them on all the issues, except that on the sixth plea, and the defendant should have a verdict on the sixth plea.

THE SAME CASE.

The fact that a collector of taxes received the money without any roll having been delivered to him, and without having taken the oath of office, forms no defence for his surety to an action for not paying over such money.

An extension of time for making the collection without the surety's consent does not discharge him, being expressly allowed, and his liability retained, by the 18 Vic, ch. 21.

The plaintiffs, besides taking issue, demurred to the fourth, fifth, and sixth pleas.

C. Patterson for the demurrer. *Richards*, Q. C., contra.

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

As to the fourth plea, we can only understand it to mean that the collector collected or received the money without having any roll furnished to him.

The demurrer, we think, must be taken to admit that, for we cannot infer from the plea what the evidence on the trial proved: that a collector's roll signed by the clerk, though not otherwise certified, was delivered to him.

As the plaintiffs have taken issue upon the plea as well as demurred to it, and as we think the plaintiff's were entitled to a verdict in their favour upon that issue, the costs only of this demurrer are in question. The defendant's counsel relied much on the authority of *Webb* v. *James*, (7 M. & W. 279,) for supporting this plea, but the condition of that bond made it, when coupled with the recitals, much more restricted in its nature than the bond into which this defendant entered. We think this bond makes the surety liable for all rates and assessments for 1857, which should come into the collector's hands, and which he should not pay over.*

The declaration avers that the collector collected moneys of the rates and assessments for 1857, which he did not pay over, but neglects and refuses to pay over. It is no sufficient answer to the declaration to say that no certified collectors roll came to the collector for the rates of 1857, before he received the said moneys, or at any time; for if any person assessed, knowing what he stood rated at on the roll as formerly revised, should voluntarily pay it to him before the clerk had sent him the roll, he would be bound to pay it over; and besides, under 12 Vic., ch. 81, sec. 179, there might be rates which the collector would be bound to collect for 1857, and which would not appear on the certified roll, but would be leviable by the collector under a precept from the sheriff.

The fifth plea assumes it to be a good equitable defence, when insisted on by the surety, that the collector had not taken the oath of office at any time after he was appointed.

The 12 Vic, ch. 81, sec. 127, requires that every collector shall, before entering on the duties of his office, take an oath that he will truly, faithfully, and impartially, to the best of his knowledge and ability, *execute the office of collector*, and, that he has not received, and will not receive any reward for the exercise of any partiality or malversation, or other undue execution of the said office.

No doubt it would be a breach of this oath, which the collector ought to have taken, if he received rates which he did not duly pay over; and it is possible, though not certain, that the defendant when he became surety for the collector, looked upon this oath, which he might have supposed the collector must have taken, or must take, as affording some security for his integrity. We must not suppose that a sworn officer would have more scruples about acting unfaithfully than one who was not sworn, otherwise it would be altogether idle in the legislature to exact such oaths. But we can find no authority that would warrant our holding that the omission to take the oath on the part of the collector furnished a legal excuse to the collector for not paying over money that he had collected, or that it could be set up by his surety as a claim to

* The bond in this case contained no recital, and was conditioned as follows: "The condition of this bond is such that if the above bounden Thomas Hodgson shall collect all rates and assessments of the said municipality for the year 1857, for which he has been appointed collector, and shall pay all such rates and assessments (or so much thereof as can be collected) over to the treasurer of the said municipality of the township of Whitby, on or before the fifteenth day of December, one thousand eight hundred and fifty seven, then, and in such case, this bond shall be void, or otherwise to be and remain in full force and virtue."

exemption from liability on his part. Then can we hold it to be a defence for the surety in equity more than at law? We think not. It may be truly said that the plaintiffs were negligent in not seeing that the oath was duly taken, and on grounds of public policy they should not be encouraged to think themselves equally secure as if they had done their own duty in that respect, but at the most that was laches on their parts, and in a matter collateral, not in any thing to which the bond or condition refers.

He was collector, though he was not sworn. His receipt for the money, we take it, would bind the municipality so that they could not enforce payment a second time from the parties assessed, who had paid their taxes to this collector; and we should be supported by no authority, we think, in holding that the fact of the collector not being sworn operates in equity as a discharge of the surety. By the 127th section, as amended by the statute of 1850, a fine of £10 is imposed upon the collector if he omits to take the oath, which would hardly be an adequate punishment if the legislature intended that all he had done while he had not taken the oath should be held to be illegal to the extent that he might keep as against the municipality whatever money he had collected.

There are many instances where the surety has claimed in vain to be exempt in consequences of laches in the party taking the security, where the claim for discharge was far stronger, as, for instance in *Sheperd* v. *Beecher*, (2 P. Wms. 288). There was no fraudulent concealment here of a fact which the surety might desire to know. He could easily have learned whether the collector had taken the oath of office. When the act says, as it does, that before entering on the duties of his office the collector shall take the oath prescribed, or in default of his doing so shall pay £10, it does not follow, in our opinion, that his failing to observe that direction renders whatever he does illegal.

As to the sixth plea, the statute 18 Vic., ch. 21. is an answer to any objection on the ground of extension of time, for it authorised the extension, and expressly provides that any such extension should not "invalidate or otherwise affect the liability of the collector or his sureties in any manner whatever."

The plaintiffs we think should have judgment in their favour on all the demurrers.

Judgments for plaintiffs on demurrer.

McIver et al. v. Jacob Dennison.

Note payable to maker's wife—Endorsement by her.

Declaration, on a note made by defendant, payable to D. or order, and by him endorsed to plaintiffs. *Plea*, that D., when the note was made, was, and still is defendant's wife. *Replication*, that defendant made the note with the intent that D. should endorse away the same, and that she endorsed it to the plaintiffs by his authority.

Held, on demurrer to the replication, that the action was maintainable, and the plaintiffs entitled to judgment.

Action on a promissory note for $472 75, made by defendant, payable to Catherine Dennisen or order, and by her endorsed to plaintiffs.

Plea.—That the said Catherine Dennison, to whom the said supposed note in the declaration mentioned was made payable, was at the said time of the making of the said supposed promissory note, and at the said time of the said endorsement thereof, and still is the wife of the said defendant; and that the said defendant and the said Catherine Dennison, at the said several times, when, &c., were, and still are living together as husband and wife within Upper Canada.

Replication.—That the said defendant made the said promissory note in the said declaration mentioned, payable to the said Catherine Dennison, or order, as set forth in the declaration for the express purpose, and with the intent that she should endorse away the same, and that she endorsed the said note to the plaintiffs with the privity, approbation, and consent of the said defendant, and by his authority.

Demurrer on the grounds.—1. That inasmuch as the matter disclosed in the plea shews the instrument declared on to be void and not a negotiable instrument, for want of a legal and sufficient payee, and the replication admits the truth of the plea, the intent and purpose alleged in the replication are insufficient to render the instrument a valuable and negotiable instrument. 2. That the instrument being void from the beginning, the consent or authority of the defendant, as alleged in the replication, could not make the endorsement valid, or give a right of action to the plaintiffs upon such instrument.

The plaintiff joined in demurrer, and took the following exceptions to the plea:—that the defendant having made the said note, as in the said declaration alleged, payable to the said Catherine Dennison or order, thereby gave her authority to endorse the said note, and she having in pursuance of such authority endorsed the same to the plaintiffs, the defendant is estopped from alleging her coverture with him in bar of the action, or from denying her right to endorse the said note. That under the circumstances set forth in the declaration and in the said plea, the plaintiffs being the holders of the said note without notice, the said plea affords no answer whatever to the declaration, or to the right of the plaintiffs to recover on the said note That the defendant having made his said note payable to the said Catherine Dennison or order, as a feme sole, is now estopped from alleging his coverture with her in bar of the plaintiff's action.

C. S. Patterson for the demurrer. *Richards*, Q. C., contra.

The following authorities were cited—*Smith* v. *Marsack*, 6 C. B. 486; *Easton* v. *Pratchett*, 1 Cr. M. & R. 798; *Hooper* v. *Williams*, 2 Ex. 13; *Goy* v. *Lander*, 6 C. B. 836; *Prestwick* v. *Marshall*, 7 Bing. 565; *Cotes* v. *Davis*, 1 Camp. 485; *Prince* v. *Brunatte*, 1 Bing. N. C. 435; Chitty on Bills, 16.

Robinson, C. J.—I think the plaintiffs are entitled to judgment on this demurrer, on the authority of the case of *Smith* v. *Marsack* (6 C. B. 500) and of *Drayton* v. *Dale*, (2 B. & C. 299,) which latter case is relied on as an authority in *Sanderson* v. *Collman*, (4 M. & Gr. 218.) I refer also to Story on Promissory Notes, secs. 80—88; *Halifax* v. *Lyle*, (3 Ex. 453); *Braithwaite* v. *Gardiner*, (8 Q. B. 474); *Pitt* v. *Chappelow*, (8 M. & W. 616); *Prestwick* v. *Marshall*, (4 C. & P. 594, S. C. 7 Bing. 567); *Prince* v. *Brunatte*, 1 (Bing. N. C. 435,) and Byles on Bills, p. 155.

McLean, J.—It appears to me that this action is sustainable, and that the defendant cannot set up as a defence that the note declared on was made by him payable to his wife or order, and therefore void.

When he made the note so payable he constituted his wife so far his agent as to give her power, by putting her name on it, to give it currency as a negotiable note. She could not enforce the payment, and the note would have no force so long as it remained in her hands, but by endorsing it and handing it over to the plaintiffs the defendant became bound to pay the amount according to its tenor and effect. If the note had been drawn by the defendant payable to his own order, it would be of no value until endorsed by him, but his endorsement would immediately make it a note payable to bearer; and I cannot see why a note payable to the defendant's wife or order, and endorsed by her in blank, should not equally become binding as a note payable to bearer. The defendant could give his wife authority to make a note in his name, and if she made such a note, and the authority could be shewn, the defendant would of course be liable as the maker. But if he authorised his wife to endorse an instrument by which he promised to pay a certain amount to her order, and the instrument so endorsed is transferred, as alleged in the replication, I think he is estopped from denying his liability on such instrument to the holder of it.

Judgment for plaintiffs on demurrer.

IN PRACTICE COURT.

EASTER TERM, 1860.

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

In the matter of the Arbitration between the Corporation of the Township of Eldon and David Ferguson and Israel Ferguson.

Corporations, sole or aggregate, if not disabled, may submit disputes relating to Corporate property, to arbitration, and their successors will be bound thereby.

The authority of the Executive Government to appoint a Commission to enquire into the financial affairs of a Municipal Corporation, does not prevent such a Corporation from suing for money due to them.

Quære—Can the Reeve of the Township affix the Seal of the Township to a submission to arbitration as to property of the Township, without being specially authorized by resolution of the Council so to do?

Arbitrators appointed by a Municipal Corporation, as above mentioned, may examine the accounts of the Corporation, though previously audited, as the Municipal law directs.

Under the special circumstances of this case, it was held that the arbitrators might well make their award against the father of the Township Treasurer, who was really but not nominally the Treasurer, and who was a party to the submission as to the state of the Township Treasurer's Accounts.—(23rd June, 1860.)

In Hilary Term last, Mr. Hector Cameron obtained a Rule calling on the Corporation of the Township of Eldon to shew cause on the first day of the then next Term, why the award made between the parties, should not be set aside, on the following grounds:

1.—That the Corporation had no right to enter into the submission.

2.—That by the Municipal Act, a Commission may be appointed to investigate the financial affairs of a Corporation, and therefore no other mode can be resorted to, to investigate the accounts.

3.—That the deed of reference does not purport to be under the corporate seal, and there is nothing to shew that the reference was duly entered into by the Corporation, under their seal, or otherwise, in a manner obligatory on the Corporation.

4.—That two of the arbitrators acted in a partial and unfair manner, and shewed a determination to favor the Corporation, during the arbitration.

5.—That the arbitrators acted perversely and illegally in going into an examination of accounts which had been duly audited according to the provisions of the Municipal Act, and in reference whereto, the Report of the auditors is made final.

6 —That the arbitrators acted unjustly and with gross partiality, in charging the treasurer with all moneys appearing due by the Collectors' Rolls, for taxes, without evidence that the Collectors had received or paid to the treasurer, the whole of such moneys, and notwithstanding that a Collector stated to the arbitrators he had not paid to the treasurer all such moneys, and also in refusing to receive evidence of, or give credit for sums paid by the treasurer, but not charged in his book as paid.

7.—That the arbitration was unfair in this, that the Corporation appointed two out of the three arbitrators, and refused to arbitrate, except on that condition.

8 —That the arbitrators consulted with members of the Council of the Corporation, as to their award, and what amount they wished them to find, and award for.

9.—That the award was not as it purported to be, the unanimous decision of the three arbitrators,—Jacob Ham, one of the arbitrators, having signed it under a mis-apprehension.

10.—That the award was unjust in this, that it clearly appears no sum whatever was due the Corporation by their treasurer, and that the Corporation admitted that, by levying a tax for payment of a balance due by them to the treasurer.

11.—That the Corporation could not legally arbitrate with Israel Ferguson, he not being responsible to them, and that the award as regards him is void, and there was no liability on his part, to the corporation; or contract between him and them.

12.—Or why the award should not be referred back to the arbitrators, for re-consideration.

The submission was dated the 25th of November, 1859, and made between the Corporation of the Township of Eldon, of the first part, and Israel Ferguson and David Ferguson, of the second part. It recited that David Ferguson was treasurer of the Township, from 1854 to 1857, both years inclusive, and that Israel Ferguson was his deputy, and received and paid out Township moneys for David Ferguson, during his said term of office. It further recited, that disputes had arisen between the parties, and were then depending, touching certain alleged irregularities and omissions in the accounts and books of the said David Ferguson, as such treasurer, as aforesaid, and certain alleged deficiencies on his part, or on the part of the said Israel Ferguson, acting as such treasurer during the said term; and in order to put an end thereto, and to obtain an amicable adjustment thereof, the parties of the first and second parts respectively agreed to refer the same to the award of Alexander A. McLauchlin, Jacob Ham, and George Kempt, arbitrators, indifferently chosen on behalf of the said parties respectively; award to be made before 28th December, 1859.

The indenture of reference witnessed that the said parties, thereto did, and each of them did; and each of the parties of the second part, for himself and the other, severally and respectively, and for his and their respective heirs, executors, administrators, and successors in office, covenant that each of the parties thereto, of the first and second parts, should well and truly obey and perform the award of the arbitrators or any two of them, concerning the premises, or anything in any manner relating thereto; the costs of the arbitration and reference, to be in the discretion of the arbitrators.

The submission was signed by John Morrison, Reeve, [L. S.] written partly on the seal of the Corporation, and by David Ferguson, and Israel Ferguson, and the attesting clause was thus; "In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written."

The award was under the seals of all the arbitrators, and dated the 14th day of December, 1859.

The award, after reciting the submission, and that the arbitrators had taken on themselves the burthen of the reference; stated that they had determined that there was justly due and owing to the Municipality, from David Ferguson, and Israel Ferguson, £128 15s. 5½d., and £21, interest on the same; and directed that David Ferguson and Israel Ferguson, should pay the said sum of £149 15s. 5½d., to the Municipality, one half in three months, and the balance in six months, with interest, from the day of the publication of the award, and notice thereof in writing given to the said David and Israel Ferguson. The arbitrators also directed the payment the costs of the reference.

There were a great number of affidavits filed, on moving the rule; the general effect of them was that the treasurer's accounts for 1854, 1855, 1856, and 1857, were duly audited and approved, by the auditors appointed by the Township; that the arbitrators acted unfairly, and refused to allow the auditing of the accounts to be considered binding on the Corporation, and in making up the accounts charged the treasurer with the gross amount of taxes payable according to the Collector's Roll, without any investigation of the amount paid to, or received by the treasurer, or remaining uncollected; that divers large sums of money had been paid on behalf of the treasurer, for the uses of the Township, which were not entered in the book kept by Israel Ferguson, but the arbitrators refused to give credit for such sums, because they were not entered, though evidence was offered to prove their payment; and that Israel Ferguson was not treasurer during the four years, the accounts for which, were in dispute; nor was he security for the treasurer, nor did he ever enter into any contract or agreement to become liable to the Corporation for the treasurer, but being his father, and well acquainted with the Municipal affairs of the Township, he usually acted for him.

The parties making the affidavits besides David and Israel Ferguson, were persons who had been members of the Municipal Council of the Township, and officers of the Council, the Clerk, and one of the Auditors. They expressed their opinion, and David and Israel Ferguson stated positively, that they did not owe the Municipality anything. Jacob Ham, one of the arbitrators, who signed the award, stated the same thing, and explained that he thought he was bound to sign the award because a majority of the arbitrators concurred in it. He also spoke of the mode adopted by the arbitrators, to ascertain the amount due, and of their refusal to allow several sums of money proved to have been paid on account of the Corporation by the treasurer, because they were not entered in the treasurer's account or memorandum book.

During last Easter Term, *D. B. Read*, Q.C. showed cause, and filed numerous affidavits, shewing that the mode in which the accounts were made up and allowed by the arbitrators, was by charging the treasurer only with sums for which receipts were produced, and most of these receipts were signed by Israel Ferguson, for David the treasurer, and that all sums that they could show were paid out on account of the Corporation, were allowed; and then the award made for the balance, adding interest. Mr. Read contended that his affidavits clearly answered the case made out when the rule was moved for, and shewed that Israel Ferguson was really the treasurer, and did all the business, whilst during the same four years he was Reeve of the Township; that if it should appear that the Township had lost anything whilst he was filling the two incompatible offices of Reeve and Treasurer of the Township, or Reeve and Deputy Treasurer, and that the monies lost had gone into his hands, there could be no doubt that it would be viewed as

a fraud on his part, and the auditing and approving of the accounts would not prevent his being liable to the Township, and that David must be equally liable either because his deputy had been guilty of fraud in relation to the office, or because he allowed his name to be made use of to allow Israel to fill the office for his own benefit, and therefore he could not set up the auditing, to cover the fraudulent conduct of the real principal. He referred to the affidavit of Geo. W. Millar, who had been one of the auditors in 1855 and 1856. He stated that no Collector's Roll was produced, and no other papers, books, or documents, than the treasurer's books and vouchers, and that Archibald Jackson, his co-auditor, said he had asked Mr. Israel Ferguson, the Reeve, for the Collector's Roll, but that he had said it was only the treasurer's books that the auditors had to audit. He contended that this shewed conduct on the part of Israel Ferguson, further sustaining the view that he had acted fraudulently. That the affidavits filed by him, further shewed that the Bond of David Ferguson, with sureties for the due performance of the duties of treasurer, could not be found. That the Reeve, Israel Ferguson, stated he had given it to the Town Clerk, and this the Town Clerk denied, and that the Bond could not be obtained. He argued that the case raised, had been fairly met, and that the Rule should be discharged.

Hector Cameron, contra. The Corporation seal to the submission is not alone sufficient, it ought to be shewn that the submission was by order of the Corporation, and there should be some By-law or resolution of the Council, authorising it He referred to Russell on awards, and to Municipal and Con. Stat., sec. 3, 5, 8, sub. sec. 8, and 9. He also urged that under sec. 179, of same statute, the Council having allowed the accounts as audited, their decision was final, and that the arbitrators were not allowed to go behind that allowance. He further contended that the power given by sec. 240 and 241, of the same statute permitting the appointment of a commission, to inquire into the financial affairs of a Municipality, shews that the decision on the report of the auditors must be final. He also urged that there was nothing to warrant an award against Israel Ferguson; besides urging generally, that nothing was due the Corporation from the Treasurer.

RICHARDS, J.—It will be more convenient to dispose of the objections to the award in the order in which they appear in the Rule.

As to the first objection.—It is laid down in Watson, on awards, that "Corporations sole or aggregate, if not disabled, may submit disputes relating to Corporate property, to arbitration, and the successors will be bound,"—He refers to Rolle Arbitr. 2 (A) and Bac. Abr. Arbitr. C. 21, E. 4, 13.

As to the second.—The power conferred is merely one of inquiry, and may be of great advantage to Municipalities, by enabling the Commissioners to enforce the attendance of witnesses, and compelling them to give evidence. There is nothing in the section to prevent a Corporation from suing for money due them. It would be unreasonable to hold that this power to inquire, should deprive the Corporation of resorting to a more speedy and economical mode of investigating their accounts, and obtaining payment of the amount due, when ascertained. I see nothing in this section to prevent the corporation from referring their claim.

Third.—The submission is not under the Corporate Seal. The objection as a whole, may be considered thus, that because it is not under the Corporate Seal, and it is not shewn in any other manner, that the reference was duly entered into by the Corporation, *under their seal or otherwise*, therefore the submission is void. As it is under the seal of the Corporation, the objection seems answered. If it is contended that there is no authority given to the Reeve to enter into the submision on the part of the Corporation, though he has put the seal thereto, then the objection is not taken quite in that form. But if it had been so taken, I would not feel justified in setting aside the award on that ground, for the resolutions of the Corporation, filed, clearly contemplate a reference of this matter, and the Reeve states in his affidavit, that the Council appointed Alexander A. McLauchlin, Esq., as their arbitrator, and that Mr. Kemp was appointed as third arbitrator, at the request of Isaac Ferguson. I apprehend if the Corporation were not bound by the submission, that would be as good a ground for the treasurer to take, on any proceeding to enforce the award, as it is on this application—the objection would be, that the submission is void for want of mutuality. I am not therefore disposed to interfere with the award on this ground, as it will be open to the parties to raise it hereafter, if so advised.

Fourth.—The affidavits filed to sustain the award, establish that the arbitrators took a reasonable course. The affidavits of the two arbitrators, the gentlemen appointed by the Council to go over the books and accounts, shew that they only charged against the treasurer the monies for which his receipts were produced, and they allowed him all sums that appeared by the books, to have been paid out, and what it could be proven were paid out on account of the Corporation. As to the interest, and consulting the Corporation as to its being charged, the arbitrators discussed it among themselves, two of them were inclined to allow interest at six per cent. They finally called on the members of the Council, in presence of all parties, to say if they demanded interest. They said they did, and would be content with interest at five per cent. I see no partiality or unfairness in this.

Fifth.—That the arbitrators should go into the accounts though they had been audited, seems to me to be very natural. The very ground of the dispute was that (although the accounts had been audited,) there were irregularities and omissions in the books of David Ferguson, as such treasurer, and certain alleged deficiencies on his part, and on the part of the said Israel, acting as such treasurer, and these were to be referred, and they bound themselves to abide by and perform the award It was to put an end to the dispute, that the submission was made, and it certainly would not be a satisfactory adjustment if the arbitrators after that kind of a submission, had refused to examine the irregularities, and omissions in the accounts and books, and the deficiencies of their officers. Under the submission, I think any advantage from the auditing and allowance of the accounts was waived.

Even if not, it seems to me to be a monstrous proposition that an officer of the Corporation may wilfully, or even negligently omit to enter the receipt of monies, and because the auditors have not been able to discover this omission, and the Corporation approves of the report, that when the omissions are discovered the officer may set up the audit to cover his own fraud or neglect. In the case before us it was open to the arbitrators to say on all the facts whether the conduct of the Treasurer and Acting-Treasurer was fraudulent or not—and if they thought there was fraud, as they seem to have done, they were quite justified, independently of the special ground of submission, in going into the accounts. I understand there is a case decided in the Court of Queen's Bench here, of the Municipality of the County of Haldimand v. Martin, in which the question is raised, how far the audit of an account prevents the Corporation from suing to recover back money improperly paid on such account. I have not been able to see the case, but have been informed that the Court decided that the auditing and approving of the account by the Corporation was no answer to the action.

As to the *sixth* objection—this seems negatived, by the facts as shown by the affidavits filed in reply. I have mentioned the mode in which the indebtedness was ascertained, in my observations on the four objections, and I also refer to that for an answer to the *seventh* and *eight* objections.

Ninth—As to this there is no doubt that two of the arbitrators did concur in the award, and that is sufficient—that Mr. Ham did not concur, is only shewn by his own affidavit—the other arbitrators were not aware that he dissented, and the affidavits filed in shewing cause, shew that he assented. If it were of any consequence in determining the matter with these contradictions, the fact that he signed the award would prevail.

Tenth—The observations on this fourth objection apply to this

Eleventh—It is shewn beyond all doubt, that Israel Ferguson though Reeve of the Township, transacted by far the larger part of the business of Treasurer; that he gave explanations and statements as to the accounts, and although he acted in the name of David, it might be urged with great force, that he was in truth the Treasurer. The monies for which the Treasurer is said to be in default were almost all, if not all paid into his (Israel's) hands. By his own letter he seems to admit that he had some monies belonging to the Township, in his hands. The bond given by his son David, for the due performance of the duties of his office, had been in his possession. When applied to for it he stated he had handed it over to the Clerk—the Clerk denied that he had re-

ceived it. It does not appear that it has yet been delivered to the Municipality. Under these circumstances the Municipality agree to arbitrate if Israel will become bound with his son, to fulfil the terms of the award. By the submission which recites the fact, that he (Israel) acted as Treasurer, it was agreed to refer the disputes about the omissions, &c., in the Books, and certain alleged deficiencies on David's part, or on the part of the said Israel to the arbitrators, and both covenant to perform the award. Under this state of things I think the arbitrators may well award against Israel.

Twelfth—I see no reason for referring back the award. Looking at all the facts of the case, I see no reason to doubt that the arbitrators have done substantial justice. Israel Ferguson was Reeve of the Township for *four* years; during that period his son was the Treasurer, and as Reeve he would no doubt have influence in the appointment of the other officers of the Corporation. As head of the Corporation, it was his duty to see that all the subordinate officers did their duty; that the Treasurer kept proper books, and entered therein all monies received and paid out on account of the Township. It was also his duty to see that the Treasurer gave good security for the proper discharge of the duties of the office. As Deputy-Treasurer, or as real Treasurer, discharging the duties of the office in his son's name, he undoubtedly omitted to enter some monies which he had received for the Township, and for which he gave the Treasurer's receipt. He contended that he had paid out monies for the Township which amounted to the sum so omitted to be entered by him, and that these sums had not been entered as monies paid out for the Township. One of the persons appointed to look over the accounts, states that the amounts so claimed by him to be allowed were all entered in the Treasurer's books. By thus being connected with the office of Treasurer, he was placed in a position, where, if the Treasurer neglected his duty or acted dishonestly, the Municipality lost the supervision of its head over that officer, for he could not be expected to report his own negligent or dishonest acts to the body over which he presided. When called upon to deliver up the bond of the Treasurer, he does not produce it, but says he gave it to a subordinate officer who denies having received it. By connecting himself with the active discharge of the duties of the office of Treasurer, he incapacitated himself for the proper discharge of his first duty, viz., that of looking after the interests of the Corporation of which he was the head; and whenever the Corporation suffer from the default or misconduct of the Treasurer, Mr. Israel Ferguson has no right to complain if the worst construction is put on all his acts, and that he is made personally liable for any defalcations that occurred in the office, the duties of which he personally discharged, and when the monies claimed to be missing, were paid over to him. Then, where is the bond given for the proper discharge of the duties of the office of Treasurer? If he has improperly retained the possession of this, the presumptions would be still stronger, and against him. Finally, if he has kept the books of the Treasurer, and the accounts of the Municipality in such a confused or improper manner, (when in truth he ought not to have medled with them at all,) so that the intelligent gentlemen who acted as arbitrators, and the others who investigated the accounts of the Corporation, satisfied themselves that there was a large sum of money due by the Treasurer to the Municipality he has no good ground of complaint.

In moving to set aside this award, the Treasurer contents himself with general statements, that the accounts have been audited and allowed, and therefore the award is wrong. If it could be shewn what sums were improperly charged against the Treasurer by the arbitrators, and what they had refused to allow, there would be a greater shew of reason to support the rule. On the other hand, the arbitrators explain that they only charge the Treasurer with monies paid to him for which receipts and vouchers were produced; and that they allowed him for monies paid—shewing how the amount is made up. I cannot say that I have any doubt as to the correctness of the award.

It will be for the Corporation to ascertain, when taking steps to enforce the award, if the proceedings taken by the Municipal Council shew a sufficient authority to the Reeve to enter into the submission on behalf of the Corporation, and whether the obligation as to want of mutuality in the submission, is one that can be urged with success.

Per Cur.—Rule discharged.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

LAZARUS v. THE CORPORATION OF THE CITY OF TORONTO.

Snow falling from roof—Injury thereby—Liability.

There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling.

The defendants, a city corporation, owning land in the city, leased it to one H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower story was occupied by one S. as lessee of H. and the upper story and garret by defendants. There was no evidence of any fault or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof. *Held*, that defendants were not liable.

This was an action brought for injury caused to the plaintiff by the falling of snow from the roof of a house in King Street, in the City of Toronto. The declaration contained two counts.

First count—That the defendants were and are the tenants and occupants of the upper part of a certain house and premises on King Street in the City of Toronto, being part of St. Lawrence Hall, and it therefore became the duty of the defendants to clear the show off the roof of the said house and premises, and to prevent the snow from collecting and accumulating on the said roof in such quantities and in such a position that it became liable to fall and descend therefrom, to the danger of persons passing along the said street; but the defendants wrongfully and injuriously neglected this said duty, and failed and omitted to remove and clear off the said snow from the said roof, whereby a large quantity therefore descended and fell from said roof with great force neglected this said duty, and failed and omitted to remove and violence upon the plaintiff, who was then lawfully walking and passing along the said street in front of the said house and premises, and knocked the plaintiff down, and caused her great and permanent injury by producing congestion of the brain, and destroying the sight of one of the plaintiff's eyes, whereby she was put to great pain and loss, and obliged to pay and expend large sums of money in and for physicians and medical attendance, and was prevented from following her usual occupation as governess, and has been rendered permanently unable to follow her said occupation or profession.

Second count.—That the defendants, being the owners of a certain lot of land on King Street, in the City of Toronto, caused to be built and erected thereon a certain house, being part of the buildings knows as the St. Lawrence Hall, upon and adjacent to a certain highway and public thoroughfare in the said city, know as King Street, and therefore it became and was the duty of the defendants to build and construct, and cause to be built and constructed, the roof of the said house in such a skilful manner that the snow collecting thereon should not fall and descend with force and violence in a large mass in and upon the said street, to the danger and injury of persons lawfully passing and going over and along the said highway and thoroughfare; yet the defendants, contrary to their duty in that behalf, so negligently and unskillfully caused the roof of the said house to be constructed, that the snow which collected thereon suddenly and with great force and violence descended and fell on the plaintiff, then lawfully passing along the said street or highway in front of the said house and premises, and knocked the plaintiff down, &c.. as in the first count.

Pleas.—1. Not guilty. 2. That before and at the time of the committing of the said alleged grievances the defendants were the owners in fee of the said lot or piece of ground on which the said house was standing, and that long before the said time when, &c., by a certain lease made by the defendants under their corporate seal, the said lot or piece of ground was let for a term of years, which had not at the time when, &c., nor has yet expired, to one Thomas Hutchinson, and that the said Thomas Hutchinson at the same time when, &c., occupied the said house as the tenant thereof under the said lease to the defendants, and as such tenant it was

the duty of the said Thomas Hutchinson, and not of the defendants, to remove and clear away the accumulation of snow from the roof of the said house, at the same time when, &c.

Replication, to the second plea.—That the said defendants, before and at the time of the committing of the grievances in the declaration mentioned, became and were the tenants and occupants of the upper part, and that part immediately under and next to the roof of the said house and premises in the first count of the said declaration mentioned, whereby it became and was the duty of the said defendants to clear away and remove the snow, as in the first count alleged.

The trial took place at Toronto, before *Draper*, C. J., when a verdict was given for the plaintiff, and £100 damages, subject to the opinion of the court on the law and evidence, the court to determine the plaintiff's legal right to recover on the evidence given.

The facts of the case are stated in the judgments.

Hector Cameron for the plaintiff, cited Broom Leg. Max. 330; *Fay* v. *Prentice*. 1 C. B. 828; *Regina* v. *Watts*, 1 Salk. 357; *Bishop* v. *The Trustees of the Bedford Charity Estate*, 33 L. T. Rep. 27; *McCallum* v. *Hutchinson*, 7 C. P. 508; *Barnes* v. *Ward*, 9 C. B. 392.

Cameron, Q. C., contra, cited *Holden* v. *Liverpool New Gas Company*, 3 C. B. 1.

Robinson, C. J.—The evidence given upon the trial, proved that the plaintiff was walking on the 7th of December, 1858, in the street, along the front of Sargant's store, which forms part of the building called St. Lawrence Hall in Toronto, and on the same side of the street; that a quantity of snow slid down from the roof of Sargant's store and struck her on the head, throwing her down, and occasioning her very serious injury, from which at the time of the trial in October last she had not fully recovered.

The defendants own the land on which the building is erected from which the snow fell. They leased to Mr. Hutchinson a piece of ground adjoining what is properly St. Lawrence Hall, upon certain conditions as to building. Hutchinson gave a bond to build such a building as the corporation would approve of, and he built his house under the directions of the city architect.

The defendants occupy the garret of that building, and the floor next below it, over Sargant's store.

The city are bound by their lease from Hutchinson to repair the premises occupied by them. The only way of getting on the roof from the inside is through the garret occupied by the defendants, but Mr. Hutchinson stated that he did not know that there was any access to the roof from that part. The roof over Sargant's store slopes at two angles, the lower part of the roof being more precipitous than the upper part. The roof of the St. Lawrence Hall is higher than the other. The two roofs are covered with slate.

It was sworn by Mr. Hutchinson that he had seen snow fall from the same roof occasionally, but had not known of any damage being done before.

The defendants contend that if the injury did occur in the manner stated in the declaration, and if in consequence the plaintiff had a good cause of action against any one, it could only be against the owner or tenant of the house from which the snow fell, not against the defendants, who were the sub-tenants only of the upper part of the house; that the evidence shewed a faulty construction of the roof, rather than a neglect to clear off the snow; that it did not sustain the first count, for it did not shew that the snow came from the building mentioned in it, but the snow may have fallen from St. Lawrence Hall: that as to the second count, which charges that the roof was negligently constructed, it was not the defendants who built the house mentioned in it, but Hutchinson; and although he may have been obliged to build it under the superintendence and direction of the defendants' architect, still that cannot make the defendants liable to a third party, as if they had built the house.

The Municipal Act 22 Vic. ch. 99, sec. 290, sub-sec. 12, provides that the municipal council of every city may pass by-laws for compelling persons to remove the snow from the roofs of the premises owned or occupied by them. It was not shewn that any by-law had been made by the Corporation of Toronto, and that the defendants had infringed it, and I do not see in the evidence such proof of negligence as should render the owner or occupier of the house from which the snow fell liable to an action. What occurred here was such an accident as may occasionally happen, and be attended with serious results, but I do not think that in the absence of any public regulation on the subject people are compelled to keep the roofs of their houses clear of snow, or to detain the snow on the roofs so that the snow cannot slide from them into the street. There may be in a particular case something so evidently faulty in the construction of a roof as to make it more likely to occasion accidents from this cause than roofs in general are, but I do not see any proof that such was the case here.

If that had been shewn, however, then on whom would it be incumbent in this case to make compensation?

In both counts the defendants are charged as liable for the snow falling from the house along the front of which the plaintiff was walking: that is, from the shop referred to in the declaration.

The principles of law which govern the remedy against the owner or occupier of property on which a nuisance has been created or exists is very fully gone into in the case of *Rich* v. *Basterfield* (4 C. B. 783), in which a great number of authorities are cited. The first count in this declaration charges the defendants with neglecting to remove the snow from the building in question; but as owners of the land merely they had no such duty incumbent on them, and they are not charged on that ground, but because they occupied the upper part of the house. No case has been cited for the position that a tenant of part of a house has the duty cast upon him of taking care that the building generally is not the cause of injury to others. If any one would be liable to this action by reason of occupation, it must be, I think the lessee of the whole building. The defendants have no particular charge of the roof because they occupy the room next below it.

As to the second count, it does not appear to me to have been proved that there was anything unskilful and negligent in the construction of the building, and if there was, there was nothing in the evidence, as it seems to me, that would make the defendants liable as if the house had been built by them, or for them, which it was not, but by Hutchinson, under the conditions of his lease. The defendants were the owners of the soil. They did not let it with the house in question built upon it, nor did they afterwards build the house upon it, but their tenant built it; and though it was done under the superintendence of the defendant's architect yet that does not, I think, establish that the defendants built the house, and unless they either built, or own, or occupy a house which is necessarily a nuisance, and not merely from want of care in the owner or occupier of the building, they cannot be liable in this action.

In my opinion the *postea* should go to the defendants.

Burns, J.—There is not any evidence to support the second count, for the building from which the snow fell upon the plaintiff was not erected by the defendants. The defendants owned the land in fee, but had leased it for years of those who erected the buildings, and though it appears the buildings were erected according to a plan furnished by the defendants, yet that fact cannot make them the builders or create any duty upon them. What the plaintiff desires to make out as supporting that count is that the centre being the St. Lawrence Hall had its roof constructed in such a way as the snow slid from that roof to the other, the roof of the latter being constructed at right angles, or at an angle which caused the snow resting upon the latter to slide into the street. If the fact had been as suggested by the plaintiff, still it would have been a question whether the defendants were liable under the circumstances, but the facts were not proved as suggested, there being no evidence whatever that the snow first fell upon the St. Lawrence Hall and then slid upon the other roof before again falling into the street. All this part of the proposition advanced by the plaintiff rests upon theory only. Perhaps the theory might be quite correct if applied to rain falling in such quantities that the gutters or appliances to carry off the water from the St. Lawrence Hall were insufficient for the purpose, but I apprehend that the same rule cannot be held with respect to snow, which we know blows and drifts about in every way the eddies of the wind carry it. The fact of the St. Lawrence Hall being so much higher than the adjoining building would I think of itself furnish very strong evidence that snow would not and could not in the nature of things

rest in any quantity upon the roof of the higher building, that is St. Lawrence Hall, so as to slide that way. I know of no law which would render a person liable to a stranger because he builds his house higher than his neighbour adjoining him, by means of which eddies are created in the atmosphere, drawing more snow to one locality than another.

The first count charges the defendants with the duty of cleaning the snow off the roof of the building from which the snow fell into the street, merely because the corporation were the tenants of the upper rooms. The building is divided in separate tenements, and the defendants occupy the upper suite of rooms, and the lower part is occupied as a store or shop. Suppose that both set of tenants were or that they were separately liable, and that an action might either join all or be brought against each, the question would be whether there is such a duty as that alleged in this count. I am not aware that any common law duty is attached to the owners of houses to clear the snow from the roofs. This case is different from those cited by the plaintiff's counsel. In each of those we find that the owner or proprietor has done something *actively* upon his premises, which either directly causes the injury, or neglecting to do something which he should have done to guard against his act, an injury has been sustained. In this case the tenants have done nothing actively; they are the *passive* subjects of the elements. If there had been no house built upon the land at all, I apprehend that the owners were not by any common law duty bound to have removed the snow which fell upon the land. And if the snow had slid upon the ground, and thereby caused an injury, it could have been considered in no other light than the operation of nature, of which every one must take his share, and no one would be answerable for the consequences. Instead, however, of allowing the land to remain in a state of nature, the proprietor covers it with a house, which of necessity must be constructed so as to render it habitable and therefore a roof required.

I find the law stated upon this subject in Domat better than any where else. "He who, in making a new work upon his own estate uses his right without trespassing either against any law, custom, title or possession, which may subject him to any service towards his neighbours, is not answerable for the damage which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without any advantage to himself. For in this case it would be a pure act of malice, which equity would not allow of. But if the work were useful to him, as if he made in his estate any lawful repairs to secure it against the overflowings of a torrent or river, and his neighbour's grounds were thereby the more exposed to the flood, or suffered from thence any other inconvenience, he could not be made answerable for it." (Dom. C. L. Sec. p. 581, by Strahan.)

There was no evidence offered in this case to shew that the roof of the building was improperly constructed, or different from the roofs of other houses in the city, so that it was a nuisance to people passing and re-passing. The evidence shews that snow was seen occasionally to fall from the roof, but not to do any damage. I suppose we must take judicial notice of the general character of the weather at the different seasons of the year, and I know that snow while the thermometer is below the freezing point will be apt to remain some time where it may be deposited by the atmosphere. I know of no obligation imposed at common law, where people use their property in a manner similar to all others, to do any act to guard other persons against the acts of nature. This count assumes, from the fact of snow having fallen from the roof, and the plaintiff having sustained a severe and serious injury, that it was the duty of defendants to have removed the snow from the roof of the house. It is not complained against the defendants that they have done anything which creates a nuisance, and no evidence of any injury having been sustained from a like cause has been given, except in this one instance.

It is said in the civil law, if tiles fall from the roof of a house which was in good case, and by the bare effect of a storm, the damage which may happen by such fall is an accident for which the proprietor or tenant of the house cannot be made accountable. But if the roof was in a bad condition, he who was bound to keep it in repair may be liable to make good the damage that has happened, according to the circumstances.

It may be inconvenient to people living in cities to be subject to snow falling from the roofs of houses, but what is claimed in this declaration would apply as a duty all over the province, and I imagine the people living in the country or scattered villages would think it very strange if they were told it was their duty to clear the snow off the roofs of their buildings, when it is a well-known fact that they depend upon the melting of the snow which lies upon the roofs for water for many domestic purposes during the winter.

The best proof, however, that it was considered necessary there should be some law enacted upon the subject of removing snow from the roofs of houses in cities, is that the authority to do so is conferred by the 12th sub-section of section 290, of the Municipal Corporation Act, 1858, but I do not find there was any specific mention of such authority before that. The accident in this case is stated to have occurred in December, 1858, which would be after the act of parliament came into force, but we have not been informed whether the city council has ever passed any by-law upon the subject, and before such by-law be passed there is no duty existing upon people living in cities more than in the country.

I do not see that we can help the plaintiff in any way upon this record, or by assistance of the evidence given at the trial, and therefore I think that the *postea* must go to the defendants.

McLEAN, J., concurred.

Judgment for defendants.

CHAMBERS.

GREATOREX ET. AL. v. SCORE ET. AL.

Bill of Exchange—Rate of Exchange.

Action on sterling bill drawn by plaintiffs in London, upon defendants, in Upper Canada, accepted by defendants in London, (one of them being at the time in London,) payable in London. *Held*, that plaintiffs entitled to recover the current rate of exchange.

January, 1860.

This was an application made by *H. B. Morphy*, in Chambers, to prevent plaintiffs from recovering more than 24s. 4d. in the £ sterling, (being the par rate of exchange,) as the value of the bill on which action brought. The bill was in these words:—

"£279 15 6 London, Feby. 2nd, 1859.

Six months after date pay to our order, two hundred and seventy-nine pounds, seventeen and sixpence, value received."

BRADBURY, GREATOREX & Co.

To Messrs. SCORE & BRAYLEY, Toronto.

(Endorsed,)

BRADBURY, GREATOREX & Co.

Accepted payable at the Bank British North America in London.

SCORE & BRAYLEY.

Mr. Morphy contended that plaintiffs were not entitled to receive more than 24s. 4d. in the £ sterling, and cited *Foster et. al. v. Bowes*, 2 U. C., Prac. R. 257.

McLennan—Contra, referred to Story Conflict of Laws, secs. 308 to 319.

Robinson, C. J., Held, that plaintiffs were entitled to the current rate of exchange at the time bill became due, and discharged the summons.

COUNTY COURTS.

In the County Court of the United Counties of Frontenac Lennox and Addington, Before MACKENZIE, J.

BENJAMIN HARPELL v. HENRY COLLARD.

Contract—Construction—Parol evidence.

The plaintiff sued defendant for two cultivators with wheels upon the following contract signed by defendant, "good to B. Harpell (plaintiff) for two cultivators, and Robert Leakey's note for $22 7 to him or bearer when called for—value received." *Held*, that defendant had satisfied the obligation of his contract by tendering to plaintiff two cultivators without wheels, and that under the contract plaintiff was not entitled to recover any other description of cultivators than that tendered. (July 18, 1860.)

This was an action for the non-delivery of two cultivators, and on the common counts.

Pleas—1. Denial of the contract; 2. Denial of the breach of

contract; 3. Tender of the two cultivators to the plaintiff. To the common counts, the defendant pleaded, never indebted and satisfaction.

The plaintiff was not entitled to recover anything on the common counts The main issue was that joined in the plea of tender. The action was brought on the following agreement:

"Kingston, Feb. 15, 1860.

"Good to B Harpell, for two cultivators, and Robert Leaky's note for twenty-two dollars and seven cents, to him or bearer when called for value received.

"HENRY COLLARD."

At the trial it was proved that the plaintiff called upon the defendant to receive two cultivators, in the month of February last, after the making of the above agreement. The plaintiff refused to receive them, contending under the agreement, he was entitled to two cultivators with two wheels. That the defendant offered him two cultivators, but without side wheels, This the defendant denied. The question for determination was, whether under the agreement in question, the plaintiff was entitled to two cultivators with side wheels, or without them.

At the trial, the counsel for the defendant offered parol evidence to show the wheels formed no part of the cultivator, and to show what was meant by the word cultivator. The learned Judge refused to receive this kind of evidence, as he thought that no parol evidence could be received to vary, limit or explain the written agreement. The defendant then put in evidence a Patent he had from the Crown as the inventor of improved cultivators. The Judge held that the description in the patent must prevail, and that the plaintiff was entitled to get two cultivators, such as are described in the patent; and he thought, according to the description in the patent, the plaintiff was entitled to get two cultivators with side wheels, and so directed the jury.

Britton for the defendant, took exception to the Judge's charge.

The jury found for the plaintiff $66 damages.

In July term, *Britton* obtained a rule Nisi for a new trial, on the grounds that proper evidence had been rejected—that the jury had been misdirected, and that the verdict was contrary to the weight of evidence, and to amend the verdict upon the common counts.

Snook showed cause.

MACKENZIE, Co, JUDGE.—I am of opinion that the oral testimony offered at the trial was properly rejected. It was offered with a view to explain, vary and limit the written contract between the parties, which is contrary to rules of evidence, as now understood.

I am, also, of opinion, that the direction given to the jury in reference to the oral testimony—namely, that they should exclude it from their consideration, the oral testimony which was offered to explain what was meant by the word cultivator, was correct. Under this view of the case, the description of a cultivator given in the defendant's patent must prevail.

The defendant obtained a patent from the Crown, on the 19th day of December, 1859, as the inventor of an 'Improved Cultivator,' securing to him the exclusive right of making, constructing and vending the same for the term of fourteen years. The two cultivators now in question were constructed by the defendant under the patent, and as the patentee of the Crown for the making of such cultivators. The cultivator is described in the body of the patent, specifications and description, as well as a mapped drawing, are annexed to the patent and declared to form part of the patent. The description in the patent is as follows: "An Improved Cultivator, which may be shortly described as follows, that is to say: Reference being first had to the hereto annexed specifications and drawings, which form part of these presents. It consists in its being used with large wheels, connected together by axle No. 7, as described—in its having a small wheel No. 5 to guide it and support the front part—in its being capable of cultivating different depths of soil, by simply raising or lowering the part with the teeth, by means of lever No. 6 and chain—in its not being so liable to sway or slue, on account of the large wheels keeping the machine firm." The specification and description of the invention are set out more at large in the paper annexed to the patent, and are as follows: "Specifications and description of an Improved Cultivator, invented by H. Collard, October, 1859. The Cultivator is made so that it may be used with the hind wheels of a common waggon, or with the wheels of a cart, or wheels may be permanently attached to, and furnished with the cultivator if required, and is intended to be drawn by a team of horses or cattle, or by one horse." The drawing annexed to the patent have figures and letters on it, to point out and explain the various parts of the machine—such as the teeth, axle, tongue, front wheel, handle, bar and plate of iron and the like—but there are no figures or letters on the side wheels, although the small front wheels has the figure five on it, to point it out as a part of the machine.

After having carefully examined the drawing annexed to the Patent; and after having attentively read over the description of the cultivator in the Patent, and the more enlarged one in the specification annexed, and comparing the one with the other, I am bound to acknowledge that the side wheels form no part of the cultivator itself, but are only appendages to it.

The absence of explanatory letters and figures on the side wheels, as exhibited on the drawing annexed to the Patent, indicate to a certain extent that the side wheels were not to form an integral part of the machine itself. The descriptive language contained in the specification, placed the matter beyond doubt, although that contained in the body of the Patent is not so certain.

If my attention, at the trial, had been directed to the description in the specification, in all probability I would have ruled differently. The describing words contained in the specification, are as follows:—'The cultivator is made so 'hat it may be used with the hind wheels of a common waggon, or with the wheels of a cart, or wheels may be permanently attached to it and furnished with the cultivator, if required, and is intended to be drawn by a team of horses or cattle, or by one horse.' The words, 'The cultivator is made so that it may be used with the hind wheels of a common waggon, or with the wheels of a cart,' indicate in plain and intelligent terms that the cultivator is one thing and the side wheels, by which it is to be used, another thing.—When a person purchases one of those cultivators to be used with the hind wheels of a waggon, the wheels will be common to the cultivator and waggon—they may be used one day with the waggon, and another day with the cultivator—but can they be said to form an integral part of the one or the other? They certainly cannot. The words, 'or wheels may be permanently attached to, and furnished with the cultivator if required,' demonstrates, in my opinion, with an unerring certainty, that the side wheels form no part of the cultivator itself, but one of the mediums or agencies by which it may be worked.

Under the Patent, the purchaser has the right to contract for a cultivator to be worked or used with the hind wheels of a common waggon—the wheels of a common cart, or wheels may be permanently attached, if required by the purchaser. The attaching of permanent wheels to the cultivator is something done over and above the cultivator itself. The words used in reference to the drawing of the machine—namely: 'and is intended to be drawn by a team of horses or cattle, or by one horse,' have as extensive a signification in reference to the drawing of the cultivator, as the words 'may be used with wheels' have, in reference to the manner in which it may be used.

There would be as much logical property under the Patent, in saying that the team of horses, or cattle, or the one horse by which the cultivator may be drawn, form a part of the machine itself, as to say that the side wheels by which it may be used, form a part of it.

The Patent describes the cultivator itself as an entire machine, which may be used by three kinds of wheels, at the option of the purchaser. Under this view of the case, it is clear then that an agreement of the Patentee to furnish a cultivator simply, does not include an engagement on his part to furnish side wheels.

In the case of *Smith* v. *Jeffreys* 15 M. & W. 561, the Court of Exchequer held, 'where several classes of goods, of superior and inferior quality are comprised under one general name, and a written contract is made to supply goods of that name, the contract will be fulfilled by a supply of any goods to which that name is appliable; and parol evidence will not be received to show that the parties intended that goods of the superior class should be

supplied. In that case the contract was to sell plaintiff 60 ton of 'Ware Potatoes. At the trial, it appeared in evidence, that, in the neighbourhood, three qualities of potatoes were known by that name. The defendant at the time of the sale had two kinds, known as the 'Regent's wares' and 'Kidney Wares,' the inferior potatoes. The plaintiff insisted on getting the 'Regent's Wares,' the best potatoes, and offered parol evidence to show the best were intended. The court, very properly rejected the parol evidence, and held that the parties were bound by their written contract, which was fulfilled by the tender of any potatoes to which the generic term 'Ware Potatoes' was applicable.

If the present plaintiff wished to secure to himself a particular kind of cultivator, he should have it so expressed in the contract. The present defendant, in the agreement now under consideration, has merely engaged to deliver to the plaintiff two cultivators, when called for. The Patent under which the defendant constructs cultivators, contemplates that the machine may be used in three ways, that is to say, by the hind wheels of a waggon—the wheels of a common cart, or by wheels permanently attached to the machine. The plaintiff insists that he is entitled to two cultivators of the class—namely: with wheels permanently attached to the body of the machine. I am of opinion, now, that the agreement put in evidence, entitles the plaintiff only to two cultivators without wheels, and that he could only secure himself the right to have permanent wheels attached to the body of the cultivator by the defendant, by an express stipulation to that effect in the contract. Under this view of the case, the verdict is wrong, as the defendant tendered to the plaintiff, long before the commencement of the present action two cultivators, according to his undertaking, when called for.

The plaintiff claims more than two cultivators, he claims appendages which defendant has not undertaken to furnish in his agreement. The issue on the plea of tender should have been found for the defendant. Therefore there must be a new trial, and as the verdict is contrary to law, and there was misdirection, the new trial must be without costs.

Rule absolute for new trial, without costs.—[See *Macdonald et al* v. *Longbottom*, 2 L. T. N. S. 606.—EDS. L. J.]

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

KINGSTON, 3rd August, 1860.

GENTLEMEN,—Referring to the letter of your correspondent J. F., on page 165 of your July issue; allow me to call your attention to the judgment of Chief Justice Robinson, in the case of *De Forrest et al* v. *Bunnell*, 15 U. C. Q. B. Reports 370.

"As to those objections which apply to the affidavit made by Miller, the Mortgagee, one is, that the second christian name of Miller in the body of the affidavit, is not written in full but the initial letter only is given. This is not fatal. There is nothing in the Act, or in any *other Act* or *Rule of Court*, which makes an affidavit, for any purpose, inadmissable on that ground." Yours truly, A. T. K.

[We are obliged to our correspondent for directing our attention to the case of *De Forrest et al* v. *Bunnell*. The language of Robinson, C. J., in that case, apparently conflicts with the language of Campbell, C. J., in *Richardson* v. *Northope Tay*, U. C. R. 452, and with the decision of *Westover* v. *Burnham*, MS. R. & H. Dig. Arrest I. 29, to which our correspondent was referred, but is, we think, notwithstanding, reconcileable with them. The cases to which our correspondent J. F. was referred, decide that it is necessary for an affidavit to hold to bail, to contain all the christian names of deponent, while Robinson, C. J., speaking of the description of the deponent in *De Forrest* v. *Bunnell* says, "One christian name is given in full and *we are not to know* that the M. after Ebenezer stands for *another* christian name. It may be intended for nothing more than to *distinguish* the deponent from another Ebenezer Miller." It is not said that if deponent were shown to have two christian names, it would be sufficient to give the initial of one only, but that the Court will not presume that the single letter is the initial only of a name. We repeat that, in general, an affidavit should set forth the deponent's names in words at length. This is the rule, and it is much safer, under all circumstances, to adhere to, than to depart from it.—EDS. L. J.]

To the Editors of the Law Journal.

COLLINGWOOD, Aug. 24, 1860.

GENTLEMEN,—I notice in the *Law Journal* for August remarks on the "Law of Registered Judgments." Would it not be useful to a number of your readers to extend them to lands *not yet patented?*

Your opinion on the following case would much oblige.

1. A. has a Location Ticket to a certain Lot. B. obtains judgment against him and issues *fi. fa.* lands. The Sheriff sells the interest of defendant in the land and conveys the same to the purchaser who registers his deed. In the meantime A. sells his right to C., who makes the payments to the Crown Office and takes out the patent. Who has the land—the purchaser at Sheriff's sale or C.?

2. What effect would B.'s registering his judgment before the sale to C. have?

3. Or suppose the Patent is issued to C. before the sale?

By answering the above you will confer a favor on

Yours respectfully,

A LAW STUDENT.

[Our correspondent will find some cases in our Reports showing that judgments do not bind unpatented lands. *Dougall* v. *Lang* (5 U. C. Chan. 292) is express on this point. In that case, the plaintiff had purchased at Sheriff's sale all the interest of a bargainee of the Crown, and then leased the land to the defendant as his tenant. The sheriff's sale was not recognized by the government, and the lots were offered for sale and bought by the defendant as the then occupier, he concealing the nature of his holding. The Court held him a trustee for the plaintiff, and ordered him to convey. In giving judgment, ESTEN, V. C., remarked: "The plaintiff, in fact, had *no title*, as the sole ground of his title was the sheriff's sale, which conferred *none*." In *Casey* v. *Jordan* (5 U. C. Chan. R. 467), it was held that the Registry Acts do not apply to instruments executed previously to the grant from the Crown, and by analogy it follows that registered judgments are of no avail until the issue of a patent in the name of the judgment debtor. The Crown Lands Act (22 Vic. c. 22) provides that the original locatee or bargainee of the Crown may assign and register in the Crown Lands office his right, and that priority of registration shall convey title. And by the Assessment Act special provision is made for the sale of such right for taxes, and the recognition of such sale by Government.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. BARKER v. ALLAN AND OTHERS. Dec. 7.

Joint Stock Company—Contract of Directors—Resolution at Board meeting—Contract when complete—Guarantee.

At a meeting of the Directors of a Joint Stock Company, it was resolved that they should accept the resignation of the Manager and pay him arrears of salary, and further, as follows: "At the same time, the members of the Board will jointly relieve him of his shares, and guarantee him against all calls thereon. The Directors being desirous that this matter should be definitely settled, request that Mr. B. (the Manager) will reply to the offer now made to him by next board day, the 4th of September. Unless the terms of arrangement now proposed are accepted by that date, the Directors are to be no longer bound by them." This being communicated to B., he answered by letter on the next board day, that he accepted the offer, adding "It may be arranged as speedily as you can wish, and in fact I accept the offer as one to be carried out; and then, on receiving the guarantee as to the shares, in which I presume your chairman, Mr. C., concurs, I advise that the sum fixed is paid in to my account or L's, my resignation shall be at once forwarded." At the meeting held on the same day, a resolution was passed, which was communicated by the secretary to B., as follows: "The Board, having heard B's letter read, accept his resignation, and request the secretary to get the guarantee prepared by the solicitor, and to take other steps to carry out the negociation."

Held, that there was a complete contract on the part of the Directors who attended the Board meetings to guarantee B. against calls, and that they were liable in action for breach of such contract for not indemnifying him, B. It was contended that the matter was in negociation until the settlement of the terms of the guarantee. This, however, was overruled. Further, that as all the members of the Board were not shown to have concurred, but only the defendants or record, that the contract was incomplete. This also was overruled.

REVIEW.

THE MUNICIPAL REPORTS, CONTAINING REPORTS OF CASES ARISISING UNDER THE MUNICIPAL AND SCHOOL LAWS OF UPPER CANADA; Edited by Robert A. Harrison, Esq., B. C. L., and Thomas Hodgins, Esq., L. L. B., Barrister-at-Law, Toronto; Printed and published by Maclear & Co.

We have received from the Publishers, the third number of these Reports; each number contains sixty-two pages, and is replete with matter useful not only to the profession but essential to the correct understanding and proper working of Municipal and School Law by those to whom these great interests are entrusted. No Municipality—no School Section should be without these Reports. The subscription, we believe, is only $5 per annum. The number before us contains the Reports of no less than nine decisions of Municipal and School Law, besides a variety of notes, which add much to the value of the publication. Mr. Harrison is the Editor of the Municipal Manual, and Mr. Hodgins Editor of the Educational Manual—both works now well known in every part of Western Canada. Judging from what each has already done in his own department, we should imagine that the Reports of Municipal and School cases in which they unite their exertions, should be worthy of the patronage of those for whose use the Reports are more especially designed.

A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE, BY WILLIAM HENRY RAWLE, Third Edition, Revised and Enlarged. Boston: Little, Brown and Co. 1860.

We greet this volume with much satisfaction. It is the third edition of a work of very great merit. Its success is conclusive evidence of its value. The work is now so well known to our readers that little comment is necessary to explain its real utility to the profession. The author has performed his task with credit to himself and advantage to the members of the legal profession in Great Britain, the United States and Canada.

To those who know not the work, we may say that it commences with a short chapter on ancient warranties, and the introduction of covenants for title—a chapter essential to the correct understanding of what follows. The author then treats of the covenant for seizin; for good right to convey; against encumbrances; for quiet enjoyment; for further assurance of warranty; the extent to which covenants for title run with land; the operation of covenants for title, by way of estoppel or rebutter; implied covenants; the covenants for title which the purchaser has a right to expect; the persons who are bound by, and who may take advantage of covenants for title; the purchaser's right to recover back, or detain the purchase money, after the execution of the deed.

The style of the author is eminently practical. He expresses his meaning in a forcible as well as clear manner. He uses not a word unnecessarily, and so has succeeded in compressing a great deal of learning within a convenient compass. His references to authorities while exceedingly numerous, are unusually correct, and with a view of attaining the greatest possible accuracy in the last mentioned particular, he states that in the preparation of the edition now offered to the profession, he has re-consulted every authority previously cited in the work.

Each chapter of the work is an interesting and concise essay upon the subject of which it treats. The peculiarity and attributes of each covenant, together with its form, definition, scope, and measure of damages are severally considered. In the first place, the author in general refers to the law of England on the subject in hand. He then examines in what respect it is varied, if at all, in the several States of the Union. In the next place, where there is a conflict, he endeavours to deduce the correct rule, and to support his position as much by common sense, as authority. All this is done in a very able manner.

We would suggest in a future edition of the work, that some attention should be paid to Upper Canadian decisions. They might be incorporated in the work, with as much benefit to the work, as the decisions of Maine, New Hampshire, Massachusetts, or any other State of the Union. Besides, such a plan if adopted, would make the publication of increased value to the profession in this Colony, and so call for increased support. While reading the remarks of the author on leading cases in the different States of the Union, leading cases in our own country, suggested themselves to our mind, and we were forced to think that the absence of all mention of them, in places where they would be mentioned, of much utility, is a defect in the work, at least so far as this Colony is concerned. We make the suggestion in the most kindly spirit; it would not be at all difficult to adopt it. Mr. Rawle, who we believe is a lawyer of Pennsylvania, could as easily master the decisions of the Courts of Upper Canada, as of Maine, or any other State or country in which he is not accustomed to practise. In fact, on many points, the decisions of our Courts are more in unison with the decisions of the Courts of his State, than those of South Carolina, and other States that we might if necessary name. The foundation common to all, is the common law of England. With this starting point it is only necessary to note the points of divergence, and to comment upon them in whatever manner his judgment may dictate. We are convinced that the reasoning of our Courts upon some points about which the author appears to be in doubt, would carry conviction to his mind, and if embodied in his work, would greatly enhance its value.

The edition before us is from the well-known establishment of Little, Brown and Company of Boston. It is only necessary to name that firm to make known the fact that the present edition is as regards mechanical execution, unsurpassed by any law book published in England or America. By a slight reduction in the size of the type, and by throwing parts of the former text into notes, the writer has been enabled to present much new matter to his readers, without increasing the size of the volume. The present edition is very creditable, not only to author and publishers, but to the United States of America, where it was published.

THE WESTMINSTER REVIEW, No 145, JULY 1860; New York: Leonard, Scott and Co.

The New York publishers of these sterling periodicals, issue the reprints with unerring exactitude and exemplary expedition. It is really wonderful to think, that the number before us was issued in New York about the same time that the original was issued in London. Messrs. Leonard, Scott and Co, having made an arrangement with the London publishers as honorable to themselves, as satisfactory to the latter, are enabled to print the Reviews, sheet by sheet, as they issue from the London Press. This coupled with the fact that their facilities for republication are in other respects equally satisfactory, gives us the secret of their great success. The present number is the commencement of a new volume, and offers a good opportunity to intending subscribers. The contents of it are as follows: Strikes; their tendencies and remedies: The Mill on the Flos: Rawlinson's Bampton lectures for 1859: The Post Office monopoly: Ary Scheffer: The Irish Education question: Germany; its strength and weakness: Thoughts in aid of Faith: Grievances of Hungarian Catholics: The French Press: Contemporary Literature. All disposed to questions of Politics, Social and Political economy, Theology, the Fine Arts and Education, will find here laid out an ample repast.

BLACKWOOD'S MAGAZINE, AUGUST 1860: Leonard, Scott and Co., New York.

Blackwood is always gladly received by us. Its unobtrusive appearance entitles it to a cordial reception, and a cordial reception is always followed by much entertainment. It lays no pretension to the solid character of the Reviews, but courts patronage rather because it is light and entertaining as compared with them. A person tired of the arts and sciences, or with difficult questions of political economy, is sure to be relieved by an indulgence in the reading of Blackwood. The following are some of the most entertaining articles in the number before us. Lord Macaulay and Dundee: the Pursuit of Tantia Toppee: the Great Earthquake at Lisbon: Norman Sinclair, an autobiography: Wycliffe and the Huguenots: Domine Quovadis.

THE LONDON QUARTERLY, No. 215, July 1860: Leonard, Scott and Co., New York.

Contents:—The Missing Link and the London Poor: Joseph Scaliger: Workman's Earnings and Savings: the Cape and South Africa: Ary Scheffer: Stonehenge: Darwin's Origin of Species: the Conservative re-action. In this number, Political Economy and Natural Philosophy hold a conspicuous place. The reader of the four great English Reviews, has the advantage of considering questions of Political Economy viewed from very different stand points. The articles which appear in these periodicals, are not the newspaper squibs of a day, read only to be forgotten, but the results of deep research, great reflection, and great talent. No scholar, and certainly no man of any public position, can afford to be without the English Reviews. They discuss not only questions of the hour, but questions of lasting importance to the progress of civilization. The price of each Review is only three dollars a year, or the four Reviews and Blackwood may be had for the marvellously low price of $10 a year. The Number of the London Quarterly now before us like that of the Westminster, is the commencement of a new volume.

THE EDINBURGH REVIEW, No. 227, JULY 1860: Leonard, Scott and Co., New York.

The articles in this number are not only very numerous but of great interest. Their titles are as follows: Chevalier on the probable fall in the value of gold: Diaries and Correspondence of George Rose: D'Haussonville's Union of France and Lorraine: Sir R. Murchison's latest Geological searches: The Patrimony of St. Peter: Dr. Vaughan's Revolutions in English History: Mrs. Grote's memoir of Ary Scheffer: Prince Dalgoroukow on Russia and Serf emancipation: Correspondence of Humboldt and Varnhagen Von Ense: M. Thier's Seventeenth Volume: Cardinal Mais Edition of the Vatican codex: Secret Voting and Parliamentary Reform. Subjects of the most vital moment in the political, and of the greatest possible interest in the literary world, are here discussed with moderation and ability such as not to be found in any other publications of the age. The number before us, we notice commences a new volume.

THE NORTH BRITISH REVIEW, No. 65, AUGUST 1860: Leonard, Scott and Co., New York.

Though we notice this the last, it is not the least of the Reviews. It is the youngest of the four, and by many considered the most erratic, if not the most talented. The papers which it usually contains, are noted for their vigor as well as boldness. What is meant is said, and what is said is intended. The following are the contents of the number before us: Present discoveries in astronomy: Dr. Brown's Life and Works: Scottish Nationality: Colonial Constitutions and Defences: Recent Poetry: M. Thier's history of the Consulate and Empire: Imaginative Literature: La Verité sur la Russie: Recent Rationalism in the Church of England: Present theories in Meteorology. The number just received commences a new volume.

THE ECLECTIC MAGAZINE OF FOREIGN LITERATURE; New York: W. H. Bidwell, Editor and Proprietor.

The number for September is received. It fully sustains the reputation of the Eclectic, and is the third volume for the present year, or fiftieth of the series. It opens with a portrait of Thackerey, true to life. We have seen the original, and can testify to the truthfulness of the Portrait. Next, we have portraits of Cranmer, Ridley and Latimer. The letter-press is varied and instructive, as usual.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

FREDERICK FRASER CARRUTHERS, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted August 11, 1860.)

GEORGE H. DARTNELL, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted August 11, 1860.)

CORONERS.

WILLIAM HODGE, Esq., to be a Coroner in the Provisional District of Algoma.—(Gazetted August 11, 1860.)

TO CORRESPONDENTS.

E. S. WHIPPLE—Under "Division Courts," p. 205.

A. T. K.—A LAW STUDENT—Under "General Correspondence," p. 214.

J. HOLGATE.—Received, but too late for insertion in this number.