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DIARY FOR AUGUST.

3. SUNDAY..... *7th Sunday after Trinity.*
9. Saturday..... Articles, &c., to be left with Secretary of Law Society.
10. SUNDAY. ... *8th Sunday after Trinity.*
13. Wednesday... Last day for service of Writ County Court.
17 SUNDAY.... *9th Sunday after Trinity.*
19. Tuesday... . . Last day for Notice of Chancery Examination Term, Toronto.
21 Thursday .... Long Vacation ends.
23. Saturday..... Declare for County Court.
24. SUNDAY. .... *10th Sunday after Trinity.*
25. Monday..... TRINITY TERM begins.
29. Friday. ..... Paper Day, Q. B.
30 Saturday.. ... Paper Day, C. P.
31. SUNDAY..... *11th 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 & Arclagh, 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.

The Upper Canada Law Journal.

AUGUST, 1862.

THE COURT OF IMPEACHMENT AND THE COUNTY JUDGE OF ELGIN.

During the last month, the public and profession were startled by the strange and solemn proceedings incident to the impeachment of a Judge of one of our County Courts, before the Court of Impeachment for Upper Canada, composed of the three heads of the Supreme Courts in this Province. The novelty of the proceeding, the solemn character of the tribunal, and the reputation of the Judge who has been called upon to play so sad and so prominent a part in the impeachment, require from our hands something more than a passing comment.

By the Act 20 Vic. cap. 58 (Con. Stats. U. C. cap. 14), there was established in Upper Canada a Court of Impeachment, for the trial of charges preferred against Judges of County Courts, having all the incidents, powers and privileges of a Superior Court of Record. The Judges of this Court are, the Chief Justice of Upper Canada, the Chancellor of Upper Canada, and the Chief Justice of the Common Pleas; and in case of the illness or absence of any of said Judges, the senior Puisne Judge of the Superior Courts of Common Law may act in his place.

The jurisdiction of the Court is only to be invoked in case the Governor-General finds any complaint for inability or misbehaviour in office against any Judge of any County Court, *sufficiently sustained*, and *of sufficient moment* to demand judicial investigation by the Court of Impeachment; in which case he shall direct such complaint, and all papers and documents therewith connected, to be transmitted to the Chief Justice of Upper Canada as President of the Court; and thereupon the said Court shall appoint a day for the meeting of the Court, and the trial and adjudication of the charges laid and set forth in the complaint. The judgment of the Court is to be certified to the Governor, and is to be final and conclusive to all intents and purposes whatsoever. If the complaint be for inability, the Court is to determine whether such inability has been proved; and if it has, the nature of the inability, and whether the same is, in the opinion of the Court, of such a character as to render it expedient to remove the Judge. If the complaint be for misbehaviour in office, the Court is to determine whether the Judge is guilty or not guilty; and if not guilty, whether the conduct of the Judge is censurable or unbecoming. The Court may also award reasonable costs to either party, according to the nature of the adjudication, viz.: if the complaint be adjudged false or vexatious, the judge shall be entitled to his costs of defence; if the conduct of the Judge complained against (whether he be found guilty or not guilty) be adjudged censurable and unbecoming, the complainant shall be entitled to his costs of prosecution.

The object of the measure appears to be to place the County Judges in a better position of independence than they had previously occupied, and to relieve the Crown of what is in effect a criminal trial of a branch of the judiciary, and which might in some cases be influenced by political feeling. In carrying out this object, the Legislature has established a Court of criminal jurisdiction to some extent similar in purpose and effect to the High Court of Impeachment in Parliament.

In England an impeachment is in the nature of a criminal proceeding, and is described (4 Bl. Com. 259) as a presentment by the House of Commons, the most solemn grand inquest of the whole kingdom, to the House of Lords, the most high and supreme court of criminal jurisdiction in the kingdom. The articles of impeachment are a kind of bill of indictment found by the Commons and tried by the Lords, who are in cases of misdemeanor considered not only as their own peers, but the peers of the whole nation.

The mode of proceeding, as laid down by Mr. May, in his *Parliamentary Practice*, is as follows: A member of the House of Commons, in his place, first charges the accused of high treason, or of certain high crimes and misdemeanors; and after supporting his charge with proofs, moves that he be impeached. If the House deem the grounds of accusation sufficient, and agree to the motion, the member is ordered to go to the Lords, and "at their bar, in the name of the House of Commons and of all the Com-

mons of the United Kingdom, to impeach the accused," &c. (p. 501). And again, on page 49, he says: "In impeachments, the Commons, as the great representative inquest of the nation, first find the crime, and then as prosecutors support their charge before the Lords"

So in the United States. By the constitution of that country, it is declared that "the House of Representatives shall have the sole power of impeachment," and the practice there is similar to that which prevails in England—the Senate exercising the functions of the House of Lords.

These extracts indicate the practice heretofore established in conducting impeachments; and they should, we think, have been carefully considered before this case was sent to the Court of Impeachment. In Judge Hughes's case, the Crown was in no way represented—the prosecution was left to the dubious disinterestedness and solvency of a private prosecutor, who, we are informed, is the agent of a foreign corporation carrying on the business of an express company at St. Thomas.

The precedent is a bad one; but we hope, for the honor of the Crown, and for the protection of County Judges, that it will not be followed in any future cases. The impeachment of a Judge or public officer is a criminal proceeding, and is always conducted in England and the United States as a public prosecution. The wrong complained of is treated as a wrong against the whole community, and is prosecuted by the representatives of the nation as public prosecutors. So in ordinary criminal proceedings; the meanest offender is proceeded against by the Crown, "because the King," as Blackstone says, "in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore the proper prosecutor for every offence."

Now, why should the prosecution of a County Judge be treated differently? If he misbehaves in his office, he is guilty of a wrong which affects the whole community; and taking into account the dignity of his office, and the power and influence he wields, it is due to both Crown and people that his wrong-doing should be complained of by the Crown, and his impeachment conducted by the Attorney-General, or in his behalf. Besides, in the administration of justice, a judge necessarily comes into antagonism with the vices and aims of suitors; and we unhesitatingly say that as against the disappointed spleen of defeated litigants, and the envy of unprincipled aspirants or inefficient practitioners, he is entitled as of right to the protection which the honor of the Crown assures to him,—that in his impeachment no personal malice or private envy shall influence the fair trial of the charges preferred against him. The law gives the Crown the power to find a true bill against the Judge. Like the House of Commons, it must first find the crime; and then, as the public prosecutor, it should support its finding before the Court whose jurisdiction it has invoked. This view of the law and practice of impeachment was, we understand, taken by Mr. Chief Justice Draper in this case.

As to the particular case of Judge Hughes, we cannot say that the Government has exercised a wise discretion in sending him before the Court of Impeachment. The Act says that the jurisdiction of the Court is only to be appealed to in case the Governor finds any complaint against a County Judge *sufficiently sustained*, and *of sufficient moment*, to demand judicial investigation; and after a perusal of the charges and the finding of the Court, we doubt if there will be found many to say that the case was a proper one to invoke the jurisdiction of the second great court of criminal impeachment in this Province.

STATUTES OF LAST SESSION—25 VICTORIA, 1862.

The Session of Parliament just closed has not been as fruitful of legislation as former sessions. Although 109 Acts have been passed, few of them are of public or general interest; they chiefly amend the law as previously existing. The first Act (ch. 1) is *An Act to amend the Act respecting the Militia*, amending the Consolidated Militia Act (Con. Stats. Canada, ch. 35) in a few particulars. It authorizes the raising of the Active Militia or Volunteers, Class A, entitled to receive pay, from 5,000 to 10,000, leaving the number in Class B, in the unlimited discretion of the Commander-in-Chief;—and provides (sec. 10) that the Commander-in-Chief may, in the event of war, raise in addition to the Active and Sedentary Militia of the Province, regiments of Militia by voluntary enlistment for general service during such war, and for a reasonable time after its termination. The Commander-in-Chief may also (s. 11) sanction the organization of associations for purposes drill, and of independent companies of Infantry, composed of of professors, masters or pupils of Universities, Schools or other public institutions, or of persons engaged in or about the same, or of reserve men; but such associations or companies shall not be provided with any clothing or allowance therefor, nor shall they receive pay. In all other respects—especially as to "arms and ammunition" (which words were struck out of the Bill in passing through the House), we presume these associations or companies will be subject to the Militia Law.

Ch. 2 amends chapter 36 of the Con. Stats. Canada, and gives power to Her Majesty's Principal Secretary of State for War to construct, hold and work lines of telegraph, for military purposes, over any part of the Province.

Ch. 3 is the Supply act. It appropriates $3,230,926 38 for defraying the expenses of the Civil Government for the years 1861 and 1862, and authorizes a loan of 3,000,000 for the expenses of those years, to be raised by sale of Provincial Stock or Debentures. In all these Supply Acts a clause is added, apparently useless in these days of Responsible Government, providing that "the due application of all moneys expended under the authority of this Act shall be accounted for to Her Majesty, her heirs and successors, through the *Lords Commissioners of Her Majesty's Treasury*, in such manner and form as Her Majesty, her heirs and successors shall be pleased to direct."

The next three statutes relate to Customs and Excise Duties. Ch. 4 amends chapter 17 of the Con. Stats. Canada, relating to the Customs' Duties. Ch. 5 amends ch. 19 Con. Stats. Canada, relating to Duties on Spirits and Beer, and changes the name of Revenue Inspector to that of "Collector of Inland Revenue." Ch. 6 amends ch. 20 Con. Stats. of Canada, relating to Tavern Licenses.

Ch. 7 amends ch. 32 Con. Stats. Canada. This Act constitutes the Bureau of Agriculture a separate Public Department, and places all matters relating to Colonization and Immigration under the control of the Minister of Agriculture, unless the Governor in Council shall otherwise order.

Ch. 8 amends section 20 of ch. 40 of Con. Stats. Canada, respecting Emigrants and Quarantine, by requiring all persons acting as runners, soliciting emigrants for hotels, steamboats, &c., *at any port or place within this Province*, to obtain licenses from the Mayor of the Municipality within which they act.

Ch. 9 is the usual *Act to continue for a limited time the several Acts therein limited, and for other purposes.* The Acts of Canada continued are 7 Vic. c. 10, 9 Vic. c. 30, 12 Vic. c. 18, and 13 and 14 Vic. c. 20, relating to Bankrupts; 10 and 11 Vic. c. 1, Trinity House, Montreal; 14 and 15 Vic. c. 159, Sons of Temperance, Canada West; 9 Vic. c. 12, 10 and 11 Vic. c. 38, and 12 Vic. c. 97, Registration of Titles in the County of Hastings. The other Acts are certain Acts of the late Parliament of Lower Canada. All these are continued until the 1st January, 1863, and thence until the end of the next ensuing session of the Provincial Parliament and no longer.

Chs. 10, to 17, relate to Lower Canada.

Ch. 18 is *An Act respecting the Court of Error and Appeal in Upper Canada.* S. 1. The President of the Court when appointed by commission under 24 Vic. c. 36 is to have precedence over all other Judges of Law or Equity in Upper Canada. S. 2. Within six months after entering upon his duties, he is to take an oath of office before the Governor in Council. S. 3. Any retired Judge holding a patent for an annuity of two-thirds of his former salary, when appointed President, is to be entitled to a further sum per annum equal to one-third of the amount of his former salary. S. 4 Repeals s. 8, ch. 13 of Con. Stats. U. C. and substitutes the fourth Thursday next after the several terms of Hilary, Easter, and Michaelmas for the commencement of the sittings of the Court, subject to any adjournment.

Ch. 16 amends the Municipal Law of Upper Canada, so far only as relates to the Sessions of Recorders' Courts,—repealing 23 Vic. c. 50, and substituting the following for s. 377 of ch. 54, Con. Stats. U. C.: "The Recorders' Courts shall hold four sessions in every year, and such sessions shall commence on the first Monday in the months of March, June and September, and on the third Monday in December"—to take effect from the 1st August, 1862.

Ch. 20 makes a most material alteration in the Statutes of Limitation, and one highly beneficial. It is *An Act to amend the law relating to the limitation of actions and suits in Upper Canada*:—

WHEREAS it is desirable to abolish the distinction between plaintiffs or persons resident within or without the jurisdiction of the Courts of Law and Equity in Upper Canada, in the limitation of actions and suits: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. Any plaintiff or person in any action, suit or proceeding, either at Law or in Equity, who has been or is resident without or absent from Upper Canada, shall have no greater or longer period of time to bring, commence or prosecute any such suit, action or proceeding, by reason of such nonresidence in, or absence from Upper Canada, than if such plaintiff or person had been or were resident in Upper Canada, when the cause of such action, suit or proceeding first accrued; and all and every exception or distinction in any law or statute relating to the limitation of actions now in force in Upper Canada, in favour of any plaintiff or person resident without or absent from Upper Canada, by whatever terms or words such residence without or absence from Upper Canada is stated or described in such law or statute, shall be, and the same are hereby abolished and repealed.

2. This Act shall not apply to suits or other proceedings instituted before the first day of July, one thousand eight hundred and sixty-three.

As the operation of this Act is suspended by the last clause, ample opportunity is afforded to parties out of the Province to take steps to protect their interests before the 1st July, 1863.

Ch. 21, restores to Registrars the authority to discharge mortgages, on production of the proper certificate, which had been taken away by the Act abolishing registration of judgments (25 Vic. c. 41), and makes valid all certificates of discharge registered since the 18th May, 1861.

Ch. 22, amends s. 1, ch. 105, Con. Stats. U C., by striking out the words—"or turns any horse, cattle, sheep, or swine upon, or permits any such to go or range at large upon"—from the first part of the section.

Ch. 23, alters the mode of issuing Shop and Tavern Licenses in the Cities of Upper Canada, repealing the provisions heretofore existing in regard to such in the first five subsections of s. 246 and s. 259, of ch. 54, Con. Stats U. C., and the 23 Vic., c. 53, by giving (from the 1st January, 1863) the power heretofore exercised by City Councils to the Boards of Police Commissioners.

Ch. 24 amends the Act of last Session 24 Vic. c. 53, separating the City of Toronto from the United Counties of York and Peel, by enacting that the said Act shall not be read or construed as establishing a County Court of the County of the City of Toronto; but shall be received as establishing for the said City separate sittings for the trial of cases sued in the then existing Courts, and as providing for payment to the said City of jury fees paid on cases entered for trial at sittings of Courts holden therefor. The second section confirms all proceedings heretofore taken in the County Court of the County of the City of Toronto, and provides that all such shall be amended, renewed or continued in the County Court of the United Counties of York and Peel.

The remaining Acts are Local and Private Acts.

NEW CROWN LAW OFFICERS.

The late change of Government has given us new Law Officers of the Crown for Upper Canada. The Hon. John Sandfield Macdonald, Q. C., of Cornwall, is Premier, and has received the appointment of Attorney-General West, *vice* the Hon. John Alex. Macdonald, Q. C., of Kingston, resigned; and the Hon. Adam Wilson, Q. C., of Toronto, is the new Solicitor-General, *vice* the Hon. James Patton, LL.D., Q. C., resigned. The new Attorney-General has been for a long period in public life, being now the senior member of the House of Assembly. He received his legal education under the supervision of Chief Justices McLean and Draper, and was called to the bar in Trinity Term, 1840. In 1849, he received the honor of a silk gown, and was appointed Solicitor-General on the elevation of Mr. Solicitor-General Blake to the Chancellorship. He resigned that office in 1851, and the following year was elected Speaker of the Legislative Assembly. He also held his present office of Attorney-General for a short period in 1858. The present Solicitor-General is comparatively new to political life. He was called to the bar in Trinity Term, 1839, and was for many years the law partner of the late Hon. Robert Baldwin. In 1850, during the administration of that distinguished politician, he, together with the present Chancellor, and Justices Richards and Hagarty and others, received the patent of Queen's Counsel. He has held the office of Mayor of the City of Toronto for some years, and has the reputation of being a careful, learned and pains-taking lawyer.

The Law Officers for Lower Canada are the Hon. Louis Victor Sicotte, Q C, Attorney General, and the Hon. J. J. C. Abbott, D.C.L., Q.C., Solicitor General.

THE YELVERTON MARRIAGE CASE.

This celebrated case is now going through the preliminary stages preparatory to its reaching the House of Lords. The Irish and Scotch Courts have given judgments directly antagonistic to each other. In Ireland, the verdict declaring Maria Theresa Longworth to be the wife of Major Yelverton, has undergone the test of an investigation in the Court of Common Pleas there, and has been sustained owing to the Judges being equally divided in opinion. In Scotland, however, Lord Ardmillan has given judgment the other way. It will be curious to watch the future proceedings in the case.

THE LAW OF REGISTERED JUDGMENTS.

At last we are likely to have some authoritative decision upon the conflicting cases relating to registered judgments. The case of *Fraser* v. *Anderson*, which will be found among the Queen's Bench cases in this number, is to be appealed. The questions involved are, as Mr. Justice Burns remarks, of great importance to the landed interests in this Province.

CHANCERY FALL CIRCUITS, 1862.

HOME CIRCUIT.

Toronto	Tuesday,	2nd September.

WESTERN CIRCUIT.

Sandwich	Tuesday,	16th September.
Chatham	"	23rd "
London	"	7th October.
Brantford	"	14th "
Hamilton	"	21st "
Barrie	"	28th "
Goderich	"	4th November.

EASTERN CIRCUIT.

Whitby	Tuesday,	16th September.
Cobourg	"	23rd "
Belleville	"	7th October.
Kingston	"	14th "
Brockville	"	21st "
Ottawa	"	28th "
Cornwall	"	4th November.

HEARING TERM.

Toronto, from Monday, 17th November, to Saturday, 29th November.

CHANCERY ORDERS.

FRIDAY, 9th May, 1862.

A Petition, filed under the 18th section of Order IX. of the General Orders of this Court, of the 3rd June, 1853, is to be set down to be heard in Court in the paper of Motions for Decrees. And when it is ordered that any new party or any present party may answer the petition, and that the petitioner shall be at liberty to set down the petition again, it is to be set down in like manner. And upon the copy of such petition to serve is to be endorsed the following memorandum or notice, namely, "If you do not appear on the petition, the Court will make such order on the petitioner's own showing, as shall appear just." And upon the copy which is to be served of the order to answer such petition, when the Court shall deem it advisable to make such order, is to be endorsed the following memorandum or notice, namely, "If you do not answer the petition, the Court will make such order on the petitioner's own showing as shall be just, in your absence; and if this order is served personally, you will not receive any notice of the future proceedings on such petition.' And when the party so served shall answer the petition, the same is to be set down to be heard upon notice in the same paper.

Petitions set down to be heard under the foregoing Order are to be set down not less than ten days before the day on which they are so set down; and notice thereof, when notice is required, is to be served upon all proper parties not less than seven days before such day.

Causes are to be set down for rehearing not less than ten days before the commencement of the rehearing Term for which they are so set down; and notice thereof is to be served upon all proper parties not less than seven days before said rehearing Term.

A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of.

The Registrar is to prepare a peremptory list of causes set down for hearing for each day on which they are to be heard; and for that purpose the party setting down a cause for hearing, is to notify the Registrar of the day for which he has given notice of the hearing of such cause, not less than seven days before the day for which such notice is given.

(Signed) P. M. VANKOUGHNET, *C.*
J. C. P. ESTEN, *V. C.*
J. G. SPRAGGE, *V. C.*

6th June, 1862.

Sections fifteen and sixteen of General Order number nine of the General Orders of this Court of the 3rd June, 1853, are hereby abrogated and discharged.

Bills of Revivor.—Bills of Revivor and Supplement. Original Bills in the nature of Bills of Revivor, and Original Bills in the nature of Supplemental Bills, are abolished.

Upon any Suit becoming abated by death, marriage or otherwise, or defective by reason of some change or transmission of interest or liability, on the part of any plaintiff or defendant, by devise, bequest, descent or otherwise, it shall not be necessary to exhibit any Bill of Revivor or Supplemental Bill, or to proceed by any of the modes provided for by the sections of General Order by this Order rescinded, in order to obtain an Order to revive such suit, or a Decree or Order to carry on the proceedings; but an Order to the effect of the Order to revive, or of the usual Supplemental Decree under the former practice of this Court, may be obtained as of course upon præcipe upon an allegation contained in such præcipe of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an Order so obtained, when served upon the party or parties who would be defendant or defendants to a Bill of Revivor or Supplemental Bill, according to the former practice of this Court, shall from the time of such service be binding upon such party or parties in the same manner in every respect as if such order had been regularly obtained according to such former practice of the Court; and such party or parties shall thereupon become thenceforth a party or parties to the suit: Provided, that it shall be open to the party or parties so served, within fourteen days after the service of such order, to apply to the Court by motion or petition to discharge such Order on any ground which would have been open to him or them on a Bill of Revivor or Supplemental Bill stating the previous proceedings in this suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: Provided also, that if any party so served shall be under any disability other than coverture, such Order shall be o no force or effect as against such party, until a Guardian or Guardians *ad litem* shall have been duly appointed for such party, and the period of fourteen days shall have elapsed thereafter.

(Signed) P. M. VANKOUGHNET, *C.*
J. C. P. ESTEN, *V. C.*
J. G. SPRAGGE, *V. C.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office"

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

CHAPTER V.—(*Continued from page* 122.)*

The following forms of appointment by Judge and order thereupon are suggested for use :†

JUDGE'S ACT APPOINTING CLERK OR BAILIFF.

I, Judge of the County Court of the County of , by virtue and in pursuance of the powers to me given and belonging by the Division Courts' Act, do hereby appoint A. B, of the &c., *Yeoman*, Clerk, (*or* "Bailiff," *or* "a Bailiff") of the Division Court of the said County, to hold the said office during my pleasure. And I do direct that the said A. B. shall give security for the due execution of his office by entering into a covenant in the manner and form required by the statute, with *two* sufficient sureties; the specified liability thereunder as against the said A. B. to be not less than $, and as against the said sureties not less than $ each. such sureties to be approved by me.

Bond to Her Majesty, A. B. bound in $ two sureties each in $ } Given under my hand and seal at , this day of 186 .

Judge.

ORDER FOR THE APPOINTMENT OF OFFICER, CLERK OR BAILIFF.

In the Division Court in the County of

Upon the appointment by the Judge of the County Court of the said County, of A. B., of *yeoman*, as Clerk, (*or* "Bailiff," *or* "a Bailiff,") of this Court, and it appearing that the said A. B. has given the security required by law, it is ordered that the said A. B. be and he is hereby appointed and declared the Clerk (*or* "Bailiff" *or* "a Bailiff") of this Court.

Given, &c. By the Court. Clerk.

Before the order of appointment is passed the Judge, as already observed, should ascertain the sufficiency of the officer's sureties, and endorse his approval on the security covenant, the provisions in the 25th and 26th sections of the act being to enforce proper security before the officer acts; and whether the enactment be directory or imperative, the neglecting to settle the amount and approve the sureties would be a failure of duty on the part of the Judge.‡ (See Miller v. Tunis, U. C., C. P. R., vol. 10, page 425.)

As the Judge is required to approve the sureties and declare them sufficient for the sums in which they are bound, the power of making judicial investigation before approval is implied, and in cases where the Judge has not personal knowledge of the fact of sufficiency, and indeed in all cases, it seems proper that the sureties should justify by affidavit showing what they are worth over and above their debts.

The form of security covenant is given in schedule A to the Act, and follows closely, though not exactly, the form of covenant to be entered into by Sheriffs under cap. 38 Consol. Stats. U. C. There is no covenantee named, nor is the amount that each of the covenantors may be called upon to pay under the deed specified, and, *according to the form*, they may be treated either as jointly or severally liable, though the covenant is in fact a joint covenant. The proviso at the end of the deed that no greater sum shall be recovered under the covenant against the several parties than the deed specifies, is not a part of the undertaking of the covenantors, but it makes it the duty of the court to see that none of the parties to the deed shall be compelled to pay under it more in all than the sum which has been set opposite to his name, (see McArthur v. Coole 19 Q. B., U. C., 482; Miller v. Tunis, 10 C. P., U. C., 424 and sec. 149 of the Act, latter part.) The 27th sec. provides who may avail themselves of and sue as covenantees on this covenant—namely, any person suffering damage by the default, breach of duty or misconduct of the Clerk or Bailiff. The language of the covenant in this particular is "damage of any person *being a party* to any legal proceedings."

Further reference to the covenant need not be made here, as it will fall more in place when remedies thereunder against the officer come to be treated of.

COVENANT BY CLERK OR BAILIFF.

(Form A. subjoined to the Act.)

Know all men by these presents, that we, J. B., Clerk (*or* Bailiff *as the case may be*) of the ( ) Division Court, in the County of , S. S. of in the said County of (*Esquire*), and P. M., of in the said County of (*Gentleman*), do hereby jointly and severally for ourselves and for each of our heirs, executors and administrators, covenant and promise that J. B. Clerk (*or* Bailiff) of the said Division Court (*as the case may be*) shall duly pay over to such person or persons entitled to the same all such moneys as he shall receive by virtue of the said office of Clerk (*or* Bailiff, *as the case may be*) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or* Bailiff) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding: nevertheless it is hereby declared, that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said J. B. in the whole, $
Against the said S. S..... .....
Against the said P. M..... .....

* A portion of the matter has been reprinted to correct an error, and the form having been in a previous number erroneously printed as a note.—EDS. L. J.

† The forms are from those used by one of the most experienced County Judges in Upper Canada.

‡ In Miller v. Tunis an omission of this nature was pointedly rebuked by Chief Justice Draper—*and* had the course pointed out by the statute been followed the parties in that case would have been saved the expense.

In witness whereof, we have to these presents set our hands and seals this day of in the year of our Lord one thousand eight hundred and

Signed, Sealed and delivered
in the presence of

CORRESPONDENCE.

TILSONBURG, C. W.

GENTLEMEN,—Your opinion in the following case will oblige.

A, a duly admitted attorney, delivers his bill of costs to B, by depositing it in the post office, directed to B, according to the terms of Consolidated Statutes U. C., chap. 35 sec. 27. Afterwards finding that B had left the country (absconded) A made an affidavit stating the fact of the bill being so served and that B had absconded, &c. A then applied to the county judge for leave to commence an action under section 37 of the above mentioned act, which the judge refused to grant, saying that the application should have been made previous to B's leaving the country, as the section reads as follows, viz.: "Any judge of a superior court of law or equity, or county judge, on proof to his satisfaction that there is probable cause for believing that the party chargeable *is about to leave* Upper Canada may authorize such attorney or solicitor to commence an action for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month has not expired *since delivery of the bill as aforesaid.*"

The judge held that the words "about to leave, &c.," in the above clause, in this case precluded him from giving the order, which in fact gave B a chance to remove his goods.

Yours truly,

EDWARD STONEHOUSE, *Solicitor.*

[We think, though the point is doubtful, that the judge would have been justified in granting the order asked.

The prohibition in section 27 of the act respectiug attornies must be read in connection with the 28th section. The object is to secure to the party to be charged a month to enable him to have the bill taxed and paid without further charge; and had the attorney in the case but undertaken and made it part of the order to allow the defendant the same advantages as he would have under ordinary circumstances, we cannot see what reasonable objection could lie to the granting the order. Such a case would certainly seem within the spirit of the act. But it strikes us that the attorney might have prevented B taking his goods by suing out an attachment, which is a proceeding *in rem*, and when the month had elapsed, following it up by suit.

This proceeding would not be held, we think, a violation of the enactment in section 27, that "no *suit* at law or in equity," shall be brought, &c.]—EDS. L. J.

U. C. REPORTS.

COURT OF IMPEACHMENT.

Reported by THOMAS HODGINS, ESQ., M.A., LL.B, *Barrister-at-Law.*

IN RE DAVID JOHN HUGHES, ESQUIRE, JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN, AND JUDGE OF THE SURROGATE COURT IN AND FOR SAID COUNTY.

The charges set forth in this case were made to the Governor General, on the complaint of one Murdoch McKenzie, Agent of the American Express Company, at St. Thomas, against the Judge of the County Court of Elgin, for misbehaviour in his said office of Judge. The Governor General transmitt[illegible] complaint—then extending to fifty-six charges, —with the papers and affidavits in reply, to the Court of Impeachment; and on the 8th January, 1862, the Court met, and entered upon the case, striking out a number of the charges, and at an adjourned sitting on the 11th January, appointed the 3rd July, 1862, for the trial of the charges laid. On the 3rd July, the Court met, and proceeded each day with the case until the 11th July, when the evidence on both sides was closed. On the 19th July, the Court gave judgment—the Judges being, the Honorable Archibald McLean, Chief Justice of Upper Canada, the Honorable Philip Michael Matthew Scott Vankoughnet, Chancellor of Upper Canada, and the Honorable William Henry Draper, C.B., Chief Justice of the Court of Common Pleas. The charges struck out are not given in this report.

Richards, Q. C., for the prosecution.

John Wilson, Q. C., for the Judge.

(No counsel appeared for the Crown.)

5th Charge.—That the said Judge on 22nd July, 1859, became assignee of the real and personal estate of J. White and James Mitchell, by the terms of which he is entitled to receive 10 per cent.

Reply.—The defendant replies that he was chosen assignee of the *real* but not of the *personal* estate of the parties mentioned for a specified purpose, at the rate of 2 per cent. only, but that he has a personal and pecuniary interest in the estate in common with other creditors, and he has lately resigned the trust. He also replies that the charge, if it were true, shows neither inability nor misbehaviour in office.

Per Cur.—Upon the 5th charge we find 1st. That before the assignment therein mentioned, the Judge had purchased a house and portion of the lands assigned, which were encumbered, and liable to the creditors of White and Mitchell, and that the assignment was taken for the purpose, and with the hope that Judge Hughes might protect himself from heavy loss. 2nd. That the per centage to be received by him was two and not ten per cent., and, according to the evidence, might not do more than pay the expenses attending the execution of the trusts. 3rd. On this charge we adjudicate and decide that the said Judge is *not guilty* of any misbehaviour in office, and that the charge is *false.*

6th Charge.—That the holding of the said office of assignee has caused the Judge to exhibit partiality in suits where said parties had interests antagonistic to the interests of the assignors—instance *Thos. B. Hart* v. *Benson.*

Reply.—That the charge is untrue.

Per Cur.—Upon the 6th charge, we find that the adjudication thereon must depend upon the adjudication of other charges connected with the case of *Hart* v. *Benson*, (See 22*nd et al.*)

9th Charge.—That previous to and during 1859, the Judge had a pecuniary interest in the business of Thomas Farrell and James Mitchell, both of St. Thomas; that he endorsed their negociable paper in consideration of receiving a portion of their profits or *a per centage* for endorsing.

Reply.—That the charge is untrue; and if it were true, that neither inability nor misbehaviour is shown. I never had any transactions with Thomas Farrell and James Mitchell. Probably the charge is intended to refer to a transaction I had with Sylvester Farrell & Co., which was negociated by me with Mr. Mitchell, whom I understood to be in the business. It was this: Mr. Wilson of London, Mr. Barwick of St. Catharines, and I, own a farm in Southwold, which has been in my charge for some years. In the fall of last year I was desirous of letting the after-grass for the season. Mr. Mitchell told me Messrs. Farrell & Co. were intending to buy cattle to export if they could get money from the bank by way of loan wherewith to buy, and a pasture to keep the cattle and sheep until ready to send away. He stated they did not like to give a fixed rent for the pasture. I offered him the pasture for the season for one-third of the profit to be realised from the sale of the stock, and to endorse the paper at the bank. This was the basis of the agreement. It had nothing whatever to do

with the buying and selling. I endorsed their paper—on which they effected a loan at the bank, without any remuneration whatever. They occupied the pasture until the close of the season, and I was paid for my co-tenants and for myself $18 73 for the use of it, which is all we ever received, either directly or indirectly. The defendant contends he had a right to engage in this operation.

Per Cur.—On the ninth charge we find that the said judge for a long time during the year 1859, and previously had a direct pecuniary interest in the business of one Sylvester Farrell and one James Mitchell, both of St. Thomas, either as a partner or under an agreement, whereby the said judge endorsed the negociable paper of the said Sylvester Farrell and James Mitchell, in consideration of receiving a share of the profits of certain business in which they were engaged, or a per centage for so endorsing. The court finds that the judge is *not guilty;* and this finding is on the merits, and not by reason of the misnomer of Farrell in the charge. The charge is unsupported by the facts admitted in the answer of the judge—which was the only evidence advanced—and therefore the court considers this charge *vexatious.*

11*th Charge.*—That the Judge made a profit out of the Division Court patronage, by getting his children taught by John Powell, the Clerk of the Court of St. Thomas, the said Powell getting no other remuneration than the fees of the office, both for doing the duties thereof and teaching the children of the Judge.

Reply.—That the charge is untrue; and if it were true, that neither inability nor misbehaviour is shown.

Per Cur.—Upon this charge the Court finds the following proved: 1. That John Powell up to some time in Oct. 1854, was employed in the Post Office at Woodstock, and was recommended by Mr. Barwick, the Postmaster, to Judge Hughes, to be appointed a Division Court Clerk.—2. That on the 18th Oct., 1854, Judge Hughes addressed a letter to the said Powell, containing the following passage: "I guarantee to you enough to pay Mr. Warren £50, and £100 a year besides for yourself. In consideration of that guarantee you promise to perform the duties of clerk during that four years, and to give instruction to my children at certain hours that we may hereafter fix upon. If the fees of the office do more than pay all I guarantee to you and to Mr. Warren they are to be your own; and I will pay you whatever sum you and I shall fix upon as a proper remuneration for teaching my children, because I do not want them to be taught for nothing. If I have to supply any deficiency on my guarantee to you of course I should wish that to be considered as paying for their instruction."—3. That one Henry Warren was at the date of that letter, Clerk of the Division Court, which was held at St. Thomas, in the County of Elgin.—4. That the said Henry Warren was a very old man and incapable of discharging the duties as such Clerk, and that he resigned his office upon the suggestion of Judge Hughes, who held out to him the expectation that the successor, who was to be appointed by the Judge himself, should pay to him (Warren) for four years, if Warren should so long live and the successor retain the office, an annuity of £50 per annum; and that it was stipulated by the Judge that Warren should afford the new clerk such aid and explanation as should enable him to understand the business of the office and facilitate the discharge of its duties.—5. That the letter of the 18th October, 1854, was written in furtherance of the communication between Judge Hughes and Mr. Warren; and that early in November, 1854, Powell was appointed to succeed Mr. Warren, and gave to Mr. Warren his bond conditioned to pay £50 per annum for the time above stated, and that while Powell continued to hold the office (say fifteen months) he paid quarterly the sum of $50 to Henry Warren.—6. That the fees which accrued to Powell as such clerk during the time he held the office, and which, if he had insisted on immediate payment as Judge Hughes told him to do, he might have received, amounted to as much or more than £100 a year after paying the stipulated annuity to Warren, but that Powell actually received less than at the rate of £100 a year for himself.—7. That in February, 1856, Powell was dismissed by the Judge as incompetent to do the duties of clerk.—8. That while Powell held the office of clerk he gave instruction to Judge Hughes' children for about three hours per diem.—9. That no sum was ever fixed upon as a proper remuneration to be paid by Judge Hughes to Powell for teaching his children while Powell was clerk of the Division Court.—10. That soon after Powell's dismissal he applied to Judge Hughes for remuneration for teaching his children during the time he held the clerkship, and that Judge Hughes refused to pay anything unless Powell could show that the fees received did not amount to £100 a year, besides yielding enough to pay Warren.—11. That Powell never has made up any statement of the fees of his office for that or for any purpose, and that Judge Hughes never has paid him anything for teaching his children during the period that Powell was clerk of the Division Court.—12. That in appointing Powell to be clerk of the Division Court, Judge Hughes intended to secure the services of a person who could, in addition to the duties of the office, instruct his (the Judge's) children during certain hours each day on the terms expressed in the letter of 18th Oct., 1854.

The court finds that the result has been that the said judge did obtain indirect profit from the appointment of Powell, inasmuch as he paid Powell nothing for instructing his children while Powell was division court clerk, although upon a proper construction of the agreement contained in the letter of the 18th October, 1854, he might have been liable to Powell for such services, until the latter, in the final settlement made between him and Judge Hughes in 1859, abandoned all further claim on the judge. On these grounds we find the judge *guilty* on this charge.

12*th Charge.* That since the said John Powell was discharged from his office of clerk of the said division court, he was employed for a considerable time by the present clerk of that court at a salary of £100 per annum, and has been paid by the said clerk 'and judge' (interlined), and that during the time of such subsequent engagement the said Powell taught the children of the said judge who has refused to pay him any further remuneration therefor, on the ground that the said £100 per annum covered the same, which it did not.

Reply.—Denial and justification.

Per Cur.—Upon charge 12 we find the following facts as proved by Mr. Powell, the only witness who has been called on either side to give testimony in reference thereto:—1. That after Powell's removal from the office of clerk of the division court, he made an agreement with Judge Hughes to teach his children for three years ending 1st April, 1859, at the rate of £50 per annum; the time given to this teaching appears to have been from 9 to 12 each morning; and up to October, 1857, the judge paid him at this rate quarterly.—2. That in October, 1857, Powell was engaged by Mr. Farley (who had succeeded him as clerk of the division court) as a copying clerk, for the remainder of his time, after the hours of teaching the judge's children; and that Powell thereupon gave up an afternoon school which he had kept.—3. That Farley agreed to pay Powell (as he, Powell, swears) £100 per annum, and that Powell was not informed then, and did not suppose, that this payment was intended to cover anything but his services as copying clerk.—4. That when this change took place the judge ceased to make any payment directly to Powell for teaching his children.—5. That either six or nine months after Powell's employment by Farley, he rendered an account to Judge Hughes, and some time after he asked Farley to advance him some money, saying that the judge had not paid him for teaching, upon which Farley told him that the £100 per annum was to cover both his services in the office and his tuition of the judge's children, and Judge

Hughes, coming into the office at the time, asked Powell if he was not aware that Farley was making payment for him (J. H.)—6. That up to this time Farley had paid Powell by giving cheques for the quarterly sum, making no distinction between the payment as clerk or tutor; and Powell swears that this was the first occasion he had any intimation that he was only to receive £100 per annum on both accounts.—7. That after this time Farley took receipts from Powell distinguishing the accounts on which payments were made.—8. That Powell "gave in" to the representation that he was only to receive £100 on the two accounts; and on the first April, 1859, he gave a receipt acknowledging payment in full of all demands on Judge Hughes.

Upon the foregoing charge, No. 12, the court finds that it is not proved by the foregoing evidence, and therefore adjudicate thereupon that the said judge is *not guilty*, but do not affirm that the charge is false or vexatious.

13*th Charge*.—That since the discharge of Powell the Judge has made a profit out of the St. Thomas Division Court.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge no evidence was offered other than upon charge number 12,—the charge is not proved.

16*th Charge*.—That the Judge practised as a conveyancer in drawing a deed for one Hugh Douglas to one Campbell, and thereby deprived H. Hamilton, Esq., barrister, of the profit of drawing the deed, according to an agreement previously made.

Reply.—That the charge is untrue. That a Judge of a County Court may practice as a conveyancer, and that if he had done wrong the remedy is not sought in a proper way. [See 8 Vic., chap. 13, sec. 3, and 16 Vic., chap. 20, sec. 1 and 2, and 5 Sec. Consol. Stats. U. C., chap. 15.]

Per Cur.—Upon this charge we do find and adjudicate that the said Judge is *not guilty*, and that the charge is *false*.

19*th Charge*.—That said Judge has acted as counsel and adviser of James Mitchell, in matters connected with the assignment.

Reply.—That the charge is untrue, and that any charge of the kind must be prosecuted by action or information in one of the Superior Courts of Common Law.

Per Cur.—Upon the foregoing charge, we do find and adjudicate that the said Judge is *not guilty*, and that the said charge is *vexatious*, being wholly unsupported by evidence

22*nd Charge*.—That in delivering a certain judgment in the case of *T. B. Hart* v. *John Benson*, the Judge stated that he was not assignee of the personal estate of James Mitchell, but only a portion of his lands, while in fact he was assignee of part of personal estate of said Mitchell, and had collected monies on account thereof.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we do find that the assignment to Judge Hughes, made by White and Mitchell, was not made for the purpose of passing any merely personal property, unconnected with real estate—though some promissory notes are mentioned in a schedule attached thereto, which were not proved to be connected with any sale of part of the real estate assigned; and that the judgment complained of affords not even a plausible ground for the very offensive imputation contained in the said charge. We do, therefore, adjudicate thereon, that the said Judge is *not guilty*, and that the said charge is *false and vexatious*.

23*rd Charge*.—That the Judge made the statement because he had an interest in Mitchell's affairs, (the business of Benson really being that of Mitchell,) and also to assist Edward Horton, the attorney employed by Benson.

Reply.—That the charge is untrue.

24*th Charge*.—That in two trials of *Hart* v. *Benson*, the Judge charged the jury unfairly in favour of defendant.

Reply.—That the charge is untrue.

25*th Charge*.—That upon application being made for a new trial in the case of *Hart* v. *Benson*, on behalf of the defendant, the Judge ordered the costs to abide the event, although the verdict was not warranted by the evidence, and that the order was made to favour the aforementioned Edward Horton and the said Benson and Mitchell; and therein was unfair.

Reply.—That the charge is untrue.

26*th Charge*.—That upon application being made on behalf of the plaintiff after the second trial, (the second verdict being in favour of the defendant,) the Judge behaved in an unseemly and passionate manner, stating that the affidavit of the plaintiff was false, that he passionately refused at first to grant a rule *nisi*; that he said at length that he would consider about it, but refused for some time to name a day upon which to give his decision until by the perseverance of the plaintiff's counsel a day was fixed.

Reply.—That the charge is untrue.

Per Cur.—Upon these charges we find, 1st. That it is not proved that the business of Benson was really that of the said James Mitchell, and that the weight of evidence before us was the other way, although contrary opinions were expressed founded in part on facts not proved before us. 2nd. That in granting one new trial, and in refusing a second, the Judge acted in the exercise of his judgment and discretion honestly, though another person in his situation might have given a contrary decision. 3rd. That whatever motive might have induced the making of the affidavit, it might well be understood by the judge to convey the same imputation which the 22nd charge contains, and might have excited, momentarily irritation, but that the Judge did not allow it to interfere with his granting a rule to show cause, which was fully discussed before him. 4th. That the evidence is not sufficient to sustain the charge of partiality in the said cause of *Hart* v. *Benson*, and, therefore, we do find and adjudicate that the said Judge is *not guilty* on the said four charges, or on the sixth charge (*ante*), or on either of them, and that the said charges are *false*.

27*th Charge*.—That in charging the jury in the case of *Benham and others* v. *John Sells*, the Judge exhibited partiality in favour of the defendant, by commenting upon statements made by plaintiff's counsel, as they had been in evidence—which they were not—thus manifesting a decided partiality for the defendant's counsel, Edward Horton.

Per Cur.—This charge being misstated in the original complaint transmitted for trial, and as we did not feel we had any authority to alter any of the charges which were so transmitted by His Excellency the Governor General; we find, however, that the Judge is *not guilty* and that the charge is *false*. (*Draper*, C. J., stated that had the charge been properly framed, the finding of the Court would be the same.)

28*th Charge*.—That in the same cause the defendant's counsel asked leave to enter a non-suit. The Judge appeared to write as if taking note of the application. No objection was made either by Judge or plaintiff. On applying for a rule to enter a nonsuit at the following term, the Judge stated that leave had not been reserved, as it could not be reserved without leave or consent of the plaintiff's counsel, and that a new trial was granted on the ground that the evidence did not support the declaration. But the said Judge in so acting was partial to Edward Horton.

Reply—To the 27th and 28th charges. The Judge replies that they are untrue. They both relate to the same cause. In the 27th the Judge is charged with favouring the defendant, and Mr. Horton is made to appear as acting for him, and in the 28th for the plaintiff, and the charge in both is that he favoured Mr. Horton.

Per Cur.—Upon this charge we find that the defendant's Counsel did not apply to the Judge at the trial to reserve leave to him to move for a non-suit in the following term on the objections raised to the plaintiff's right to recover. 2nd. That upon the declaration as it then stood, and both on the opening of his counsel and on the evidence, the plaintiff

wholly failed to show a cause of action against the defendant. 3rd. That in granting a new trial the Judge gave the defendant the only relief in his power, as no leave to move for a non-suit had been reserved. 4th. That there is no foundation in the evidence given upon this charge to justify an adjudication that the Judge was guilty of partiality in the course he pursued; and we do adjudge that he is *not guilty* of this charge, and that the same is *vexatious*, inasmuch as the defendant's counsel overlooked the necessity of his obtaining leave to move for a non-suit, which omission appears to have given rise to the subsequent difficulty.

30*th Charge.*—That the Judge in a written judgment delivered by him in the Surrogate Court, in the matter of the rule of James Finn, dated 19th May, 1860, stated among other reasons for his decision,—"Before the order was granted all parties met together some time after in my presence, and then Mr. Abbott suggested that if the executors acted further in the matter, until the validity of the will was decided, they should file a bond or give security for all their actions henceforward,"—and also further stated as follows:—"I afterwards, within an hour, advised Mr. Abbott of the manner in which the order had been modified, and he expressed his concurrence with it, and said it would now be unobjectionable, and he had no doubt the bond of the executors would be sufficient for the amount without sureties." That such alleged reasons were false, and that the Judge falsified his judgment to favour Edward Horton.

Reply.—That the charge is false, and that the statements made in the judgment were true.

31*st Charge.*—That the Judge in this case counselled with Mr. E. Horton.

Reply.—That the charge is untrue.

32*nd Charge.*—That the Judge counselled with Daniel Mc Gregor, one of the executors of the said will of James Finn.

Reply.—That the charge is untrue.

33*rd Charge.*—That in this same matter the Judge directed the Clerk of the Surrogate Court to deliver out of Court certain promissory notes amounting to several thousand dollars, upon the verbal application of E. Horton, without any evidence and without any notice to the parties interested—to favour the said E. Horton.

Reply.—That the charge is untrue.

Per cur.—Upon these charges we find, 1st. That a suit has been instituted in the Court of Chancery to try the validity of the will of the late James Finn, in which suit all questions relative to the will, the Probate, and the alleged renunciation thereof, and the proceedings in the Surrogate Court respecting the same, will, or at least may, be brought forward for adjudication, and that it is not therefore deemed proper to express any opinion thereon. 2nd. That it is not proved that any of the acts complained of were done by the Judge from partiality and favouritism to the executors, or other parties for whom Mr. Edward Horton was solicitor, or to Mr. Horton personally. 3rd. That the Judge, by his answer read by prosecutor's counsel, as evidence, admits that he did make an order, on the application of Mr. Horton, that the papers and money lodged with Mr. Murtagh, the Registrar of the Surrogate Court, by the executors of Finn's will, should be re-delivered to them. The finding already stated, as to instituting proceedings in Chancery, renders it unnecessary to say more on the mere question of right; and there is nothing in the answer of the Judge to alter or qualify the conclusion already expressed. Upon these four charges, Nos. 30, 31, 32, and 33, therefore, we find that the said Judge is *not guilty*, and that the said charges are *false*.

39*th Charge.*—That in a case tried in the County Court, *Mc Wetherell* v. *Brown*, the plaintiff based his case upon a bill of sale given to him by one Tracy. The defendant objected that the bill of sale had not the affidavit required by the statute 13 and 14 Vic., cap 62, but merely the affidavit for a chattel mortgage. The Judge ruled that the objection was not tenable, that the instrument was a mortgage, and gave as a reason that the affidavit showed the intention of the parties. When the defendant's counsel asked if the instrument was a mortgage, when the time was fixed for the payment of the money? the Judge replied he was not there to answer questions! Counsel requested the Judge to note his objections, and the Judge refused to read to him, when requested, the language he had used in noting the objections. The said instrument was an absolute bill of sale, and the Judge was actuated by an unfriendly feeling to the defendant's Counsel.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find, 1st. That the instrument referred to in this charge was, in point of law, a bill of sale, and that the Judge ought to have so held. 2nd. That though the defendant's counsel had a perfect right to request the Judge to note his objection, he had no right to call upon the Judge to read how he had noted it. That such a request, especially when made, as Mr. Baxter swears, in a manner which he considered offensive and disrespectful, was properly refused. Mr. Stanton admits in his evidence that he was on bad terms with the Judge at the time, and that either before or very shortly after, the Judge adopted towards him a severe course to enable him to conduct the business of the Court with proper decorum. 3rd. If the defendant's Counsel thought that any point on which the jury should have been directed had been omitted, he should have called the attention of the judge to that point—the question as to whether the instrument was a bill of sale or a chattel mortgage had been already discussed and disposed of. Upon this charge we find that the said judge is *not guilty*, and that the charge of partiality is *false*.

40*th Charge.*—That in the case of *Cochrane* v. *Sheppard*, respecting certain letters and receipts, signed by the plaintiff and conclusive to the defendant's favour, the Judge told the jury that perhaps the plaintiff had never seen the receipts, that it was not likely he would have brought the action if he had knowingly signed such receipts, and thus induced the jury to find for the plaintiff through the genuineness of the receipts was not questioned. The Judge also refused a new trial on any terms.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find 1st. That in the opinion of the Court of Queen's Bench, before which the case of *Cochrane* v. *Sheppard* was brought by appeal from Judge Hughes's decision, refusing a new trial, such a decision was erroneous as that court ordered a new trial on payment of costs, though apparently with some hesitation. 2nd. That, considering the language of Sir *John B. Robinson*, C. J., in in pronouncing that judgment, and comparing the evidence of Mr. Stanton in support of the charge, with that of Mr. Baxter in reply thereto, the allegation that Judge Hughes was actuated by personal feeling in favour of the plaintiff's (Cochrane's) counsel is not proved. We do, therefore, hereby adjudge that the said Judge is *not guilty* of said charge, and that the charge of partiality is *false*.

41*st Charge.*—That a contrast of the judgments and decisions of the said Judge in certain cases in the said County Court on applications for new trials, wherein Edward Horton, of St. Thomas, barrister, was counsel on one side, and James Stanton, of St. Thomas, barrister, was counsel on the opposite side, exhibits an unjust preference towards the said Edward Horton, and against the said James Stanton; and the cases referred to are *Brown* v. *McWetherall*, *Foote* v. *Howard*, *McDiarmid* v. *McDiarmid*, and *Hart* v. *Benson*.

Reply.—That the charge is untrue. That Edward Horton was neither counsel nor attorney for either party in two of the suits named.

43*rd Charge.*—That in the case of *Foote* v. *Howard*, a new trial was granted, with costs, to abide the event, without any

reasonable grounds being shown, out of favour to the defendent and his counsel, the said Edward Horton.

Reply.—That the charge is untrue.

Per Cur.—Upon charge 41, we find 1st. That in the case of *Brown* v. *McWetherall*, Mr. Nichol was concerned as counsel for the plaintiff, and Mr. Stanton for the defendant; and that Mr. Horton was not engaged in the suit. 2nd. That in *McDiarmid* v. *McDiarmid*, Mr. Stanton was counsel on one side, and Mr. Abbott on the other.* It is not positively shewn whether this case occurred during the time that Horton and Abbott were partners—the inference is that it was so. Upon charge 43, in the case of *Foote* v. *Howard*, we find 1st. That the plaintiff having obtained a verdict, a rule *nisi* for a new trial was granted, and was enlarged by consent of both parties to the 24th July, 1858, a day out of term, as appeared by the endorsement thereon, signed by Mr. Horton, and by a clerk of Mr. Stanton's; that Mr. Stanton did not attend at the return of the rule, which was thereupon made absolute, and a new trial was granted: costs to abide the event. 2nd. That the case was one in which, in the exercise of his discretion, the Judge might deem it conducive to the ends of justice to grant a new trial, though on different terms as to costs; but the absence of any one to sustain the plaintiff's case, and press such considerations as might have produced a different decision as to costs, was a matter for which the judge was not answerable; and should have prevented complaint on this head. 3rd. That the facts of the case, and the decision thereon in the County Court, afford no grounds for an imputation of improper motives on the Judge's part. We do, therefore, find and adjudicate upon the said charges 41 and 43, that the said Judge is *not guilty*, and that the charge of partiality is *false*.

46th Charge.—That in the suit of *Sarah Finch* v. *E. S. Ganson*, tried at Aylmer 2nd Division Court, the judge directed the jury to find a verdict contrary to evidence.

Reply.—That the charge is untrue.

47th Charge.—That upon being applied to, to grant a new trial in this case, the judge refused, on the ground that the defendant's conduct in managing his own case was captious. In the judgment the judge said,—"This conduct was captious in the defendent, and I must allow him to take the consequence—I therefore refuse to grant a new trial as the defendant has no one to blame for those consequences but himself."

Reply.—That the charge is untrue.

Per Cur.—Upon these charges we find, 1st. That on the first trial the Judge ought, in point of law, either to have non-suited the plaintiff, or to have directed the jury to find for the defendant. 2nd. That the Judge ought, in point of law, to have set aside the verdict which was rendered in favor of the plaintiff, and to have granted a new trial. 3rd. That owing to an error in judgment, on the part of the Judge, the defendant has been obliged to pay $112 for which he was not legally liable. 4th. That this has arisen apparently from error on the part of the Judge, and from an entire omission to call his attention to the meritorious grounds upon which the defendant was entitled to succeed, and not from a hostile feeling to the defendant, which we do not find proved. Upon these charges we find, therefore, that the Judge is *not guilty*, and (Vankoughnet, C., *dissentiente*) that neither of them is vexatious, nor can be pronounced false under the statute. Upon this latter point, affecting the question of costs,

McLean, C. J., said, that the Court was divided in opinion. He could not add that the charges were vexatious, as he could not see that the judge acted in the matter entirely free from all feeling against the defendant, and that so far as he could gather from the statements and evidence before the Court he did not see in the conduct of Ganson that captiousness with which the Judge had charged him.

Vankoughnet, C., could not agree with his brother Judges. He was very decidedly of opinion, that, having found the Judge not guilty on what was the gravemen of the charge, they should also declare the charge false, and more especially as the charge was not made by the party said to have been injured, but by another, a total stranger to the transaction. He considered that a party in such a position, bringing forward such a charge, and failing in it, should suffer the consequences of his temerity, and be ordered to pay the costs.

Draper, C. J., agreed with McLean, C. J., and said, that though he had read the evidence several times, he could not free his mind of the feeling that the conduct of Ganson had not, to some extent, influenced the Judge. He had no doubt that Ganson had given occasion for this feeling, from the facts of his being a constant litigant in the Courts, that his cases were more litigated than others, and also, because Ganson appeared so frequently as a litigant, exacting enormous interest, and as acting with harshness in his cases. But as this man had suffered so much in having to pay costs in this case, he thought it best to leave the decision of the Court as he had read it.

48th Charge.—That in the case of *Charles Askew* v. *Marwood Gilbert*, the jury, under the unfair direction of the judge, brought in verdict for plaintiff for $95. And that the judge refused to grant a new trial, although the application was backed by four or five of the jury, who complained that a mistake had been made. That the Judge was actuated by partiality for the plaintiff, who was a bailiff in one of his courts.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find, 1st. That an erroneous conclusion was arrived at by the Judge and jury who tried the cause, as the plaintiff has been allowed to recover much more than he could legally have demanded. 2nd. That it is not proved that this erroneous decision arose either from personal feeling on the part of the Judge against the defendant or from partiality to the plaintiff in the cause. We do therefore find that the said Judge is *not guilty* of the said charge, and that the same is *false*.

49th Charge.—That the Judge has lost the confidence of the people of the county of Elgin; and that it is the general opinion that persons employing the said Edward Horton have an advantage over their opponents by reason of the Judge's favouritism.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we are all of opinion that it is vague and general, involving an enquiry into opinions and feelings rather than into matters of fact affecting the administration of justice; that the Court of Impeachment could not, or at least ought not, to try what opinions were entertained respecting the Judge; and we therefore declined to hear evidence in support of this charge.

52nd Charge.—That the Judge caused one Robert Nicoll to be prosecuted at the Quarter Sessions, and induced the Clerk to conceal his having acted in the matter. That the Judge sentenced the prisoner to a much more severe sentence than the nature of the offence proved warranted, in all of which he was animated by personal feeling.

Reply.—That the charge is untrue.

Draper, C. J.—In this case of Nicoll we consider that the Judge did not overstep his proper duty as Chairman of the Court of Quarter Sessions in taking the matter up. He was clearly right in doing so, and besides we find by the evidence of a most respectable witness, whose testimony is in no way impeached, that he was the person who first brought the case under the notice of the Judge.

Per Cur.—Upon this charge we find that the said Judge is *not guilty*, and that the charge is *vexatious*.

* Note by the Reporter.—These two gentlemen, Messrs. Stanton and Abbott, were the most active in getting up the charges against the Judge, and were apparently the real complainants in the case.

53rd Charge.—That in a writ of *Thompson* v. *Luke* the same being an unimportant suit, the Judge granted to the plaintiff's counsel a counsel fee of £3 10s., although in the suit of *McDiarmid* v. *McDiarmid*, stated by the Judge to be the most important suit ever tried before him, he refused to grant the defendant's Counsel a higher fee than £2 10s. That in the case of *Thompson* v. *Luke* the Judge was actuated by feeling against the defendant, and so expressed himself, and in the other suit, the Counsel and Attorney for the defendant were not on good terms with him, and in both cases he showed partiality and unfairness.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find, 1st. That in the case of *Thompson* v. *Luke*, the Judge ordered a fee of £3 10s. to be taxed to the plaintiff's counsel who had obtained a verdict. 2nd. That in the case of *McDiarmid* v. *McDiarmid*, the Judge ordered a fee of £2 10s. to be taxed to the defendant's counsel who obtained a verdict. 3rd. That the latter case took up much more time, and involved more important considerations than the former. 4th. That the charge that the Judge was actuated by ill-feeling towards Luke is not proved nor endeavoured to be sustained in argument upon the facts, and that the circumstances stated by the Judge in his answer, might (if true, and they were not denied in commenting on the case) have occasioned a larger allowance to the plaintiff's counsel, as he was detained in court a much longer time than the other trial occupied, waiting for the defendant, to whom time was given to procure a witness.* 5th. That, if as is charged, the larger fee was taxed against Luke, in consequence of the Judge's feeling against him (and Mr. Stanton's evidence tends to sustain this view, which is corroborated by the Judge's answer) there is no ground for imputing the granting such fee to a different motive, viz.: partiality to Mr. Horton or Mr. Abbott, his partner, who was counsel for Thompson; nor does the ordering of a less sum to Mr. Stanton as a counsel fee in another and more important case, afford sufficient reason for convicting the Judge of partiality or unfairness in reference to either fee. Upon this charge we find the Judge *not guilty*, and that the charge is *vexatious*.

DRAPER, C. J., stated in reference to the other charges not enumerated in the judgment of the Court, although they had either been struck out, or no evidence had been offered on behalf of the prosecution to substantiate them, yet as the Court must adjudicate upon all the charges transmitted to them by the Governor General, they find the Judge *not guilty* on such charges. As to costs, it appeared by the statute that they had to do something more than declare the accused not guilty, in order to entitle him to his costs of defence; therefore where the Court declared the charges to be *false or vexatious*, the Judge should be entitled to his costs; where nothing was said on that point, or where the Court declined to declare the charges false or vexatious, each party should pay his own costs, but where the accused was found *guilty*, the prosecutor should be entitled to his costs on that charge. The costs of the trial would, therefore, be distributive.

COURT OF ERROR AND APPEAL.

THE BANK OF TORONTO v. ECCLES.

Assignment for benefit of creditors—Preferred creditors—Power of debtor to insist on release by creditors.

(July 2nd, 1860, and January 23rd, 1861.)

[Before the Hon. Sir J. B. ROBINSON, Bart., C J.; the Hon. W. H. DRAPER,† C. B., C. J. C. P.; the Hon. Mr. Justice McLEAN;‡ the Hon. Vice Chancellor ESTEN; The Hon. Mr. Justice BURNS; the Hon. Vice Chancellor SPRAGGE; the Hon. Mr. Justice RICHARDS, and the Hon. Mr. Justice HAGARTY.]

On appeal from a judgment of the Court of Common Pleas.

Where a debtor had, before the passing of the Statute 22 Vic., chap 96,– assigned and surrendered his estate and effects to trustees for the satisfaction of his debts without reserve *Held*, affirming the judgment of the Court of Common Pleas, that he might, under the then state of the law, stipulate for the payment of some of his creditors in full, and a ratable distribution as to the rest, and also, for a release to himself from all further liability [ESTEN & SPRAGGE, V C C. dissenting.] *Held* also, that such release may still be insisted upon without any reference to the amount of the dividend to be paid by his estate.

This was an appeal from a judgment of the Court of Common Pleas, as reported in the tenth volume of the Reports of that court, at page 282, where the facts of the case are distinctly set forth.

Mr. *J. Hillyard Cameron, Q. C.*, for appellants.

Mr. *M C. Cameron* and Mr. *Anderson* for respondents.

The cases cited by counsel appear in the judgments of their Lordships.

Sir J. B. ROBINSON, Bart, C. J.—This is an action of ejectment brought, &c.

This is an action of ejectment brought by the plaintiffs, who claim that the fee in the land as purchasers at sheriff's sale, under a writ of *fi fa* against lands upon a judgment in their favor against John L. Ranney.

The defendants claim as assignees of Ranney under an assignment made on the 4th Jan., 1858, and registered 6th Jan, 1858.

The judgment against Ranney was entered upon 8th January, 1858, and was registered on the next day. The sale under that judgment was made on 15th Feb., 1859, and the sheriff's deed to the plaintiff was executed 5th March, 1859.

The deed of this land to the defendants of 4th January, 1858, is expressed in the deed itself to have been made in consideration of five shillings, and by it the land was granted to the defendants—"to hold as joint-tenants, and not as tenants in common, and to the survivor of them and the heirs of such survivor for ever." There is no mention in this deed of any further consideration than the five shillings.

On the next day (5th January ,1858) Ranney executed another deed to the same grantees (the three defendants in this action), in which he recited his deed to them of 4th Jan., and other conveyances which he had made to the same grantees of other lands; and he recites further, that the lands mentioned in the said indentures so referred to were conveyed to the said grantees, (although it was not so expressed in the said indentures) upon the like trusts and for the like purposes as those for which the said Ranney did by the deed of 5th Jan., 1858, containing these recitals, assign to the same grantees his personal estate and effects: and by this deed he assigns all his personal estate to these defendants, their executors, administrators and assigns: To have and to hold all the lands and tenements mentioned and described in the several indentures before mentioned: and all and singular, the personal estates (enumerating the various descriptions of personalty) to the said grantees (these defendants), their heirs, executors, administrators and assigns, to their own use for ever; but upon the trusts thereinafter mentioned.

These trusts are to sell the whole of the said property, real and personal, and out of the proceeds to pay first—the charges attending the trusts. Secondly,—to pay to a long list of creditors of the grantor therein named, their debts in full; and thirdly,—to take up certain bills and notes that had been made or indorsed for the accommodation of the grantor. And the defendants covenant in this deed that they will faithfully execute the trusts, and will at the request of the parties of the third part to this deed (that is the creditors of the grantor who shall execute the deed, or the major part of them, account with them in writing concerning the said trusts, and will make a just distribution of all trust monies, which they shall receive, (after the deductions before mentioned) amongst the subscribing creditors, according to the true intent of the deed.

Then follows a general release from the executing creditors to the grantor Ranney, of all actions, claims and demands on their part, provided that no creditor who should not execute this deed within 30 days from the date, should be entitled to any benefit

* Or, as it turned out, to *manufacture a witness*, by getting the plaintiff to make admissions to a little girl during the time allowed, conduct which Draper, C J., designated as "a course which no respectable attorney would think of resorting to."

† Gave no judgment in the case. ‡ Was absent when judgment was pronounced.

under it: and the proportion of the proceeds which such non-executing creditors would have been entitled to receive,—if they had executed within the time—shall be paid over to the executing creditors in proportion to their respective debts.

And lastly, it is provided, that the trustees shall pay over to the grantors any surplus that shall remain after paying to the executing creditors the whole of their respective debts, and paying the prior charges provided for in the deed.

When the defendants set up their title under these deeds at the trial, several objections were taken on the part of the plaintiffs, and among them the objection that, the clause in the trust deed which provides for a release in full by the creditors who shall execute the deed, made the assignment invalid, because it excluded from the benefit of it all such creditors as should refuse to accept of their dividend out of the property assigned, upon that condition

Doubts had been thrown out in both the Common Law Courts in this country of the validity of trust deeds executed by an insolvent debtor containing such a clause of release; and the learned judge at the trial acceding, for the time, to the objection, directed that a verdict should be entered for the plaintiffs, reserving leave by consent of parties to the defendants to move to have a verdict entered in their favor, if in the opinion of the Court the plaintiffs were not entitled to recover upon the evidence.

The defendants having moved accordingly in the Court of Common Pleas, judgment was given making the rule absolute for setting the plaintiffs' verdict aside, and entering a verdict for the defendants: and that judgment has been appealed from.

The other objections to the defendants' title, besides the one I have mentioned, were that the conveyance of the land to the defendants by the deed of 4th Jan , appears by the deed to have been made for a consideration of five shillings only, and is in effect a voluntary deed; and that such nominal consideration, and no other, being expressed, it was illegal to receive evidence *aliunde* to establish a valid consideration by shewing that the land was in fact conveyed to trustees to be sold with the view of paying the grantor's debts out of the proceeds.

It was objected also, that the deed of 5th January was not shewn by the evidence to have been made in full accordance with what was intended by the parties to it, at the time of the deed of 4th January being executed, but varied in several particulars: wherefore it was contended that the deed of 4th January cannot be said to have been made upon the considerations which may be collected from the face of the second deed, because they were not in the mind of the grantor at the time, and did not move him to make the deed of the 4th January.

And further, it was objected, that the trust deed of 5th January never having been registered, the registered judgment in favor of the plaintiffs cannot be affected by it, and cannot be postponed by reason of the prior registration of the first deed, if that first deed taken by itself, does not shew a valid title.

It was upon the objection which I have first stated and which is relied on as the 4th reason of appeal, that the argument for the appellants principally turned; but I will first state my opinion on the other points: 1st,—As to the exception that the deed of the 4th of January, 1858, being stated (in the deed itself) to have been made upon a consideration of five shillings, any evidence *aliunde* to prove another and more valuable consideration was inadmissible, as being repugnant to the deed. I have no doubt that the exception is not tenable. The title of the defendant is not resisted by any person claiming to hold as a purchaser for value from Ranney under a deed made subsequent to that of 4th January, 1858. This, therefore is not a case under the 27 Elizabeth, chap 4, which was made specially for the protection of such subsequent purchaser against prior fraudulent conveyances.

The question is, whether the deed to the defendants is void under the statute 13 Elizabeth, cap. 5, passed for the protection of creditors against fraudulent conveyances, or is void at common law?

Whatever may have been held in cases coming only under the statute of 27 Elizabeth, respecting voluntary conveyances being necessarily and as a legal inference void against subsequent purchasers, upon which point the language of judges has not been always consistent (Roberts on Fraudulent Conveyances, chap. 1, secs. 4 & 5), there is no doubt, I think, that under the statute 13 Elizabeth, chap. 5, a creditor resisting a conveyance upon the ground that in the language of that act "it is feigned, covinous and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors of their just and lawful actions, debts," &c., must show something more than the mere want of adequate and valuable consideration; because a man acting honestly and in good faith, and having no design to delay or defeat creditors, is not disabled by that statute, or unable at common law to make a voluntary gift of his lands;—or at least it may be said that the jury must be satisfied of something more than merely that the deed was made without a valuable consideration, before they can find it to be fraudulent as against creditors.

And if, as against persons not becoming creditors subsequent to the deed, but who were creditors before it was made, the jury cannot properly be told that in the absence of other evidence they may treat the total absence of consideration, or a grossly inadequate consideration, as *prima facie* leading to a conclusion of fraudulent intent, then it must on the other hand be open to the person claiming under the deed to uphold it against the imputation of fraud, by giving evidence *dehors* the deed of the intent and purposes for which it was really made.

The case of *Gale* v *Williamson* (8 M & W. 405), cited in the judgment appealed from, is a clear authority on that point; and it is indeed admitted in this case that the conveyance by Ranney to the defendants was in fact made in good faith, and was not collusive, but really intended for the benefit of creditors; while the objection which I am now considering is founded upon the assumption of the deed being purely voluntary, and without any other consideration than that which the deed of 4th January expresses.

The admission would of itself take this case out of the statute, which says not a word of voluntary conveyances, and still less provides that deeds appearing on the face of them to be voluntary shall without hearing evidence upon the truth of the case be treated as void, however honestly it tended, and though not made to defeat creditors.

Then if evidence could be properly received, as I have no doubt it could, to show that the nominal consideration of five shillings expressed in the deed was not the only consideration upon which it was made, we must be at liberty to receive evidence of what the real purposes and objects of the deed were; and when this point is settled, it cannot be seriously contended that the case can be at all affected by the circumstance that Ranney seems to have changed his mind in respect to some of the arrangements which he had in view between the execution of the deed of the 4th January, and of the declaration of trust made on the following day.

The execution of the first deed, while we are considering the question of fraud or no fraud, must be looked upon as the mere inception of the arrangement—a preparation for securing the general body of his creditors, by creating the trust which he had then in his mind, and which he perfected the next day. It should be all regarded as one transaction (11 L. J. N. S. Chancery, 105), and it can be no objection that the declaration of trust which he executed differed in some respects in its details from that which he had contemplated the day before; that could not have the effect of establishing fraud against the truth of the case.

Then as to the point that the trust deed of 5th January having never been registered, the judgment of the plaintiffs, though subsequent, being executed on the 8th January and registered on the 9th January, 1858, will prevail over the defendants' registered conveyances of the 4th January: what the plaintiffs mean to contend is, that the deed to the defendants of 4th January, if it stood alone, must be treated as fraudulent, because it is on the face of it voluntary; that it could not have stood alone against the judgment creditors, and cannot receive aid from the declaration of trust, because that deed is still unregistered, and so must be treated as fraudulent against the plaintiffs' registered judgment. (Consol. Stat. U. C., cap. 89, sec. 53.)

But I think it was rightly held, in the court below, that as soon as we find that the authorities warrant the refusing to exclude evidence of a consideration beyond the five shillings expressed in the deed, there seems to be an end of this objection. It is under the deed of the 4th January, 1858, that the defendants make title; and if that deed is not in itself void, merely because a valuable

consideration does not appear on the face of it, then all descriptions of evidence may be resorted to in order to ascertain the real objects and intention of that deed, and thus to settle the question of *bona fides*. The objection amounts to this—that the unregistered declaration of trust is not admissible evidence, even to show the object with which the first deed was made, because we are to take the declaration of trust to be void as against these plaintiffs, who registered their judgment. That proviso of the Registry law, however, would only extend to prevent the declaration of trust from directly affecting the plaintiffs' interest. It could not annul the trust as between Ranney and his assignees, which might be established as well without deed as by a deed registered. And, fraud apart, if the deed of 4th January must stand alone, then the defendants would hold the estate discharged from the trusts, if the deed of 5th January could not be advanced for any purpose in this case. The effect of the declaration of trust is to cut down the estate of the defendants; and the effect of the Statute of Frauds, in its provision regarding trusts, is, not to require that all trusts shall be *created by writing*, but that they shall be manifested and proved by writing, plainly meaning that there should be evidence in writing proving that there was such a trust. And on this principle it is that an express declaration of trust by a bankrupt, after his bankruptcy has been held good, and when a defendant by his answer in Chancery admits a trust, it is taken as sufficient to establish it. (3 Vesey, 707; 1 Atkins, 59; 2 Vernon, 288) Besides this, it is admitted in this case that the trustees have acted in the trust, and have sold real and personal property to the amount of £7000 or £8000. This last circumstance too deserves notice in determining the main point in the case, that is, whether this assignment of Ranney's real estate for the benefit of his creditors should be held fraudulent and void on account of the clause in the declaration of trust, which exacts from all executing creditors a release of their debts and demands in full, as the condition of their receiving any benefit from the proceeds of the property assigned.

We should not, except upon the most clear and conclusive authority, determine that a deed is void which has already been acted upon to so great an extent; for though *bona fide* purchasers from the assignees, without notice of the terms of their trust, might not be exposed to be disturbed in their titles, yet litigation might spring up in regard even to the property that has been sold by the defendants, and the affairs of the trust might be placed in an embarrassing position.

In the case of *Owen* v. *Boddy* (5 Ad. & Ell. 28), determined in 1836; and in the later cases of *Jones* v. *Whitbread* (11 C. B. 406), and *Coates* v. *Williams* (7 Ex. 295), assignments which had been made by debtors of their estates to trustees for payment of their debts, were resisted by execution creditors, on account of a clause which the assignment in each case contained, providing for the trustees continuing the business which the debtor had been carrying on, in order to the winding up more advantageously the affairs of the estate. The terms of this provision were not exactly the same in all cases: the deed that was executed in *Owen* v. *Boddy*, being such as afforded more ground than the deeds in the two other cases, for contending that the business being to be carried on for the benefit of the creditors of the assignor, who were to be paid dividends ratably out of the proceeds of the business on account of their debts, it would follow, as a consequence, that the creditors who, by executing the deed, should come in under it, and participate in the profits, would render themselves liable as partners for all the debts contracted in carrying on the business. It was on that account objected by the execution creditor that the assignment did not make provision for a just distribution of the effects of the debtor among his creditors—since those only could take the benefit of it who might be willing to subscribe a deed making them partners with the trustees,—that they might justly object to incurring such a liability; and besides, as was remarked in discussing, at a later day, the effect of such a provision, it is to be considered that by employing in trade the goods and the assets of the debtor, "they put in peril the effects which ought to have been divided equally amongst the creditors" (*Hickman* v *Cox*, 3 L. T. N. S 142).

It was put strongly to the court that the creditors generally could not be expected to become parties to such a deed, and yet, if they did not come in, they would be *delayed and hindered* of their just actions and debts within the meaning of the statute 13 Eliz.

The validity of the assignment had been objected to upon another ground connected with this same provision. The court thought that first objection futile, and disposed of it at once; but the second objection of the deed seeming to make the creditors partners with the trustees in carrying on the business, brought up, as Lord Denman remarked, a very doubtful question, upon which the court must take time to consider.

A fortnight afterwards in the same term, Lord Denman disposed of the case, as follows: "On consideration we think that upon the second ground of objection, this assignment was not good The deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid."

In the two later cases to which I have already referred, of *Jones* v. *Whitbread* and of *Coates* v. *Williams*, the deeds of assignment, in both cases, exactly the same in their terms, were substantially different from that in *Owen* v. *Boddy*, in the nature and extent of the provision which they all contained for continuing the business of the debtor by the trustees for the benefit of the creditors.

The courts which determined the two last cases, held that the assignments then before them, did clearly not make the executing creditors partners with the trustees in the business to be carried on, and therefore held that the objection taken on that ground to the assignment was not fatal. They pointed out essential differences between the provisions respecting the continued business, contained in those assignments, and that in question, in *Owen* v. *Boddy*, and grounded their decision entirely upon that difference.

Fifteen years had elapsed between the judgment given in *Owen* v. *Boddy* and those cases, which afforded ample time for considering the soundness of the decision in *Owen* v. *Boddy*, first, as to the legal inference, that the executing creditors would, in that case, have made themselves partners with the trustees in the business to be carried on; and next as to the consequence of such a provision—that being unjust and unreasonable in itself, it invalidated the assignment.

The only doubt which the courts seemed to have in either of the later cases was, as to the effect of the assignment before them in creating a partnership business. If it had done so, they seemed quite prepared to have followed *Owen* v. *Boddy* in holding the assignment to be invalid; and while they pointed out what they considered to be essential differences between the terms of the assignments, they did not seem to doubt that upon the question of partnership or no partnership, *Owen* v. *Boddy* had been rightly decided. They intimated no dissent from that judgment on either ground, but they held it not applicable in the cases before them, on account of the difference of the terms of the assignments.

The late Lord Chief Justice Jervis, of the Common Pleas, in giving judgment in *Jones* v. *Whitbread*, explained the only ground of the difference. "As to the first point," he said, "the court granted the rule expressly for the purpose of having the deed contrasted with that upon which the case of *Owen* v. *Boddy* had been decided." Upon examining that case, however, he remarked, "I am of opinion, that it is not applicable to the present, for there the deed contained minute provisions investing the trustees with power to carry on the trade, for which purpose they were authorised to lay out money in payment of rent, &c., and in keeping up the stock: and the court *held the deed void, as being one which creditors could not reasonably be expected to become parties to.* Here, however, the deed contemplates the sale of the property, and the winding up the business. And the power given to the trustees to carry on the trade, was evidently intended to be merely subsidiary to the winding up of the concern."

In the same case, Maule, J., expresses his entire concurrence in the decision of *Owen* v. *Boddy*. "I also think," he said, "for the reasons already given, that this case is clearly distinguishable from *Owen* v. *Boddy*. "What is there said by Lord Denman, understanding his language with a reasonable reference to what he is speaking about, lays down, I think, a sound and a reasonable rule.

"The main object of the deed in that case was the carrying on an extensive business for the purpose of making money to pay the

creditors who became parties to the deed. Here the object is merely to wind up the concern. That is a clear, plain, and intelligible distinction."

While the argument was going on the Chief Justice interposed with this observation, "The deed in *Owen* v. *Body* contemplated the doing of many things, but there must be some limit. The meaning of that case, I apprehend, is, *that the deed was one which no creditor could in reason be expected to execute.*" And Maule J., in the course of the discussion, vindicated the decision of *Owen* v. *Boddy* by these very clear and forcible observations: "All deeds of this sort are within *the letter* of 13 Eliz. chap. 5, sec. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed shall be void; that is, all deeds made to or for any of the intents or purposes mentioned in section 1, viz.: 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits and debts,' &c." "In *Pickstock* v. *Lyster*, 3 M. & S. 371, however, it was decided that if a man assigns all his property to a trustee, *simply with the purpose of having it fairly distributed among all his creditors*, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the *spirit* of the act, and therefore is not void, because it does not deprive any of the creditors of *his fair share* of the debtor's property, if he chooses to become a party to the deed. The deed in *Owen* v. *Boddy* differed from ordinary deeds of this sort on the ground that it was not simply an assignment for equal distribution, but one by which each creditor was to participate in the proceeds only on condition of his assenting to the trustees carrying on the trade as they pleased, until interrupted by the major part of the creditors. The observation of Lord Denman, which my brother Miller professes not to understand, 'that the deed imposed such terms as might have constituted a partnership among the parties executing it, and those were terms to which creditors were not bound to submit,' means no more than this: *that the deed before them was not such a deed as it was reasonable to expect a creditor willing to take his fair share of the debtor's property, to accede to*; just as an offer of payment accompanied by a requisition of a receipt in full of all demands is not such a tender as the creditor is bound to accept, that is, his position is not deteriorated by his rejection of it. In that case there were large provisions for carrying on the trade, and the creditors were to look for the future profits."

I have cited these observations at length because it appears to me they are extremely just and forcible, and are well worth recurring to in all discussions upon such questions as that now before us.

In the case in the Exchequer of *Coates* v. *Williams*, which followed soon after *Jones* v. *Whitbread*, the court upheld a similar assignment against the same objection, distinguishing the case from *Owen* v. *Boddy*, and finding no fault with any thing that had been decided in that case.

In none of these cases was a doubt expressed, that if the creditors were by the deed made partners with the trustees, and if that were a consequence which creditors willing to take their fair share of the debtors property, could not be expected to accede to, the insertion of such terms in the deed would make it void under the Statute 13 Eliz. chap. 5, and deprive it of the support of such cases as *Pickstock* v. *Lyster*; which case, it may be noted, certainly contained no provision for releasing the debtor from his debts. No express authority seems to have been cited in support of the position, that the insertion of an unreasonable stipulation in the deed would render it invalid. The Court seems in *Owen* v. *Boddy* to have taken that ground upon reason and principle, and from that time to the present it seems to have been acquiesced in.

In regard, however, to the first point decided in *Owen* v. *Boddy*, namely, whether the deed made the executing creditors partners in carrying on the business that was provided for under it—though *Owen* v. *Boddy* can perhaps not be said to have been over-ruled, its authority has lately been greatly shaken, by the decision in the House of Lords of the case of *Hickman* v. *Cox*, 3 Law Times, Rep. N. S. 185, Oct. 20, 1860, an action instituted in the Court of Common Pleas.

That case put the soundness of the decision in *Owen* v. *Boddy* on the question of partnership or no partnership to a severe test, for assuming that the deed of assignment did in that case make the creditors partners, an action was brought against two of the executing creditors, on the ground that they were liable as partners upon bills of exchange drawn upon and accepted by "The Scranton Iron Company," under which name the trustees in the assignment carried on a business provided for in the assignment for the benefit of the creditors of the debtor who made it. The deed as regarded this feature of it scarcely differed, if at all, in its nature from that in *Owen* v. *Boddy*, and the four very learned judges of the Court of Common Pleas who heard the argument, Lord Chief Justice Jervis, Cresswell, Williams, and Willis, JJ., after taking time to deliberate, held the case to be undistinguishable from *Owen* v. *Boddy* as regarded the question of partnership, and on the authority of that case directed a verdict to be entered for the plaintiff.

The judgment was appealed from, and in the Exchequer Chamber, and after a very long and learned discussion before six judges of the Queen's Bench and Exchequer, and many months taken to consider, three of the learned judges held that the creditors were liable as partners, and three held that they were not.

The court being thus equally divided the judgment given below was in effect affirmed, and after some hesitation as to the right to carry the case further, there was an appeal to the House of Lords, where the point of partnership was again argued very fully, and upon a question put to the learned judges—the six who were in attendance were equally divided in opinion, and the Law Lords present, viz.: the Lord Chancellor, Lord Brougham, Lord Cranworth, Lord Wensleydale, and Lord Chelmsford, were unanimous in holding that the creditors were not liable as partners, and so they reversed the judgment of the Court of Common Pleas, though it had received the concurrence of a large majority of the judges who had dealt with the question in its different stages.

The case is remarkable for the difference of opinion and the unsettled state of the law which it exhibits, not only upon the main question, but upon several points which are incidentally discussed.

The judgment in the House of Lords did not go the length of over-ruling the judgment in *Owen* v. *Boddy*, even upon the legal question of partnership, but proceeded rather upon an alleged difference between the two assignments, though it must be admitted, I think, that in the result of all these discussions the authority of *Owen* v. *Boddy* upon the question of partnership or no partnership, has been greatly shaken.

But I do not perceive that since that case was decided any fault has been found with it, so far as it determined that if the creditors executing would be liable as partners for debts to be incurred in carrying on the business; that would fully justify the creditors in declining to execute the trust deed, and that it should follow as a consequence that the creditor so refusing could enforce his execution against the goods notwithstanding the assignment. Lord Cranworth, who went fully into the case in the House of Lords, and whose judgment is to my mind one of the most satisfactory, speaking of *Owen* v. *Boddy*, says, "It was at most a dictum," (alluding to the observation of Lord Denman, that the deed imposed such terms as *might have* constituted a partnership among the persons executing it—not pronouncing that it did,) and he adds, "The Court of Queen's Bench were quite right in holding that the creditors were justified in refusing to execute the deed tendered to them, and that is all that was decided." His Lordship meant, no doubt, that that was all that was decided in the case *which touched the question of partnership*, for there was this certainly decided in the case, which does not appear since to have been disputed—that as the deed imposed such terms as *might* have constituted a partnership, "those were terms to which creditors were not bound to submit, and that the assignment was therefore invalid (See 5 A. & E. 37).

Lord Wenleysdale is equally explicit on this point. "The case of *Owen* v. *Boddy*," his Lordship said, "on which some reliance was placed, is really no authority for holding that the creditors by subscription became actual partners. In the short judgment of Lord Denman the expression used is not that the deed imposed such conditions as would have constituted a partnership amongst those who subscribed it, but as *might have had the effect*, which is

a much more doubtful expression. It was quite enough for the decision of that case that the subscription exposed them to the peril of being considered partners, of which peril the opinions of the majority of the judges leave no doubt, *and that prevented the deed from being a fair deed and good against creditors.* So did the provision that the effects which ought to have been divided equally amongst the creditors should be put in peril by being employed in trade."

I have gone into this long and, I fear, tedious statement of the discussions and judgments in this much agitated case of *Hickman* v. *Cox*, not because the question of a partnership in fact, upon which alone that case necessarily turned, has any bearing upon the case now before us, but for the purpose of shewing that the correctness of what was decided in *Owen* v. *Boddy*, which has a direct bearing upon the present case, is no more called in question in this latest judgment of *Hickman* v. *Cox*, than in the other intermediate cases to which I have referred, but that it seems to be still recognized fully, and with no intimation of a doubt, that is, that even the peril of being considered partners in consequence of a provision contained in that assignment, made it a deed which the creditors generally would not be expected to sign, and that, in the words of Lord Wensleydale, "prevented it from being a fair deed and good against creditors."

Connecting, then, this deduction from the class of cases I have been referring to with what was so well expressed by Maule, J., in *Jones* v. *Whitbread*, in the passage I have already cited, it appears to me that the general principle on which the court acted in *Owen* v. *Boddy*, instead of being in any degree shaken by the judgments or discussions in the subsequent cases, has been materially strengthened and confirmed by them, for all the difference of opinion was upon the question of partnership, which we have nothing to do with in this case.

Then we have here a case in which Ranney, who, it is clear, was at the time deeply indebted, makes, on the 4th January, 1858, a deed to certain trustees, of something less than two acres of land in the township of Grantham, being the land for which the ejectment is brought; and on the next day he executed another deed, in which the fact that he was insolvent is recited; and that he had agreed to assign *all and singular his real and personal estate* and effects to these defendants as trustees for the benefit of his creditors: and that in pursuance and part performance of the agreement, he had assigned to these defendants by five several deeds, all bearing the same date, certain real estates situate in as many different counties; and it is recited that such estates were so conveyed to the defendants (though not so expressed in the said indentures), upon the like trusts, and for the like purposes, as those for which he did by the same deed of 5th January, 1858, assign all his personal estates and effects to the same trustees. And after these recitals, Ranney proceeds by this deed to assign specifically a certain schooner by name, and certain leasehold properties in the town of Brantford, and also all and singular the stock-in-trade, goods, wares, merchandize, household goods, furniture, bank stock, and all other stocks, bills, bonds, notes, accounts, judgments, mortgages, and other securities for money, debts, chattels, and all other personal estate whatsoever and wheresoever, which he, the said Ranney, or any person or persons in trust for him, then was in any way possessed of, interested in, or entitled to—To have and to hold all and singular *the lands and tenements particularly described in the said several indentures*, and the said stock-in-trade, &c. (going through the same enumeration), debts, chattels, and other personal estate in trust, &c., setting out such trusts as are usually found in assignments of this kind. The assignment contains a long list of debts, which are to be paid in full before any dividend is paid to other creditors. No objection has been taken on account of these preference claims. But we have been asked to hold the assignment invalid as against the plaintiffs in this action, on account of the following provisions at the end of the deed: "And the said parties of the third part (that is, the creditors executing the deed) for the consideration aforesaid, do severally, for themselves and their respective partners, release unto the said party of the first part (the assignor) all manner of action and actions, bonds, notes, bills, judgments, executions, and all other claims and demands whatsoever, from the beginning of the world to the day before the date hereof: Provided always, that every such creditor as shall not come in and execute these presents within 30 days from the date thereof, shall not be entitled to any distribution or advantage therefrom whatsoever; and in such case the proportion or proportions of the premises hereby assigned, which such creditor or creditors would have been entitled to receive if he had executed the same within the time aforesaid, shall be paid over to the said parties of the third part in proportion to their respective debts.

"And it is lastly agreed, that when the said parties of the third part shall have received the whole of their respective debts, and all charges, commissions, and allowances, shall have been deducted from the said trust moneys, the said parties of the second part shall deliver and pay over the remainder (if any) to the said party of the first part, his executors or administrators."

Now, in the first place, independently of any thing that can be cited as authority bearing upon the question, is this a reasonable and just provision which subjects all creditors of Ranney to these conditions before they can gain a right under the deed to share in the proceeds of the real or personal property assigned—first, that they must execute the deed within 30 days; and, secondly, that they must consent to accept in full of their debts whatever dividend may fall to them, according to the terms of the deed; and must, in consideration of their expectations under the deed, release Ranney from all debts due to them at the date of the deed. Our stat. 22 Vic., chap. 96, sec. 19, against fraudulent preferences, cannot affect this case, because it was passed after the assignment was made. There are many cases which would seem to warrant us in holding that, at common law, Ranney would have been at liberty to do what he did by this deed, notwithstanding it had the effect of giving to some of his creditors a preference over others, and that he would have been equally at liberty to do this notwithstanding the statute 13 Eliz., chap 5, provided his assignment was not a fraudulent contrivance to keep off creditors, and made upon some secret trust or reservation in his own favour (1 M. & Sel. 395, 3 M. & Sel. 375). But although he might, no doubt, consistently under the common law, and with that statute, have transferred his property directly to one or more of his creditors, or as much of it as might be necessary for payment of his or their debts, yet, if the law is correctly laid down by the learned judges, in *Jones* v. *Whitbread*, an assignment to trustees, for the payment of debts would not be legal, and could not have the effect of tying up his property so as to protect it against execution creditors, unless it was made simply for the purpose of having it fairly distributed among all his creditors.

And, in reason, it certainly would seem to follow, that an assignment should be held to be invalid which provided that a large body of creditors should be paid in full out of the proceeds before the other creditors should receive any dividend; for this might end in their receiving little or nothing out of a large property; and which, moreover, allowed no creditor to participate to any extent in the proceeds of the goods assigned, unless he would be content to confine himself to what he should receive under the trust, and to release his debtor from all claim. But, after all, if we look at what the statute 13 Eliz., chap 5, does prohibit, and according to its recital it was intended to prohibit, and if we consider further, as I think we must, that the statute was intended to go at least as far as the common law was understood to have gone before in restraining alienations to the prejudice of creditors, then we must conclude that it was only "*feigned, covinous, and fraudulent conveyances*, contrived of malice, fraud or guile, to delay, hinder or defraud creditors," that were intended to be interfered with. It would be seldom that an assignment would be found to contain upon the face of it what, without the aid of extrinsic evidence to be submitted to a jury, would warrant a court in holding it to be fraudulent. That it placed one creditor in a more favoured position than others, would not, I conceive, be sufficient, for there might be reasons which would shew that to be perfectly just and honest.

Then, would it seem just and right on principle to hold that a conveyance like this to trustees was upon the face of it a conveyance fraudulently devised to defeat or delay creditors, because of the provision which required from all creditors who should execute it a release in full of all demands against the debtor? I think not,

without something more appearing to show fraudulent conduct or intention than the deed itself exhibits

It is too late to contend, in the face of a multitude of authorities, and of the principles sanctioned by all bankrupt and insolvent acts, that an insolvent debtor who has been guilty of no fraud, and who honestly surrenders everything that he has, may not fairly expect to derive from the surrender the advantage of being secure from molestation afterwards on account of his then existing debts His exacting a discharge in full therefor, however much or little the property which he has surrendered may produce, cannot be deemed a fraudulent condition, provided he has surrendered all, and has been guilty of no deception.

Each case must stand upon its own merits, as they are made to appear in evidence. The fraudulent intent and effect of the assignment may be so apparent upon the evidence, or even upon the face of the assignment without the aid of other evidence, that it would be the duty of a judge to tell the jury that it was one so manifestly fraudulent that the law would not uphold it; in which case the calling upon the jury to pronounce upon it would be rather form than substance.

In the present case, Ranney assigned all his personal property to trustees, in terms as comprehensive as could be employed. He recites in his deed that he had agreed and intended to assign *all* his real estate; but all that he has in fact done in this respect is to convey to his trustees certain real estate. For all that the deed states, what he has conveyed may be all that he owned, or it may be but a part of it, and a very small part.

If the latter had been shown to be the fact, then his exacting a release in full, notwithstanding his failure to surrender some considerable portion of his property would have been manifestly unfair and unreasonable. So also, if what he was surrendering was of small value in proportion to his debts, and if he were known to be in possession of a large income derived from official sources, or from funds abroad, it would have been a fraud upon his creditors to endeavour to place beyond the reach of execution his tangible property, and to deprive them at the same time of all claim to be paid a dividend out of his property assigned, unless they would release him from the debt in consideration of what they might receive from the trustees. A. might be indebted to B. in £50, and to others in £1,000, and might have only £500 worth of property in this country which an execution could reach, but a large income derived from other sources. If he should endeavour to place his property out of the reach of B. by assigning it to trustees, on the condition that no creditor should be paid anything who should not consent to discharge him in full, I think a jury might fairly be told that such a deed was a fraud upon creditors, and void under the statute.

But fraud is not to be presumed, and we are not at liberty to act upon the mere surmise that Ranney might have owned real estate which he had not conveyed, or other considerable means of paying his debts, besides the property which he had placed in the hands of the trustees. The reasonable inference from what appears, and in the absence of any evidence leading to a contrary conclusion, is, that he gave up all his means of satisfying his creditors.

Still it is to be considered that an assignment of this kind, voluntarily made to assignees selected perhaps wholly by himself, might afford a very uncertain and unsatisfactory provision for the due application of all his assets to the satisfaction of his debts, and that a creditor might very naturally and reasonably object to being a party to the assignment, if he must rest his hope of being satisfied entirely upon the contingency of the debtor honestly giving up all his effects, and of the trustees diligently realizing and faithfully applying them; and it seems hard that he should be deprived of any benefit under the deed, unless at the same time he gives up all hope of ever obtaining more than the deed will give him. On the other hand it is to be considered that few, if any, persons would make an assignment for the benefit of their creditors, if the exacting a release would necessarily invalidate it; for the consequence would be that they would generally be frustrated by a portion of the creditors refusing to come into the assignment, and pushing their remedy by execution against the goods, for this would wholly defeat the object of the debtor, and of those creditors who had been content to rely upon receiving their fair dividend.

This, no doubt, has led to the general introduction of a release clause into assignments of this nature, and of its being tolerated, as it appears to have been by the Courts; that is, I mean, tolerated where there is nothing in the circumstances of a particular case to make that an unjust or unreasonable condition, which has been generally allowed to be imposed. When I say that such a condition had been generally allowed, and that assignments have not been held invalid on account of it, I accede to the correctness of the view taken in the judgment of Mr. Justice Hagarty, delivered in this case,—I mean as regards the state of the English authorities upon this question.

The only case in which a decision seems to have been called for upon this exception to the assignment containing a clause of release is that cited in the judgment below, of the *King* v. *Watson*, (3 Price 6), and there the Court entered into no discussion of the exception, but in general terms said,—the assignment (by which we must suppose him to mean, such as it was) "was a very common arrangement, which it would be very injurious to disturb" The deed had been set out at length in a plea, with the condition plainly expressed, that the creditors were to receive the monies arising from the insolvent's estate in full satisfaction, and discharge of their respective debts.

This plea was specially replied to by the plaintiff, who contended that it was fraudulent and void, and in the argument the clause of release was strongly pressed as one that made the deed void. The Court, therefore, could hardly have failed to give their consideration to that point, when they held, as they did, that there was no fraud in the case affecting the assignment.

In the case of *Owen* v. *Boddy*, the assignment contained a clause of release and sale; the present Chief Justice of the Common Pleas, though he objected as counsel for the execution creditor to the validity of the assignment on other grounds, raised no question about the release. In the case of *Huckman* v. *Cox* also, the deed as set out in 18 C. B., 626, contained a similar clause of release. The validity of the assignment was not in question in that suit, and I only mention it to shew that it seems to be the universal practice to insert this clause.

In *Tatlock* v. *Smith*, (6 Bingh., 339), this matter of a release in an assignment came up incidentally, the debtor having refused to execute the assignment because it did not contain such a clause of release as he deemed sufficient. The Chief Justice—Tindal, I believe—who tried the case at Guildhall, said he thought the defendant's objection to execute the conveyance was reasonable. The defendant had insisted that a general release from the creditors was a usual and reasonable clause.

Afterwards, in *banc*, the learned Chief Justice remarked,—"Is it unreasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors. Their situation itself seems to preclude the possibility of any such intendment."

"I do not say"—his Lordship remarked—"that an absolute refusal to execute the conveyance, as it stood, might not have remitted the creditors to their rights, but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of any release." His Lordship, we may suppose, would hardly have held this language if he had looked upon a clause of release as inconsistent with the validity of the assignment. In *Wells* v. *Greenhill*, (5 B. & Al., 875), Abbott, Chief Justice, in his judgment gives us to understand that he did not regard either the giving preference to certain creditors by directing their debts to be paid in full, or the insertion of a clause of release, as affecting necessarily the validity of an assignment. The deed the Court then had before them directed that before any dividends to other creditors, a judgment debt of £400 due to Stovell & Upton should be paid in full. The deed contained a proviso that in case any creditor whose debt should amount to £100 and upwards, or any two creditors whose debts should amount to £150, or upwards, should not execute the deed within three months, the deed should be void And it also contained a covenant that the creditors who executed the indenture would release all their claims upon the assignee within a certain time. It was contended, that as Stovell & Upton were creditors to an amount above £150, and had not executed within the time, the deed was therefore void. The Court

said,—"If Stovell & Upton had executed the deed, they would have been parties to the latter covenant, and the effect of that would be to make them covenant to release that debt which by the provisions of the deed was to be paid in full?" I have thought it worth while to refer to these two cases, in addition to the summary of English authorities so ably collected and observed upon in the Court below,—because they shew that the fact of the clause of release being in the assignment came particularly under the notice of the Court, and was remarked upon. In the judgment delivered by Mr. Justice Hagarty, the state of this question upon American authorities is, I think, correctly explained, as well as what has passed hitherto in this country, when questions have been raised in regard to the effect of these clauses of release in assignments for the benefit of creditors. I mean, their effect upon the validity of the assignment as against non-executing creditors. We had, in the cases referred to in the judgment, expressed more than a doubt of the propriety of upholding assignments containing such a clause; but it so happened that there being in those cases other objections to the assignment, which we felt bound to sustain —it had not been necessary to the disposal of the cases that we should rest our judgment upon the point in question, and in *Burritt* v. *Robertson*, 18 U. C. R., 559, as in *Maulson* v. *Topping*, 17 U. C. R., 188, I felt it proper to intimate, that I felt still some doubt as to what our decision might be in any case where the case might turn exclusively upon it.

Upon the consideration which we have since given to the matter in this case, I am persuaded we should not be warranted in departing from the conclusion come to in the Court of Common Pleas I will mention that the attention I have bestowed upon the present case has satisfied me of the general soundness of the views expressed by my brother Burns in the case of *Taylor* v. *Whittemore* (10 U. C. Q B. R., 440), referred to with approbation in the judgment given in this case in the Court of Common Pleas.

In my opinion, the judgment given below should be affirmed, and the appeal dismissed with costs.

BURNS, J.—The case of *Burritt* v *Robertson* was governed by the new statute 22 Vic. cap. 96, though the previous cases of *Kerr* v. *Wilson* (17 U. C. 168) and *Maulson* v. *Topping* were mentioned by myself as sufficient to dispose of the question with respect to a release of the debtor by the creditors, introduced in an assignment made for the benefit of creditors. It becomes necessary now, upon this appeal, to decide the precise point, though in the cases cited, as will be seen upon the facts of each, it was not necessary to decide the precise question—that is, the point was not in either of them the sole question upon which the case turned.

In addition to those cases in the Queen's Bench to be reviewed, there is also the case of *McDonell* v. *Putnam*, decided in the Court of Chancery by my brother Esten, wherein he held that the provision in a deed made for the benefit of creditors, where there were provisions for giving some creditors a preference over others, rendered the deed void. I believe these cases are all, which in our own courts, are to be found upon the precise subject before the court.

Looking at the cases in the American courts, where no system of administering estates of bankrupts or insolvents exists, we find the opinions of judges and of courts very conflicting. Each of the States of the Union holds itself bound only by the decisions of the particular State, and therefore we occasionally found some subject upon which the decisions of one State conflict with those of another State. The earliest case in point of time, I find upon the subject is that of *Lippincott* v. *Barker* (2 Binney, 174), in 1809. This case was before the Supreme Court of Pennsylvania, and the deed of assignment gave no preference to any particular creditor, but provided for all ratably who should within a certain time execute a general release of all demands. The court was not unanimous, and those judges who gave the decision did so on the particular facts of the case, and remarking that there were many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases. After the execution of the deed in that case, the greater body of creditors met, and accepted of the assignment before the writ of execution of one of the creditors came into the hands of the sheriff. The deed was upheld. In 1818, in the Circuit Court of the United States, embracing the State of Pennsylvania with New Jersey, I find Judge Washington deciding the question in favor of the assignment (*Pierpont and Lord* v. *Graham*, 4 Wash. 232). There the deed of assignment provided for payment ratably to all those who should execute a release within a specified period, giving them of course a preference; and of course those who did not release would be left to obtain what they could from the insolvent, if he had anything. In 1833 a case of *Brashier* v. *West* (7 Pet. 608) was brought upon appeal to the Supreme Court of the United States, and the judgment of the court was given by Chief Justice Marshall. In this case the deed provided for a preference to particular creditors, who were to be paid in full before others shared in the estate, and all creditors who did not execute a release within a certain time were to be excluded all benefit. The deed was executed in Pennsylvania, and it seems had not been questioned in that State, but was questioned in another State. The court upheld the validity of the assignment, upon the ground that as the courts of Pennsylvania had so decided in the two cases I have quoted, those decisions must be received in the courts of the United States, and be acted upon.

Thus I find the courts of the State of Pennsylvania and the Supreme Court of the United States upholding the law of that State to be, that a deed of assignment will be upheld where made for giving preferences to those creditors who will grant releases of their demands, and holding *that* to be so even though the deed provides for discharging the demands in unequal proportions. The criterion of the validity being the fact that the debtor has surrendered all his property for the benefit of his creditors, it is of no consequence that he should say in doing so that he exacted a release in full, that the one may be treated and taken to be a valid consideration for the other. As no bankrupt or other law compels an equal distribution of a man's property, he may dispose of it in satisfaction of his debts in any order and upon any terms he thinks proper.

Turning from the State of Pennsylvania to the courts of the State of New York, we find a different opinion enunciated, but still not such a decided and clear one that leaves the mind free from doubt as to what may ultimately prevail even in that State. The Supreme Court, in 1817 (*Hyslop* v. *Clarke*, 14 John. 458), held that a deed made to satisfy one creditor first, and then to pay the others proportionably on condition of their executing releases of their respective demands, was void. Chancellor Kent, in 1821 (*Seaving* v. *Brinkerhoff*, 5 John. C. C. 329), held that a deed conveying a portion of the debtor's property only to satisfy debts, and containing a release to the debtor, was a provision the creditor was not bound to submit to. He said, "A partial assignment upon such a condition is pernicious in its tendency, if it be not, as I rather apprehend it to be, fraudulent in its design." In 1823 the Supreme Court (*Austin* v. *Bell*, 20 John, 442) held that a deed providing for the shares of such of the creditors as refused to sign a release of their demands being paid over by the trustee to the debtor, was void under the Statute of Frauds. The court says, without in the least impugning the doctrine that a man in debt has a right to give a preference to creditors, yet that a deed which does not fairly devote the property to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is in law fraudulent and void as against the Statute of Frauds, being made with intent to delay, hinder or defraud creditors of their just and legal actions.

In 1833 the Court of Errors (*Grover* v. *Bakeman*, 11 Wend, 187), upon appeal from Chancellor Walworth, affirming his judgment, held that an assignment containing a provision giving a preference to certain creditors in the distribution of the property, to depend upon the execution by them of a release to the debtor of all claims against him, was void. The court consisted of no less than twenty members, and were divided in opinion, five holding that the deed was not void in consequence of such a stipulation. The deed provided for the payment in full of certain preferred creditors, and for the second class who should within a certain time agree in writing under seal to receive such proportion of their debts respectively as could be paid by the avails then remaining in the hands of the trustees, in full discharge of their respective claims, to be apportioned according to their respective debts.

In 1844 the Supreme Court, in *Goodrich* v. *Downs* (6 Hill. N. Y. 441), speaking of *Grover* v. *Wakeman*, says: "Until the Court of Errors is prepared to retrace its steps, this question must be regarded as finally settled." Chancellor Kent, in the 6th edition of his Commentaries, published in 1848 (vol 2, p. 536), in the note, says of *Grover* v. *Wakeman*, "This appears to be the most stern decision that exists either in England or this country on this subject." He adds his own opinion as the result of his investigation, thus: "The weight of general authority, both English and American, is, that an assignment by a debtor of all his property for the payment of his debts, and at the same time giving preferences, and requiring an absolute release from each creditor who accedes, is not *per se* fraudulent and void. The circumstances of the debtor assigning over to trustees all his property, without any reservation to himself, and giving the surplus if any to those creditors if any who do not come in and agree to release on taking their preferred share, is deemed to disarm the transaction of all illegality and unfairness."

The Supreme Court of Errors of the State of Connecticut, in 1826 (*Ingraham* v. *Wheeler*, 6 Conn. R. 277), followed the decision of *Hyslop* v. *Clarke* and other cases, and held, that a deed for paying certain creditors in full, and then providing as follows —"All the rest and residue of said proceeds, if any there be after the payments aforesaid, shall be applied by said assignees to the payment in whole or in part of the claims and dividends of all other of the creditors who shall within, &c., discharge their said claims and demands; and it is hereby expressly understood that no creditor shall be entitled to receive a dividend of the proceeds aforesaid, until he shall have signed such discharge"—was fraudulent and void.

In the State of Massachusetts, before Mr. Justice Story, in the circuit court of the United States, in 1826, a deed of a similar character was upheld. *Halsey* v. *Whitney*, (4 Mason, 208). Mr. Justice Story ably reviews the authorities, both American and English, up to that time, and speaking of those of his own State, he says: "The decisions in Massachusetts, therefore, leave the question *in equilibrio*." He sums up the whole, and gives his own opinion thus: "The weight of authority is then in favour of the stipulation for the decisions in New York (that was up to 1826), did not turn upon the naked point of a release, but upon that as incorporated into a peculiar trust, I am free to say, that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield with reluctance to what seems the tone of authority in favour of them" Mr. Justice Story reiterates his view as to the tone and weight of authority upon this point in his "Commentaries upon Equity Jurisprudence," so widely circulated, and so justly celebrated both in England and America.

Many other cases before courts in other States of America, might be added to those I have mentioned, some taking one view, and others a different view; but I deem it quite sufficient to notice those of the four States mentioned only, and two of these particularly on account of the eminent jurists who have considered the question.

In *Jackson* v. *Lomas*, (4 T. R. 166, 1791), the deed of trust, made for the benefit of creditors, contained a clause of release by the creditors to the assignor, with a proviso that in case any of the creditors should not execute the deed on or before the 26th July then next, the assignor should receive from the trustees the shares of those creditors, and that no creditor should be entitled to the benefit of the trust deed who did not sign before that day. The plaintiff did not sign until the 31st July, and he refused to sign until the assignor had agreed to make good the deficiency. And it was upon this agreement he sued the assignor. The court held this agreement fraudulent as respects the other creditors; but not a word was urged against the validity of the trust deed It seems to have been taken for granted that the trust deed was valid. If it had been void on the ground of imposing terms which the creditor was not bound to submit to, there would have been nothing in the way of the plaintiff sustaining his action upon the original debt, for there was a count in the declaration to that effect. In *The King* (in aid of Braddock) v. *Watson* (3 Price, 6, 1816), the very point was raised, and argued upon such a clause in the deed; but the Court of Exchequer said: "There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors, Braddock as well as the rest." The court adds: "This is a very common arrangement, which it would be very injurious to disturb, where there has been no commission." The case of *Pickstock* v. *Lyster* (3 M. & S. 371), had then just recently been decided; and Baron Richards remarking upon that case, as applicable to *The King* v. *Watson*, says: "Such a deed certainly ought not to be avoidable by any particular creditor not attempted to be excluded from the benefit of it; and no such attempt has been made in the present (that is, in *The King* v. *Watson*,) instance." He evidently did not consider the release clause such a coercion upon the creditor as to justify him in refusing to come in. The case of *Tatlock* v. *Smith* (6 Eing. 339, 1829.) has a strong bearing upon the case before us. There certain traders assigned their stock for the benefit of creditors, and agreed also to convey certain real estate for the same purpose. The stock in trade was disposed of, and the business wound up, and the creditors realized 10s in the pound. The agreement contained a provision that when the assignors should be called upon to convey the real estate, that there should be inserted in the deed *all other usual and necessary clauses and conditions*. When the deed of conveyance was tendered, the defendants objected to execute, because the deed did not contain a general release from the creditors. The plaintiffs then sued for the original debt. At the trial before Chief Justic Best, he held that the defendants' objection to convey for want of the release was reasonable; but as some of the creditors had executed the release, and a meeting had been appointed for all the creditors to determine what they would do, and the plaintiffs had commenced their action before that meeting was held, the Chief Justice held the action was premature, and the plaintiffs were non-suited. The court, upon an application for a new trial, upheld the ground that the action was premature. Sir N. Tindal, who had been made Chief Justice of the Common Pleas in the meantime, says: "I do not say that an absolute refusal to execute the conveyance as it stood, might not have remitted the creditors to their rights; but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of any release." The deed, signed by some of the creditors which had been tendered, did contain a release of some kind; but the defendants considered it insufficient. It is evident, I think that Sir N. Tindal considered the defendants were entitled to some kind of release, for if they were not, there was no use of putting the judgment upon the ground that there was no sufficient evidence of any release, merely because some of the creditors had not signed it. And so with the judgment of the court in holding the plaintiffs were premature in bringing their action.

In *Small* v. *Marwood*, (9 B. & C., 300, 1829), the defendant, a bankrupt, had assigned his goods for the benefit of creditors to four trustees also creditors, and the deed contained a clause of release: and provided that the trustees and creditors should on or before the 1st Feb., then next, make proof of debts if required, and execute that indenture. A covenant followed that the creditors would not sue, and if any did, the deed might be pleaded as a release. The deed was executed by two only of the four trustees, and because of that, one of the executing trustees considered the deed void, and sued out a commission of bankruptcy. The question before the Court was, whether the deed was void, and whether the debt due to the trustee was a valid subsisting debt, sufficient to constitute a good petitioning creditor's debt. Bailey, J., delivered the judgment of the Court, and it was held that the property passed to the two trustees who executed the deed. In speaking of the effect of the release of the debt he says,—"I entertained a doubt for some time whether the deed would operate as a release of the debt due to Barr, (the trustee who sued out the commission) unless the personal estate was handed over. But on consideration, I am satisfied that the deed is not inoperative on that ground Barr & Hudson have got all that the deed stipulated to give them, if they think fit to take it. The release is in consideration of the assignment; and it is therefore an operative deed. The debt was thereby extinguished, and it follows that the commission cannot be supported."

In the more recent cases of *Jones* v. *Whitebread*, and *Coates* v.

Williams, the deeds of assignment contained the clauses of release to the debtor, but no question was made to the Court about that provision making void the deeds; and yet it is obvious, that if it had been considered that such a provision would avoid the deeds, the point would have been taken. I think we must take it for granted the profession in England did not suppose that point an open question at that time, and we can scarcely think the profession there were ignorant of the views entertained upon this side of the Atlantic, especially as Mr. Justice Story's works are accepted there as standards.

Some of the cases cited, and many others which might be mentioned, were cases of traders providing for an equal distribution of their effects among their creditors, and it may be said the case before us provides for an unequal distribution among Ranney's creditors, and therefore stands upon a different footing. If this question were propounded for the first time,—that is a debtor claiming a release of debts due by him, or providing for the exclusion of such creditors as refused to accept of the assignment upon those terms, I think I should hold that it was a stipulation so far for the benefit of the debtor that it would render the deed void under the Statute of frauds; but when I see that in cases of traders, the Courts in England constantly uphold those assignments containing releases by the creditors, whereon the deed itself is not avoided on the ground of the deed itself being an act of bankruptcy: and when I see that in cases of persons not traders, the Courts constantly say that a person may select any class of creditors or any particular creditors and pay them to the exclusion of all others, and that the only question is whether the debtor has honestly given up his property to his creditors, then I am forced to the conclusion that the tone of authority is that the provision for a release being given on the one side is the consideration for surrendering the property by the debtor upon the other side. If the transfer of the property can be held to be done for a legal consideration, then of course the case does not fall within the Statute of frauds.

There is a provision in the deed before us not common in these assignments, and that is, in case any of the parties of the third part do not, within the time specified, come in and execute the deed, then the shares which such creditors would have received, shall be paid over to those creditors who do execute the deed.

At the time the deed in this case was made, the law of Upper Canada remained the same as it was when (*Taylor* v. *Whittemore*, 10 U. C., 449) was decided, persons who were traders, and those not traders being upon the same footing, and also leaving a debtor the power of saying in what order he would pay his creditors with his property. No doubt, it is true, that very many deeds of a similar character to the present have been executed and acted upon, and much real and personal property have changed hands under them, and I should say under the idea of the profession generally that was no fraud apparent upon the face of such deeds. Perhaps it was unfortunate that the point has been suggested, and that opinions to the extent they have been should have been given; and then again perhaps it is fortunate in order to settle the law and leave no doubt upon past transactions.

I think, therefore, the judgment should be affirmed.

SPRAGGE, V. C.—My brother Esten and myself agree, generally, in our views as to the law upon the point principally in question.

It is of course conceded that the debtor had, as the law stood, at the time this assignment was made, the right, although he was insolvent, of preferring one or more creditors to others. His doing so did not contravene the statute of Elizabeth; it is not hindering or delaying his creditors within the meaning of the statute. What has been done by this assignment is to give a preference to creditors, large in number, and as I should judge, large in amount; leaving the surplus, if any, to be divided ratably among the other creditors, and imposing a condition to their receiving such ratable share that they shall release the debtor.

It is admitted that in the absence of authority such a deed is void under the statute; it imposes such an unreasonable condition upon those who may come in after the preferred creditors as to be a hindering and delaying of them.

It is not unreasonable if an insolvent transfer to trustees all his assets for the general benefit of his creditors, that he should require in return that they shall grant him a release. This is in the spirit of the Bankruptcy Laws, and if there be some exceptions to the assets being for the general benefit of all creditors it may still be not unreasonable, and still within the spirit of the Bankruptcy Laws; but that I apprehend must depend upon the extent to which the exception is carried. The law recognizes certain preferences as reasonable and right, and does in Bankruptcy prefer certain creditors; and if the like preferences are given in a voluntary assignment there is no reason that I can see, why they should be held to invalidate the deed; for that which is in accordance with the policy of one statute cannot be said to be a fraud under another; and it may probably not be necessary that the preferences should be precisely the same as obtain in Bankruptcy, if they as substantially in the same spirit.

So far the Court would have something tangible to go upon, in holding such assignments not avoided by the statute of Elizabeth. But when an insolvent discards altogether that which is recognized as just and equitable in Bankruptcy, and chooses to substitute his own caprice or to consult his own personal or family advantage; and to postpone to these considerations the just rights of creditors, he places himself, it seems to me, out of the protection of the principle upon which assignments are upheld, which provide for a ratable distribution wholly, or with such preference substantially as obtain in Bankruptcy.

It must surely be competent to the Court to draw the line somewhere; otherwise the Court must feel itself bound to uphold whatever disposition an insolvent may make of his estate by assignment however unreasonable and unjust. If the insolvent does not stipulate for a formal release to himself the creditor is in a very different position, because with the debtors right to prefer one creditor over another he might be content to come in, although the preferences might be unreasonable, because he might get something under the assignment; and at all events his position as to his debtor otherwise would not be prejudiced, but with a clause of release, his position is very different. He may get something or he may get nothing; for all may be absorbed by the unreasonable preferences given; and it is generally impossible to tell beforehand how the estate may turn out. This alternative then is presented to him to become a party to an instrument which unjustly prefers others to himself, and at the same time to forego all other claims against the debtor's estate, or not to come in at all. I cannot help feeling strongly that such an assignment does hinder and delay creditors within the spirit and meaning of the act; while a fair and just assignment has no such effect, but tends to promote equality of payment, and may therefore be properly upheld even though it stipulate for a release.

I do not think the circumstance of there being no Bankruptcy Law in Upper Canada can make a difference in favor of an unfair, unreasonable assignment. If there were no Bankruptcy Law in England, it may well be doubted, I think, whether any preference at all would not be held to invalidate a voluntary assignment with a clause of release; but I think it would be right to uphold in Canada such an assignment as came fairly within the principles of English law. But I think the assignment in question transgresses those principles in substance and in spirit,—and to a degree that renders it very unjust to the general creditors.

There is another reason, founded upon public policy, which I think should operate against sustaining such assignment as the one in question. If an insolvent can only stipulate for a release when he makes a just distribution of his estate, he will be careful to make such just distribution; and thus equality, which the law favors, will be promoted, and a very salutary check will be imposed upon the giving of unfair and unreasonable preferences: whereas, if his assignment will be held valid whether the distribution thereby made of his estate be just or unjust, he at the same time stipulating for a release to himself as the price of coming in under the assignment, a powerful motive for making a just assignment will be taken away. I speak of course of the policy of the law apart from the act against fraudulent preferences passed since the assignment in question was made.

I do not think that the question is concluded by the authorities. They show indeed that a stipulation for a release does not *per se* invalidate an assignment by an insolvent for the benefit of his creditors; but I think they do not shew that an assignment con-

taining such a stipulation, and giving unjust and unreasonable preferences will be sustained.

In the case of *Rex* v. *Watson*, referred to by my brother HAGARTY, in his learned and elaborate judgment in the Court below, as the only express decision in England that he had seen, there were no preferred creditors, and the circumstance is made a ground for sustaining the assignment. The language of the Court is,—"There is certainly no fraud in this case, affecting the assignment, which has been made for the equal benefit of all the creditors." "This is a very common arrangement, which it would be very injurious to disturb, when there has been no commission (of bankruptcy.")

RICHARDS and HAGARTY, J J., concurred in the views expressed by his Lordship the Chief Justice.

Per Cur.—Appeal dismissed with costs. [ESTEN and SPRAGGE, V.CC., dissenting.]

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

WAYDELL ET AL. v. THE PROVINCIAL INSURANCE COMPANY.

Action on foreign judgment—What Defences may be set up.—What law governs. 23 Vic., ch. 24.

To an action on a judgment recovered in the Supreme Court of the State of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B, which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who therefore could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B not being a resident of the State of New York, the plaintiffs, in accordance with the laws of that State, sued there in their own names as such assignees, and recovered judgment, as by the laws of said State they had a right to do.

Held, on demurrer, a good replication, for defendants by their acts of incorporation being evidently designed to carry on business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in the State of New York the law there would govern.

Per Hagerty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs to sue in their own name by the foreign law was a question of procedure, on which that law must govern.

In another plea the defendants set up a further provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and alleged that no proof or adjustment was ever made.

The plaintiffs replied, that when called upon to pay, defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing: that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered, upon proof of such waiver, without any evidence of proof or adjustment.

Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit, it might, under 23 Vic., ch. 24, be set up here; and whether the condition was waived or performed, was a matter of evidence only, on which our law must prevail.

The plaintiffs sued on a judgment alleged to have been recovered by them in the Supreme Court of the State of New York, on 9th of May, 1860, against the defendants, for the sum of $2,947 08c., for their damages which they had sustained on occasion of the breach of a certain covenant then lately made by the defendants, as also the sum of $181 18c. for their costs and charges by them about their suit in that behalf expended. They alleged that the judgment still remained in full force and unpaid, and that defendants promised to pay the same, but had not done so.

Second Plea—That the said judgment in the declaration mentioned was recovered by the plaintiffs against the defendants in the said Supreme Court on a certain policy of insurance made by the defendants on the 21st of November, 1854, to one Joseph Buckman, for losses alleged to have been sustained on the subject assured by the said policy, and which contained the following, amongst other provisions, namely, that the said policy should and would be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the defendants; and the defendants say that they never made or entered into any covenant with the plaintiffs in respect of the said policy, or the subject assured thereby, nor did they give any consent in writing at any time to the assignment of the said policy by the said Joseph Buckman to the plaintiffs, nor did they become liable in any manner to the plaintiffs upon or in respect of the said policy, ora the subject matter assured thereby, nor can the plaintiffs sue thereon, but only said Joseph Buckman, if any one, under any circumstances.

Fifth plea.—The defendants say, that another provision of said policy was and is, that in case of loss under said policy the same would be paid within sixty days after proof and adjustment thereof; and that proof of loss under the said policy of insurance in the said first plea mentioned, on which the said judgment was recovered, was not made to the defendants at any time before the commencement of the said suit in the said Supreme Court in which the said judgment was recovered, nor was said law ever adjusted as required by said policy.

Replication to the second plea, that after the losses mentioned in the said plea had been sustained, the said Joseph Buckman in the plea mentioned assigned to the plaintiffs his right of action for the recovery of the said moneys payable after said loss by said defendants, in pursuance of said policy. And the said Joseph Buckman not being at the time of the said assignment, nor during all the time thereafter until nor at the time of the commencement of the action in which said judgment was obtained, a resident of or residing in said State of New York, in which said action was brought, the plaintiffs did, under and by virtue of, and in pursuance of, the said laws of the State of New York, one of the United States of North America, commence an action in the said Supreme Court in the said State, in their own name as such assignees, for the recovery of the said moneys; and in said action, as such assignees, and by virtue of their rights under said assignment, recovered judgment against the plaintiffs, as by the laws of the said State of New York they were permitted and had a right to do.

Replication to the fifth plea, that the defendants, when called upon after the said loss to pay the said moneys, and before the commencement of said suit in said Supreme Court, did not refuse to pay the same for want of or on account of the absence of said proof and adjustment, but for other and different reasons by them, the defendants, then in writing alleged. And the plaintiffs further say, that the defendants thereby, under and according to the said laws of the said State of New York, and of the said United States, waived the said condition of said policy in said fifth plea mentioned, and discharged the plaintiffs from the necessity of fulfilling the same; and the plaintiffs say that under and according to the said laws by the said Supreme Court administered, and by which it was governed, the said defendants were liable upon proof of such waiver to pay said moneys, without any evidence of said proof or adjustment, and that the said judgment was accordingly recovered by the said plaintiffs against said defendants upon proper evidence of said waiver.

Demurrer to the replication of the second plea—that the said policy of insurance having been made in Upper Canada, the laws of Upper Canada must guide the nature and form of and parties to actions, and that, as the plaintiffs would have no right of action in their own names under said policy, the defendants are entitled to set up that fact as a defence; and that it is not averred nor shewn that the said assignment in the replication mentioned was made with the knowledge or consent of the defendants.

Demurrer to the replication to the fifth plea—that the defendants are by law permitted to offer any defence to an action on a foreign judgment which they might avail themselves of in an action upon the original cause of action; that the facts stated in the fifth plea constitute a good defence to an action on the policy therein mentioned, and the omission to plead that defence to the action in the foreign country cannot prejudice the right of the defendants to plead that defence to this action on the judgment.

Burns for the plaintiffs, cited *Beemer* v. *The Anchor Insurance Co.*, 16 U. C. R. 485; Ellis on Insurance 143; *Brown* v. *Hudson*, Tay. Rep. 537; *Dascomb* v. *Heacocks*, Ib. 606; *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend. 401; *Lumley* v. *Gye*, 14 Eng. Rep. 442; *Morgan* v. *Couchman*, 24 Eng. Rep. 321; *Outram* v. *Morewood*, 8 East 346; *Carter* v. *James*, 13 M. & W. 137.

McMichael, contra, cited 18 Vic., ch. 213, sec. 9; *O'Callaghan* v. *Marchioness Thomond*, 3 Taunt. 82, 84.

MCLEAN, J.—In setting forth grounds of demurrer to the second plea, the defendants appear to assume that the policy of insurance was made in Upper Canada, and that on that account no action can be brought upon it except such as is sustainable under

the laws of Upper Canada, and therefore no action is sustainable by the plaintiffs in their own names, or in the name of any person but Joseph Buckman, to whom the policy was issued. Now it is no where stated in the pleadings where the policy was made or issued. The declaration and plea and replication are equally silent on that head, and if it were intended to rely on any ground of defence arising from the fact of the policy having been made in Upper Canada, it should certainly appear in the pleadings somewhere, but we cannot, I think, assume, as the defendants do, that it was made or issued in Upper Canada.

The 17th section of the charter of the defendants, 12 Vic., ch. 167, requires that all policies or contracts of insurance issued or entered into by the defendants shall be executed in a particular manner under the seal of the company, and being so executed, shall be deemed valid and binding upon the company, according to the tenor and meaning thereof. Then, in the 16th Vic. ch. 69, amending the charter by sec. 6, it is provided that all parties effecting insurance with the said company through any accredited agent in Lower Canada may proceed at law against the company for the recovery of the amount insured, or in any matter in relation to the said insurance, in any court of competent jurisdiction in Lower Canada; and that service at the office of such agent of any writ, process, or proceeding in any such case, or on the agent personally, shall to all intents and purposes be taken and considered to be legal service upon the said company.

Then, again, by the 9th section of the Act 18 Vic., ch. 213, further to amend the charter, it is stated that doubts may arise as to the liability of the said company on policies issued by them out of the Province of Canada, either in the United States of America or elsewhere; and it is declared that the said policies, wheresoever issued, shall have a like force and effect as if issued in this Province, and shall be to all intents and purposes as binding on the said company. Then last, though not least, is the provision in the same act, sec. 14, declaring that the provisions of the 6th section of the 16 Vic, ch. 69, (facilitating proceedings in all cases in Lower Canada,) shall be extended to all parties having, or claiming to have, any right of action against the said company for any cause or on any account whatever, and to any writ, process, or proceeding at the suit of any such person or persons against the said company.

Now when the defendents in the use of these enactments choose to issue policies in Lower Canada and in the United States, or are at liberty to do so at any time they may think proper, and declare such policies wheresoever issued to have the same force and effect as if issued in this Province, and moreover confer on all parties claiming a right of action against them for any cause whatever the right to sue in any court of competent jurisdiction, and to serve any writ, process, or proceeding, at the office of the agent, or on the agent personally, it can scarcely be safe to assume that the policy issued to Joseph Buckman, on which the plaintiffs' cause of action has arisen, was in fact made in Upper Canada The presumption, from all that appears, is to the contrary; and if so, and the plaintiffs are in fact assignees of the money payable by defendants on the loss insured against by it, they had a right to proceed in the State of New York, according to the laws of that State, to recover the amount; and when the defendants undertake to confer upon parties a right to sue in any court of competent jurisdiction, it must be taken that the suit and proceedings must be according to the laws of the state or country in which such suit may be pending. Then when a judgment is obtained in a foreign court, it does not require the sanction of the defendants to enable the parties to sue upon such judgment in Upper Canada.

The replication appears to be a sufficient answer as to the right of the plaintiffs to maintain this action on the judgment recovered by them in the State of New York, under the laws of that State, and the demurrer on the ground that the action can only be sustained in the name of Joseph Buckman I think must fail.

Then the defendants demur to the plaintiffs' replication to the fifth plea That plea alleges that another provision of the policy on which the loss has arisen was and is, that in case of loss arising under the said policy, the same would be paid within sixty days after proof and adjustment thereof, and that proof of loss under the said policy of insurance in the first plea mentioned, and on which the said judgment was recovered, was not made to the defendants at any time before the commencement of the suit in the said Supreme Court, in which the judgment was recovered, nor was the said loss ever adjusted, as required by the said policy.

The replication to this plea, which is demurred to, sets up that defendants, after the loss had occurred, when called upon for payment did not refuse to pay on account of the absence of such proof and adjustment, but for other and different reasons by defendants in writing alleged, and that the defendants thereby, according to the law of the State of New York, and of the United States, waived the said condition of the said policy in the fifth plea mentioned, and discharged the plaintiffs from the necessity of fulfilling the same, and that under the laws of the State of New York by the said Supreme Court administered, the defendants were held liable upon proof of such waiver to pay the said moneys, without any evidence of such proof or adjustment, and the judgment was accordingly recovered by the plaintiffs against defendants upon proper evidence of such waiver.

This replication to the fifth plea shows the grounds on which the court proceeded in the State of New York in giving judgment for the plaintiffs without any proof or adjustment of the loss according to one of the conditions of the loss, but, under our 23 Vic., ch. 24, sec. 2, that proceeding cannot exclude the defendants from pleading any defence set up or that might have been set up to the original suit. There is no doubt that the defendants might have pleaded in the original suit in the State of New York, just as they have pleaded here, that the policy granted to Joseph Buckman contained a certain condition, that proof of loss and adjustment of such loss must be made before payment of such loss could be demanded, and that no such proof had ever been given to the defendants, nor had any adjustment taken place; and if such plea had been pleaded, the court in the State of New York would scarcely have accepted evidence of a waiver by such proof as they seem to have done. But if they had done so, that alone would be a strong ground of objection to the judgment, and afford ample justification of the clause of the statute to which I have referred, giving a right to any defendant sued upon a foreign judgment or decree to make any defence which he could have made in the original action. The replication is no answer to the defendants' plea, and judgment must be for the defendants.

HAGARTY, J.—Before our Act of 1860, I conceive it to have been clearly settled that in general a foreign judgment by a court of competent jurisdiction was not liable to be questioned on the merits: that at all events, when it was not shewn that it was obtained against defendant without any notice to him, or was not contrary to what is called "natural justice," or against the positive law or policy of this country, it was conclusive between the parties. The statute 23 Vic., ch. 24, sec. 2, enacts that in any suit upon a foreign decree or judgment, "any defence set up or that might have been set up to the original suit may be pleaded to the suit on the judgment or decree." It is most important that we should understand if possible where the contract sued upon in New York was made. The plaintiffs merely set out the judgment. The defendants say nothing thereupon in their pleas. But in their demurrer they assume (as their counsel on the argument urged us to assume) that it must have been made in Upper Canada.

We are bound to know judicially that defendants are a chartered company in Canada. The preamble of their charter, 12 Vic., ch. 167, recites the petition to be incorporated "to enable such institution to conduct and extend the business of fire, marine and life assurance, and for granting annuities and sums of money payable at future periods within her Majesty's dominions in North America and other places abroad." And by a subsequent Act, 18 Vic. ch. 213, sec 9, it is declared that whereas doubts may arise as to the liability of the company on policies issued by them out of Canada, either in the United States or elsewhere, and it is declared and enacted that the said policies, wheresoever issued, shall have a like force and effect as if issued within this Province, and shall be to all intents and purposes as binding on the said company. And section 14 of the same act refers to a section in a previous act, 16 Vic., ch. 69, allowing parties effecting insurance with the company through any accredited agent in Lower Canada, proceed at law against them in Lower Canada, and providing that service at the office of such agent or personally on him should be

legal service on the company; and declares that the provisions of such section shall extend to all parties having or claiming to have any right of action against the company for any cause or on any account whatsoever, and to any writ, process, or proceeding, at the suit of any such person or persons against the company.

We have here a chartered company established in Canada evidently designing to carry on business abroad, and obtaining legislative declarations of their liability in their corporate capacity therefor, and facilitating proceedings against them in law suits.

The silence of the defendants in their pleas as to the place where the contract was made is significant, and on the best consideration I can give the case, I think that I cannot assume that the contract on which the judgment was obtained in New York was necessarily created within this Province. For any thing disclosed by the pleadings these defendants may have obtained power to act in their corporate capacity abroad, or at all events they are recognised by the foreign state, and allowed to appear as plaintiffs or defendants in the foreign courts. We may assume that they duly appeared and submitted to the jurisdiction of the New York court. If this view be correct, we may further assume the law of the place of contract must govern the proceedings in such place.

It is stated by the plaintiffs, and admitted on this demurrer, that the New York law permits the recovery by the plaintiffs in their own names, as assignees of the right of action of Buckman, the person insured. I therefore consider that the replication disposes of the objection, which would be fatal in our courts, to the right to recover in any name but that of the party to the original contract.

But the defendants further urge that any assignment was prohibited by the express terms of the contract, without their written consent. If such unauthorised assignment appears to have taken place, I have no doubt but that we must admit it here as a good plea to the present action.

The condition is to avoid the policy "in case of its being assigned, transferred or pledged," without previous written consent. The replication admits that after the loss Buckman assigned "his right of action for the recovery of the moneys," to the plaintiffs, who recovered judgment in their own names "as assignees for the recovery of the said moneys." The contention of the plaintiffs is this:—that the condition set out is merely to prevent the defendants being made insurers against their will of any person but the one named—in other words, that they contract to insure him from loss, but not to insure any other person to whom he may please to assign his claim: that this provision has never been violated: that no other person but Buckman was ever insured by defendants: that a cause of action by the happening of the loss insured against, vested completely in Buckman, and that all he did was to assign to the plaintiffs the right to obtain the sum insured from defendants.

Defendants say that an assignment to the plaintiffs is admitted, and is clearly within the condition.

If the action were originally brought in this court in Buckman's name, and it appeared just as stated in the replication, that after the loss he had assigned his right of action to the plaintiffs, who were beneficially the real plaintiffs, I do not think the defendants' plea would be held to be proved. I cannot see how the parties ever contemplated any assignment except while the policy continued as an indemnity against a possible future loss. The written consent provided for could hardly have been looked to as applying after the contingency had happened, and the right of action vested in the assured.

From the bald statement of the condition in the pleadings, I have felt hesitation in arriving at a certain decision on this point, but on the whole I am of opinion that the plaintiffs' position on this head is correct, that there was no violation of the condition.

I also think that the defendants cannot now plead the inability of the plaintiffs to sue in their own names. They could not have pleaded it successfully in the foreign court, and I do not think that our act of 1860 permits the urging of such a defence, as it would necessarily be fatal to every action on a foreign judgment, which, though correct according to the *lex loci contractus*, might be open to objections on the law of the Canadian tribunal.

I consider that our law now provides for full defence on the merits, allowing every plea which had been or might have been pleaded in the foreign court: but this, I think, falls short of allowing an objection to the *status* of the plaintiffs—to their right to being in the position of plaintiffs at all—when the law of the foreign court clearly allowed them such right and position on a contract reasonably assumed to be governed by such foreign law.

I therefore think the plaintiffs entitled to judgment on the first demurrer.

The second demurrer raises this question. Defendants plead a plea which I gather from the case, though not very clearly, was urged as a defence in New York, namely, the non-delivery of proof of loss; and the plaintiffs answer this by averring certain facts which they say by the law of the New York court amount to a waiver of their right to such proof, and "the judgment was accordingly recovered against the defendants upon proper evidence of such waiver."

Now it seems to me that this was a question of procedure, a question arising on the law of evidence as administered by the foreign court.

The rule seems clearly stated in the books. "The distinction," says Tindal, C. J., in *Huber* v. *Steiner*, (2 Bing N. C. 202, 2 Scott 304,) "between that part of the law of a foreign country where a personal contract is made which is adopted, and that which is not adopted by our English courts of law is well known and established; namely, that so much of the law as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of the country where the action is brought." This is the view taken in Story's Conflict of Laws, in Westlake's International Law, and in *Leroux* v. *Brown*, (12 C. B. 801,) and *Thompson* v. *Bell*, (3 E & B. 236.)

It seems clear to me that, admitting defendants' right to plead the non-delivery of proof of loss, &c., in the original suit, it was a matter of evidence, and of the law of evidence, whether certain acts done either proved such delivery or shewed a waiver thereof. I think such a matter related, in Sir N. Tindal's words, *ad litis ordinationem*, and has to be governed by the *lex fori*: that the defendants have a right, as the law now stands here, to have that question raised; and when raised it must be decided by the law of evidence as administered here.

I therefore think the plaintiffs fail on their replication to the fifth plea.

My view of the law is shortly this:—the plaintiffs establish their right to sue on a judgment of a court, which I think conclusively shews their right to hold that position by the law governing the contract there made between the parties, although they could not acquire such a position in our courts of law.

I think the defendants, since our late statute, have the right to plead any breach of the conditions of the policy which would avoid its effect—for example, that the plaintiffs acquired their interest by an assignment forbidden by the contract. I think they have also the right to set up again any defence urged or that might have been urged in the former suit, whatever the fate of such defence may have been according to the doctrines as to evidence, &c., of the foreign court.

I think the plaintiffs should have judgment on demurrer to the replication to the second plea, and defendants have judgment on demurrer to the replication to the fifth plea.

I also refer to *DeCosse Brissac* v. *Rathbone*, 6 H. & N. 301; *Cammell* v. *Sewell*, 5 H. & N. 728: *Cope* v. *Doherty*, 4 K. & J. 367; *Simian* v. *Miller*, 1 C. B. N. S. 684; *Hope* v. *Hope*, 3 Jur. N. S. 454; *Gould* v. *Webb*, 4 E. & B. 933; *The Bank of Australasia* v. *Nias*, 16 Q B. 717.

BURNS, J., took no part in the judgment.

Judgment for plaintiffs on demurrer to the replication to the second plea, and for defendants on demurrer to the replication to the fifth plea.

FRASER ET AL V. ANDERSON ET AL.

Judgment—Registration—Priority.

Plaintiffs recovered a judgment on the 12th, and registered it on the 15th of February, 1859. A *fieri facias* against lands issued upon it was received by the sheriff on the 30th October, 1860, under which, on the 27th November following he sold and conveyed the land in question to the plaintiffs. Defendants claimed under a deed from one of the judgment debtors, dated and registered on the 27th June, 1859

Held (following *Thirkell* v *Patterson*, 18 U. C. R. 75, and *Wales* v *Bullock*, 10 C P. 155), that defendants' title must prevail over the plaintiffs'

Remarks by Burns, J., on *The Bank of Montreal* v *Thompson* (9 Grant's Ch R. 51)

Ejectment for the west half of lot No. 2, in the 11th concession of the township of Douro.

The case was tried before Burns, J., at the last assizes held at Peterborough, and the plaintiffs' title was as follows:

The registrar of the county produced a book, which he proved had been transmitted to the registry office at Peterborough from the government of the province, and certified by the proper officer, showing what lands in the county of Peterborough had been granted to individuals. By this book it appeared that the land in question in this suit had been granted and patented on the 1st of July, 1846, to one Wheeler C. Armstrong, the same person against whom the judgment hereafter mentioned was obtained.

The certificate from the Crown Lands Department was in these words:

"I hereby certify that this volume, ending with page 499, contains a list of the names of all persons in whose favor letters patent for land within the county of Peterborough were completed and recorded previously to the 1st of January, 1847, as required by the 9 Vic. cap. 34, sec. 31, embracing also the lands thereby granted. Crown Lands Department, Montreal, December 28th, 1847."

This mode of proving that the land in question had been patented by the Crown, was objected to on the part of the defendants.

Then an exemplification of judgment was produced from the Court of Common Pleas of these plaintiffs against Robert Carew Armstrong and Wheeler Armstrong (admitted to be Wheeler C. Armstrong) for £264 19s. 5d. damages, and £14 11s. 10d. costs, entered up on the 12th of February, 1859. This judgment was registered in the county registry on the 15th of February, 1859.

The date of the issuing the writ of *fi. fa.* against lands was not shown, nor when the same was placed in the hands of the sheriff. The *venditioni exponas*, which issued upon the sheriff's return to the former writ of lands on hand for want of buyers, was tested the 26th October, 1860, and was received by the sheriff on the 30th October, 1860. Under this writ the sheriff sold the land in question on the 27th November, 1860, to the plaintiffs as the highest bidders, and on the same day executed a conveyance to them of it.

This closed the plaintiffs' case.

On the part of the defendants, a deed was produced and proved from Wheeler C. Armstrong, the judgment debtor, to the defendant Rebecca Anderson, dated the 27th of June, 1859, and registered on the same day. The consideration expressed in that deed was £1000, paid by her to Wheeler C. Armstrong. Evidence was gone into to show the consideration for that conveyance, and it was satisfactorily established to be as follows:—Wheeler C Armstrong, in the year 1855, borrowed from Peter Anderson, the husband of the defendant Rebecca, the sum of £262 19s., for which he was to have secured Anderson by mortgage in his life-time, but it was never done. No interest upon that sum had ever been paid by Wheeler C Armstrong The defendant Rebecca was the personal representative of her deceased husband's estate. Wheeler C. Armstrong, after Peter Anderson's death, got from the estate the further sum of £212 10s., which was not repaid. The land in question was mortgaged by Wheeler C. Armstrong to Mr Conger, and there was past interest due upon that; and it was proved that the defendant had undertaken to pay off that mortgage and interest, which indeed she would have to do before the land would be any security to her for the other moneys.

The defendant Rebecca received the rents and profits of the land from the date of the conveyance, the 27th of June, 1859. The other defendants were the tenants.

The learned judge, on these facts, in accordance with *Thirkell* v *Patterson* (18 U C R 75), and *Wales* v. *Bullock* (10 C P. 155), directed a verdict to be entered for the defendants, with leave to the plaintiffs to move the court to enter a verdict for the plaintiffs if the sheriff's deed to them passed the legal estate in the land.

McMichael obtained a rule accordingly; to which

Read, Q. C., showed cause.

It was admitted that the cases referred to at the trial were in point in defendants' favor, and the case was not argued at length, the object being to carry it to the Court of Appeal.

MCLEAN, C J.—The same question is involved in this case as in the cases of *Thirkell* v. *Patterson* (18 U. C. R. 75), and *Wales* v. *Bullock* (10 C. P. 155), and of course we must be guided by the decisions in these cases till they are reversed by a Court of Error and Appeal. The only difference between this case and that of *Thirkell* v. *Patterson* is, that there the judgment debtor conveyed his land *after* the recovery of the judgment against him, and before the registration of that judgment, while in the present case the judgment debtor did not convey until after the recovery and registration of the judgment. It is precisely the same in that respect as the case of *Wales* v. *Bullock*, in which the Court of Common Pleas, in deference to the former decision in the Court of Queen's Bench, gave judgment in favor of the defendant.

BURNS, J.—I have considered the judgment given by Mr. Vice-Chancellor Esten, in *The Bank of Montreal* v. *Thompson* (9 Grant Chy. Rep. 51), taking a different view of the construction of the Registry Act 13 & 14 Vic. cap. 63, from what I did in the case of *Thirkell* v. *Patterson*.

He seems to have supposed that it was my intention to overrule the cases of *Doe Dougall* v. *Fanning* (8 U. C. R 166) and *Doe Dempsey* v. *Boulton* (9 U. C. R. 532). I entertained no such idea. Those cases were decided upon the construction and effect of the statute 9 Vic. cap. 34, sec. 13, and I was myself one of the judges who took part in the judgments. When *Thirkell* v. *Patterson* came to be decided, we then had the subsequent statute, 13 & 14 Vic., cap. 63, sec. 2, which made a provision for the registration of judgments entered up after the 1st of January, 1851, operating as a charge upon the lands. The first section of this last act remedied the defect made by the 9 Vic. cap. 34, about the registration of a certificate having the same effect as the docketting of a judgment in England. The judgment sought to be enforced by a sheriff's sale of the lands in the case of *Thirkell* v. *Patterson*, was one entered up long after the 1st of January, 1851; and the provisions of the second section of 13 & 14 Vic. cap. 63, might have been brought to bear and be made available.

The Vice-Chancellor treats that provision in the last statute as cumulative to the other provisions; that is, as to the effect of registration operating in the same manner as the docketting of a judgment did in England. That may be the proper construction to give those provisions, but the question is, whether it was intended by the Legislature to have that effect.

The provisions of the second section of our act, 13 & 14 Vic. cap. 63, are copied from the English act, 1 & 2 Vic. cap. 110, sec. 13; and at the time the English Act was passed there can be no question made about the provision operating as a cumulative one, for then the provisions of the statute of 4 & 5 Wm. & M, cap. 20, applying to the docketing of judgments, were in full force. It was in the following year the statute 2 & 3 Vic ca. 11, entitled, "An Act for the better protection of purchasers against judgments, Crown debts, Lis Pendens, and Fiats in Bankruptcy," was passed. This I think shows that the Legislature of England did not mean that the provisions of the statute 1 & 2 Vic. cap. 110—for there were many others besides those contained in section 13—should remain cumulative to the effect of those of the act of 4 & 5 Wm. & M, cap. 20, respecting the docketing of judgments.

If that be so, then what was the meaning and the effect of the statute 13 & 14 Vic. cap. 63? We can easily understand what our Legislature meant by the 9 Vic. cap. 34, sec. 13, and the two decisions of *Doe Dougal* v. *Fanning* and *Doe Dempsey* v. *Boulton*, were the carrying out of that meaning, because it was plain enough that the Legislature, when it passed the 9 Vic. cap. 34, was ignorant that the Legislature of England had passed the act 2 & 3 Vic. cap. 11. Now, we must assume that when our own Legislature passed the 13 & 14 Vic. cap. 63, it was quite well known what the decisions of our courts were with respect to the effect of the 5 Geo. II. cap. 7, in selling lands upon writs of *fi fa*, and as to extending them by *elegit*, and that they were legislating upon the law as de-

clared by the courts. If they were legislating with a view to the provisions of the second section of the act being cumulative to the first, as the Vice-Chancellor has held, it looks very like legislating in the contrary direction from what they were doing in England, and instead of progressing forward we have been returning back as it were.

I do not mean to say that the Vice-Chancellor's view is wrong. Very likely my own view, taken in *Thirkell* v *Patterson*, is incorrect. The two sections 48 & 49 of cap 89 of the Consolidated Statutes of Upper Canada, have now to be considered in connexion with the subject. This action was brought, as I was informed at the trial, with a view of testing the soundness of my view in *Thirkell* v. *Patterson*, and the effect of *Wales* v. *Bullock*, in the Common Pleas; and as this point is of the utmost importance to the landed interests of the country, it cannot be too soon decided upon by the Court of Appeal, and therefore I shall all reserve any opinion at the present further than is necessary to bring the case there.

HAGARTY, J., said he had concurred in the decision of the Common Pleas, of which he was then a judge, in *Wales* v. *Bullock*, but that the question was one of great importance, and subject to grave doubts, which he trusted would soon be settled by the Court of Appeal.

Rule discharged.(*a*)

COMMON PLEAS.

(Reported by E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court)*

COLBY ET AL. v. WALL.

Ejectment—Tenancy—Notice of Title—Admission of tenancy therein—Estoppel—Written receipt—Parol evidence.

Ejectment for lots 15, 13, and north half of 12, in the 2nd concession of Sandwich The defendant, in his notice of title, besides denying the claimants title, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to the 31st of March, 1861. This action was commenced on the 12th of October, 1861. The defendant, in reply, proved his tenancy commenced in May, and that one of the plaintiffs in April, 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain on

The jury having found for the plaintiffs, and that the defendant was their agent on the premises, on motion for a new trial

Held, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th of March, for rent up to date, and that the case of *Cartwright* v *McPherson* (20 U. C. Q. B. 251) upon which the plaintiffs relied, did not relieve the plaintiffs from the proof of the determination of defendant's tenancy, although it was evidence to estopp defendant from denying that he was plaintiffs tenant.

(H. T., 25 Vic., 1862.)

Ejectment for Nos. 15, 13, and the north half of 12, 2nd concession of the town of Sandwich. Defence for the whole. The claimants set up title under the last will of Charles Arthur Smith, deceased, who was owner in fee The defendant, besides denying the title of the claimants, asserted title as yearly tenant to them, not having received six months' notice to quit. The summons was issued on the 12th of October, 1861.

The trial took place at Sandwich before Sir J. B. Robinson, C. J. The plaintiffs' case was chiefly rested on shewing that one of the plaintiffs distrained for rent upon defendant early in March, 1861, for two years' rent, and the bailiff proved the following receipt:

"Windsor, March 30, 1861

"Received from William H. Wall, the sum of $107 80, being the amount of three years' rent due George W. Colby, by me, for the north half of lot 12, and the whole of lot No 13, in the 2nd concession of the township of Sandwich west, in the county of Essex, up to date, together with the costs of distress, warrant, &c. Signed by the bailiff."

It was further proved that on the settlement of the rent a notice was served on defendant as follows: "To William H. Wall, of the township of Sandwich west, in the county of Essex. I hereby, as your landlord, give you notice to quit, and deliver up possession of the house, land and premises, with the appurtenances, situate in the township of Sandwich west, aforesaid, in the county of Essex, and being the north half of lot number twelve, and the whole of lot number thirteen, in the 2nd concession of the township aforesaid, which you hold of me as tenant thereof, on the 1st day of October next, or at the expiration of the current year of your tenancy, which shall expire next after the end of one half year from the date of this notice Dated this thirteenth day of March, A.D., 1861 Signed, GEORGE W. COLBY."

The plaintiffs also gave evidence that upwards of forty years ago one Thomas Smith was in possession of the premises occupied by defendant, and was, at his death, succeeded by his only son Charles, who died about twelve years before the trial, but he did not go on to connect the plaintiffs with Charles or Thomas Smith, nor did he prove the will mentioned in his notice of title.

On the defence, evidence was given that some short time after the distress above mentioned, early in April, 1861, the plaintiff, George W. Colby visited the premises, and after expressing his satisfaction with their condition left word with the defendant's wife, as the defendant was from home, that he (Colby) wanted defendant to remain on the place, according to one witness, "as his tenant," and also according to another to look after the timber. Colby also said that he would be back in the fall and would then settle with defendant for repairing the place, and for his trouble in looking after the timber on the lands The former of these witnesses also swore, that defendant went upon the place about three years ago last May; that defendant rented the place from Mrs. Charles Smith, daughter-in-law of Thomas Smith, after old Mr. Smith's death, and the other, who was the bailiff who distrained, swore the notice to quit was served after the money was paid, which, according to the receipt was on the 30th of March, 1861.

It was contended for defendant, that upon this evidence it appeared he entered in May; that the six months notice to quit being given in March, would not oblige defendant to give up possession before May, 1862, and that if it were otherwise, the notice to quit was clearly waived by Colby's request that defendant would remain in possession as tenant.

For the plaintiffs it was insisted that the defendant's notice prevented his disputing his landlord's title.

The learned Chief Justice said he should rule in favour of the defendant if the jury found that the notice to quit was waived, reserving leave to plaintiff to move to enter a verdict in his favour. The jury were asked to say whether Colby did express his wish that defendant should continue on the place as tenant, or merely as agent to take care of the place. They found the latter, and gave a verdict for the plaintiff. The learned Chief Justice reserved leave to defendant to move to enter a verdict for him if the court should be of opinion the defendant was entitled to notice to quit.

In Michaelmas Term, Alexander Cameron obtained a rule *nisi* to enter a verdict for the defendant on the leave reserved or for a new trial, the verdict being contrary to law and evidence, and upon affidavits shewing that defendant had further evidence of the waiver of the notice given by Colby, and explaining that it was not produced because one witness was accidentally absent, and another was in the United States. The defendant's own affidavit set forth that relying on what Colby had said, he had put in fall crops, as well as made other improvements, and that Colby, who resides at Chicago, was not, as defendant believes, aware of this.

A. Prince, in Hilary Term, shewed cause.—He relied upon *Cartwright* v. *McPherson*, 20 U. C. Q. B. 251, as establishing that the defendant having put in as his notice stating, that besides denying the title of the claimants, he asserted title in himself as their yearly tenant, not having received six month's notice to quit, was not at liberty to insist upon a right to notice to quit, because he denied the title of his landlords. He also contended that the evidence of the bailiff and of his receipt, shewed that the year ended on the 30th March, as it is acknowleged the receipt of rent for three years up to date, and lastly, that however the case stood as to Colby, as to the other two claimants there was no defence and they should recover.

A. Cameron supported the rule.

DRAPER, C. J.—Conceding, for the moment, that we ought to avoid the inconvenience that might result from not following the decision of the Court of Queen's Bench in the case of *Cartwright* v. *McPherson*, I think it right to reserve to myself on any future occasion the opportunity of expressing my regret that I cannot concur in some of the views expressed as the opinion of the ma-

(*a*) See also *Brooden* v *Odlens et al.*, 7 C. P., 61

jority of the judges in that case, for at present I think there is great force in the observations of Burns, J., who dissented from that judgment.

The legislature have substituted an appearance to the writ in ejectment for any plea by way of denial of the claimants right, and have enacted that upon the entry of such appearance an issue may be made up "by setting forth the writ and the fact of the appearance with its date, and the notice limiting the defence, if any," with the direction to the sheriff to form a jury; and it is further provided that, with certain exceptions, (not applicable in this instance,) the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false.

The object of the notice of the nature of the title intended to be set up by the claimant or defendant at the trial seems to have been to prevent expense on either side in obtaining and producing evidence to prove matter, which, but for such notice, they might apprehend their opponent's case rendered necessary. The appearance, in effect, operates as a general denial of the claimant's right to possession, and it may be well argued, that when the defendant files his notice of the special ground on which he asserts his own right to retain possession, the statement, "besides denying the title of the claimant," means no more than that he does not waive the legal consequence of his appearance, namely, that he shall not be put out of his possession until the statement in the writ of the claimant's title to possession of the premises is established, that these words are of no greater effect than in an action on the old form of ejectment, a plea of not guilty would be. Whether, if the claimant's notice of title had asserted a right to possession as landlord of defendant, the term or tenancy being at an end, a different effect to the appearance and to the "denying the title of the claimant," would not be given, is another question.

To apply this to the present case. If the defendant's notice of title had been admitted that the claimants were his landlords, it would at least be questionable whether the latter would not have been bound to prove that they were entitled "under the last will of Charles Arthur Smith," for the statute requires that the claimant shall be confined to proof of the title set up in his notice. But the defendant, though denying the claimant's right to possession sets up as the sole ground of that denial his alleged right to six months' notice to quit, and thereby either waives the proof of the particular title set up in the claimant's notice, or may be taken to admit it; and his notice being put in evidence becomes, for the purposes of the trial, proof of the alleged title of the claimants to recover, but it is consistent with this that he should deny their right to eject him until they prove his tenancy is at an end. There seems some difficulty in holding, that by following the words of the statute in giving notice of the sole answer on which the defendant relies to the claim, he deprives himself of the power o setting up such answer, though true and otherwise conclusive.

It would seem peculiarly hard, that the defendant, whose notice of title is used by the claimants, to save themselves from giving proof, otherwise indispensable, should, by the same notice, be debarred from requiring proof, that his tenancy is at an end, in other words, that the claimants should use the admission in his notice as the sole proof of their title to recover as landlords, and yet should deny its operation to protect the defendant's rights as their tenant. To this application of the decision in *Carturight* v. *McPherson*, I cannot accede, nor do I think the judgment of the Court of Queen's Bench can be taken to go that length

Upon the evidence and the affidavits for defendant which are unanswered, I think there should be a new trial. It was positively sworn, that the defendant entered in May, and I do not think the receipt dated 30th March, 1861, though worded for three years' rent *up to date*, (which three last words are interlined,) necessarily imports that the tenancy commenced at that day was due, the distress warrant was not produced, and it must have been issued some days before the date of this receipt according to the evidence of the bailiff. The question non-waiver, rather than of the commencement of the year of the tenancy, seems to have occupied the attention of the jury.

But as in any view the year will expire next May, it can scarcely be necessary that there should another trial take place. The interest of both parties would point to an arrangement by which the costs of another trial may be saved.

So far as this motion is concerned, I think there should be a new trial, costs to abide the the event.

Per cur.—Rule absolute.

PRACTICE COURT.

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

SCOTT v. MCRAE.

A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside

[Chambers, 31st Jan, 1861]

Mr. Justice Hagarty, on the 15th of January, 1861, granted a summons on the sheriff of the County of Haldimand, and on the plaintiff, or his attorney, &c., to shew cause why the property replevied in this case should not be delivered up to the defendant; and on the 19th of January, 1861, he granted a summons on the plaintiff to shew cause why the writ of replevin, and the copy and service, and the execution of the said writ, and all proceedings thereon, should not be set aside with costs, on the ground that the property replevied was seized for a breach of the revenue laws of this Province, and was at the time it was replevied in possession of the defendant, as collector of customs for the port of Dunnville, and was claimed and held as forfeited, and therefore could not be replevied.

ROBINSON, C. J.—Upon the affidavits I make the summons absolute. The Replevin Act cannot, I think, be applied to take a vessel or goods seized for breach of the revenue laws out of the custody of the collector; and upon the facts stated on the part of the collector it would be proper at any rate to set aside the writ under the late statute of 1860, 23 Vic, ch. 45, and by an order properly drawn up under the fourth section of that Act.

KERR ET AL. v. FULLARTON ET AL—CORNWALL ET AL. GARNISHEES.

Garnishment—Interpleader

Where proceedings are taken to garnish a debt, which is claimed by a third party as assignee, there is no power to direct an interpleader issue between such third person and the judgment creditor, to try the validity of the alleged assignment.

In Easter Term *McBride* obtained a rule *nisi* to rescind and set aside an order of McLEAN, J., made in this cause, which ordered an issue to be tried between the above-named judgment creditors and Alexander Gillespie and others, on the ground that the said order was not authorised by the statute in that behalf, and on grounds disclosed in affidavits and papers filed. The rule was granted on the application of counsel for defendant McCollum, and for Gillespie, Moffatt & Co.

The order of Mr. Justice McLEAN was made on the 17th of May, 1861, and ordered that the claimants, Alexander Gillespie and others named, and the said judgment creditors, do proceed to the trial of an issue in the Court of Common Pleas, in which the claimants should be plaintiffs and the judgment creditors defendants, and the question to be tried should be whether the assignment alleged to have been made by the said Thomas McCollum (one of the judgment debtors) of the judgment recovered by him in the Court of Queen's Bench against the garnishees, was null and void as against the creditors of the said Thomas McCollum, on the ground that the same was made either with intent of giving one or more of the creditors of McCollum a preference, while he was in insolvent circumstances, or unable to pay his debts in full, or knew himself to be in a state of insolvency. The order further directed how the issue should be made up, and when and where tried, and as to the costs, and enlarged a summons, dated the 13th of April, 1861, calling on the garnishees to shew cause why they should not pay the debt due by them to McCollum to the judgment creditors.

There was no dispute as to the right of the judgment creditors against the judgment debtors, and they obtained an attaching order, which was served on McCollum, one of the debtors, and also upon the garnishees, against whom McCollum had recovered a judgment. The summons on which the attaching order was made bore date on the 6th of April, 1861.

It appeared, however, that on the 20th March, 1861, McCollum made an assignment of the judgment so recovered against him by the garnishees, to Alexander Gillespie and others, composing the firm of Gillespie, Moffatt & Co It was sworn that this assignment was absolute and *bonâ fide*, and made for a valuable consideration, being for an amount equal to the judgment. It was further sworn that Gillespie, Moffatt & Co. had a large judgment against the judgment debtors, and a *fi. fa.* against the goods of the judgment debtors in the hands of the sheriff of Kent.

On behalf of the judgment creditors, it was sworn that previous to August, 1860, Thomas McCollum was insolvent, and had made an assignment of all his effects for the benefit of certain creditors, which assignment was declared void: that Gillespie, Moffatt & Co. were well aware that McCollum was insolvent and unable to pay his debts in full: that he was insolvent when he made the assignment to them, which they well knew; that such assignment was made with intent to give Gillespie, Moffatt & Co. a preference over the above-named judgment creditors.

J Read shewed cause on behalf of the judgment creditors. He referred to *Wise* v. *Birkenshaw*, (29 L. J. Ex. 240:) *Wintle* v. *Williams*, (3 H & N. 288.)

DRAPER, C. J.—The order in question is not drawn up on the consent of Gillespie, Moffatt & Co., who are directed to be made plaintiffs in the feigned issue, and it is not urged on the argument of this rule that they did consent, though it appears the agent of their attorney was heard before McLean, J., when he granted the order.

It is plain the garnishees have no objection to pay the money to the judgment creditors. I rather conclude they are desirous that the money should be so disposed of. But it seems there is an execution at McCollum's suit in the hands of the sheriff against them, and the money will come into *his* hands, and he *primâ facie* should pay McCollum, and he has notice of the assignment by McCollum to Gillespie & Co., and also of the attaching order. But he was no party in applying for this interpleader order, nor is he in any way directly affected by its result. The order is not and does not profess to be made under the statute for affording relief to sheriffs in cases of conflicting claims to the property seized by them.

Neither will this order fall within the first section of the statute respecting interpleading, for that enables the court or a judge to make the interpleader order in case a defendant, after declaration and before plea, in any action of assumpsit, debt, detinue, or trover, applies in manner pointed out by the act.

No previous summons was issued, calling on any party to shew cause why such an order as that in question should not be granted. The order was drawn up on reading the summons of the 13th of April, 1861, but that summons only called upon the garnishees and Thomas McCollum, and the attorney of McCollum in the suit of McCollum against the garnishees, to shew cause why the garnishees should not pay to the judgment creditors the amount due from the garnishees, or either of them, to McCollum, or so much thereof as would be sufficient to satisfy the debt due to the judgment creditors. The only ground for the intervention of the agent of the attorney for Gillespie, Moffatt & Co., was to shew that they held an assignment of that judgment.

The Common Law Procedure Act authorises the court or a judge to call the garnishee before them to shew cause why he should not pay the judgment creditor the debt due to the judgment debtor. If he does not appear, or does not dispute the debt, or pay the money into court, execution may be issued against him. If he appears, and does not dispute his liability, the judgment creditor may be authorised to issue a writ against him. But the statute goes no further, and certainly makes no provision for the intervention of a third party, or for calling any other parties, except the judgment creditors, the judgment debtor, and the garnishees, before the court or a judge, or for making any rule or order to bind or otherwise affect the interests of any such other parties.

But the English courts have held that when the debt sought to be attached has been already assigned by the debtor, the 60th and 61st sections of their Common Law Procedure Act of 1854, do not apply. According to the judgment in the case of *Hirsch* v. *Coates*, (18 C. B. 757,) the only course was to try any question of the liability of the garnishee to pay the judgment creditor by writ, under the 64th section of the English act, of which sec. 291 of our Consol. Stats. U. C, ch. 22, is a copy.

The decision in *Hirsch* v. *Coates* has probably made the want of a power felt to deal with third parties having, or claiming to have, a right to a debt which the judgment creditor is desirous of obtaining an order upon a garnishee to pay. And an act has been passed, 23 & 24 Vic., ch. 126, by sec. 29 of which it is provided, that when it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt. I presume that under this and the former acts, the judge having heard the third party, as well as the garnishees and the original parties to the cause, will in his discretion grant or withhold an order on the garnishee to pay. But this act gives no power to direct a feigned issue between any of the parties.

We have not any act containing the provisions of the English statute just cited, and I have not been able to find any legal ground on which to support the order.

In my opinion the rule must be absolute, but without costs.

Per cur.—Rule absolute.

MONTHLY REPERTORY.

CHANCERY

V. C. S. DOUGLAS v. CULVERWELL. *Nov.* 4, 5, 6, *Dec.* 4.

Fraud and pressure—Surprise—Sale or mortgage—Undervalue.

Where a person in pecuniary difficulties executed a deed of sale on the assurance that, notwithstanding the form of the instrument, he might redeem at any time, and it appeared that he had been induced to execute the instrument hastily in favour of a perfect stranger, by a solicitor who acted for both parties, and that the consideration money was much less than the market value of the property, the Court set aside the transaction as an absolute sale.

L. J. HUGHES v. JONES. *Nov.* 9, 11, 12, 25.

Vendor and purchaser—Specific performance—Land subject to leases—Waiver—Compensation.

Where the particulars and conditions of sale purport to offer an estate in fee simple or possession, the existence of leases for lives over a part of the estate will entitle the purchaser either to rescind the contract or to compensation, according to circumstances.

A statement in the conditions of sale that the purchaser is to be let into the receipt of the "rents and profits" from a certain day, must be construed to mean ordinary rents and profits, and not rents reserved on leases for lives.

Though the conduct of a purchaser, after the discovery of circumstances entitling him to rescind a contract, may be such as to preclude him from so doing, it does not necessarily follow that he is not entitled to compensation.

It is the duty of a vendor to qualify upon the face of the particulars the interest they intend to sell, if they do not intend to sell an unqualified estate in fee.

V. C. K. HARLEY v. MOON. *Dec.* 13.

Will—Construction—Residue—Aliquot shares—Abatement.

A testatrix being entitled to an annuity represented by a principal sum, by voluntary settlement, vests £600, part thereof, in trustees upon trust to pay the income to herself for life, with a power of appointment to her by deed or will amongst her issue, children or grandchildren, and in default to pay £250, part thereof, to her daughter C; and £200, further part thereof, to her daughter E.; and £150, the residue thereof, to her granddaughter She then, by her will, directs and appoints, in pursuance of her power, that the trustees of the settlement shall convert the £600, and after paying debts, funeral and testamentary expenses, pay £75 to each of her daughters, and the residue of the

£600 to S. C. on trust to invest, and apply the dividends and interest for the benefit of the grand-daughter, in his (C. S's.) absolute direction, until she attains seventeen, then to pay the further sum of £100 out of the sum which might then be in his hands, to each of her daughters, with a like trust to S. C. to invest the residue, and any the interest to her grand-daughter until she attains twenty-one, had then to her absolutely But in case of her dying under twenty-one, to S C absolutely, whom she appoints her executor and the guardian of her grand-daughter, to whom she gives her personalty.

Held, that the gift to her grand-daughter was not a gift of a specific sum, but of what should remain after making the payments directed by the will.

Held, also, that an assignee of the daughter's legacies, the fund being insufficient, was not entitled to take in priority to S. C., to whom they had handed over a portion.

V. C. K. LEYLAND v. LEYLAND. *Dec.* 16.

Practice—Parties—Child of plaintiff born since bill filed—Objection on the hearing.

Where a suit involves a question in which the children of the plaintiff are interested, and a child is born after the bill is filed, the Court will, on the objection taken at the hearing, order the cause to stand over, with liberty to amend by bringing the child born since the institution of the suit before the Court.

V. C. K. MATTHEWS v. GOODDAY. *Dec.* 16.

Equitable mortgage by deposit—Agreement to execute a legal mortgage.

An agreement in writing, accompanying a deposit of deeds, to charge land with a sum of money, is nothing more than an equitable charge enforceable in equity by having the money raised by sale or mortgage, and gives no right to foreclose, nor to ask for a legal mortgage.

An agreement to give a legal mortgage, superadded upon an agreement to charge land, gives a right to have th contract enforced in equity, and by the same decree to foreclose, unless the money is paid.

A simple deposit of deeds is a charge enforceable in equity, but gives no right to have a legal mortgage, although in the view of a Court of Equity it is a contract to charge the land, and the remedies are the same.

A contract to charge land, and also, if required, to give a legal mortgage, accompanied by a deposit of deeds, gives a right to a sale, but does not not compel the mortgagee to take a legal mortgage.

V. C. S. DEFRIES v. SMITH. *Jan.* 13.

Principal and surety—Separate contract by surety in consideration of extension of time.

S. S. accepted a bill of exchange as surety for C. S., and subsequently, in consideration of further time given him (S. S.) for payment, covenanted by deed to pay what was due on the bill with interest, and at the same time assigned a policy as futher security

Held, that an "entire acquittal" of debts given to C. S. by all his creditors did not release S. S.

L. J. DUKE OF BEAUFORT v. BATES. *Jan.* 11, 13.

Injunction—Landlord and tenant—Execution creditor—Right of landlord to fixtures.

Where the lessee of a coal mine had covenanted at the end of the term to yield up the works and mines, &c.; and all ways and roads in such good repair, order, and condition so that the works might be continued and carried on by the lessor.

Held, (reversing the judgment of Vice-Chancellor STUART), that such covenant did not include wooden sleepers or iron tram plates fastened to such wooden sleepers used for the purpose of a railway.

Quære, whether such covenant would have included stone sleepers and iron tram plates fastened to stone sleepers.

L. C. *Nov.* 14, 15, 18, *Dec.* 3.

HUNTER v. STEWART.

Defence of res Judicata—*Delay—Public company—Speculative business.*

If a bill is filed in the Court of Chancery in England, praying the same relief as a bill previously filed by the plaintiff in a colonial Court of concurrant Jurisdiction, an adverse decree in the former suit cannot be pleaded as a defence, unless the grounds on which the subsequent claim is made, are indentical with those alleged in the former suit.

When the allegations and equity of the one bill are different from the allegations and equity of the other bill, the plea of *res Judicata* cannot be sustained.

The question whether a plaintiff in seeking relief against a company, after a considerable lapse of time, is debarred of his remedy by reason of the supposed speculative nature of the company considered.

REVIEW.

THE UPPER CANADA LAW LIST, 1862, compiled by Rordans & Finch. 4th Edition. Toronto: W. C. Chewett & Co.

We hail with pleasure this new edition of our Law List—not only as a manual of useful information, but as the indispensable book of reference for every legal practitioner. In fact, it has now become as much a necessity in a lawyer's office as Chitty's Forms. The edition before us contains full information for students in respect to all matters affecting their interests at Osgoode Hall, the Law School, &c., and is prefaced by most useful introductory observations. We also notice with pleasure that the compilers have taken the suggestion formerly made by us, and have given separate columns for the names of the Common Law Agents and Chancery Agents in Toronto of the country practitioners. We cordially recommend the work to the profession.

APPOINTMENTS TO OFFICE, &c.

COUNTY COURT JUDGES

HENRY B BEARD, of Osgoode Hall, Esquire, Barrister at-Law, to be Deputy Judge of the County Court of and for the County of Oxford.—(Gazetted 28th June, 1862.)

EPHRAIM JONES PARKE, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court in and for the County of Middlesex.—(Gazetted 26th July, 1862.)

CLERK OF THE PEACE AND COUNTY ATTORNEY.

JOHN McNAB, of the City of Toronto, Esquire, Barrister at-Law, to be Clerk of the Peace and County Crown Attorney in and for the United Counties of York and Peel —(Gazetted 26th July, 1862.)

REGISTRAR

PETER DUNCAN McKELLAR, Esquire, to be Registrar of the County of Kent, in the room and stead of EDWIN LARWILL, Esquire, resigned —(Gazetted 12th July, 1862.)

NOTARIES PUBLIC.

JAMES BENSON, of Saint Catharines, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 28th June, 1862.)

JOHN HARPER, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada —(Gazetted 28th June, 1862.)

JAMES GRAHAM VANSITTART, of Ottawa, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada —(Gazetted 12th July, 1862.)

DAVID WILLIAM DUMBLE, of Cobourg, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 12th July, 1862.)

CORONERS.

EZRA POOTE, Esquire, M.D, Associate Coroner County of Elgin.—(Gazetted 28th June, 1862.)

JOHN PHELAN, Esquire, M.D., Associate Coroner County of Norfolk—(Gazetted 12th July, 1862.)

JOHN BEESLEY TWEEDALE, Esquire, M.D., Associate Coroner County of Norfolk —(Gazetted 19th July, 1862.)

TO CORRESPONDENTS.

"EDWARD STONEHOUSE, SOLICITOR"—Under "Division Courts."