DIARY FOR JULY.

1. Thurs. Dominion Day. Long Vac. beg. Last day for Co. Clks. fin. to exam. Assm. Rolls, &c.
4. SUN.. *6th Sunday after Trinity.*
5. MON.. Co. Ct. (exc. York) Term beg. Last day for notice of trial for Co. Ct. York. Heir and Devisee sittings commence.
10. SAT.. County Court Term ends.
11. SUN.. *7th Sunday after Trinity.*
13. Tues.. General Sessions and Co. Ct. sit. Co. York.
18. SUN.. *8th Sunday after Trinity.*
20. Tues.. Heir and Devisee Sittings end.
22. Thurs. *St. Mary Magdalene.*
25. SUN.. *9th Sunday after Trinity.*

THE

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JULY, 1869.

A FEW WORDS ABOUT BARRISTERS

PRIVILEGE FROM ARREST.

The attendance of parties and witnesses on courts of justice has always been protected from arrest. It is absolutely necessary that their attendance should be privileged, because without such a privilege justice cannot be properly administered; but the protection of legal officers is of a different character, and may well be confined within narrower limits.

The extent of the privilege of barristers as officers of the courts is not very clearly defined. When actually engaged in the business of the court they are certainly privileged; but how far the privilege extends to all courts, or even in the superior courts, to barristers not actually engaged, but in attendance in the expectation of being engaged, it is not easy upon decided cases to determine.

There are traditions in Westminster Hall to which reference is made in 1791, in *Meekins* v. *Smith*, 1 H. Bl. 636. The court, according to the report of that case, seemed much inclined to think that not only witnesses, but all persons who were coming to or returning from court, either directly on the business of the court or in any manner relative to that business, were entitled to freedom from arrest, and that to arrest them was a contempt of the court. Several cases were mentioned of barristers who were arrested on the circuit and discharged by the judge. Gould, J., recollected the instance of a Mr. Hippesley, a barrister who was discharged from an arrest on the circuit by Mr. Justice Birch, at Salisbury. Heath, J., mentioned a similar thing having been done by Mr. Baron Burland.

The privilege, to whatever extent allowed, may be traced to the recognized position and duties of the bar in Westminster Hall and on the circuits where the same bar practize under the same judges. In 1833, it is true, a barrister who had been arrested on his return from *sessions*, was discharged on motion by the Court of Exchequer: *Lumley* v. ——, 1 C. & M. 579. But in this case the privilege was admitted at the bar without any discussion, and was afterwards distinctly repudiated in *Newton* v. *Constable*, 2 Q. B. 157, so that it would seem that the privilege does not now extend to barristers by reason of their attendance at courts of sessions for the purpose of obtaining practice. It is difficult to rest the distinction on any solid ground of difference. One alleged ground of difference is that attorneys may act as advocates before courts of sessions, and the privilege of attorneys in this respect is less than the privilege which has been conceded to barristers: see *Jones* v. *Marshall*, 2 C. B. N. S. 615.

In 1846 it was held that a barrister of the home circuit who, while at his own house in London, was arrested after the close of the assizes at one place on the circuit and before the opening of the assizes at another place on the same circuit, for which he held retainers, was privileged: *Re Sheriff of Kent*, 2 C. & K. 197. It is said that a circuit is continuous from its commencement to its termination: *Re Sheriff of Oxfordshire*, *Ib.* 200. In such case it is not necessary to shew that the barrister, if in the habit of going the circuit, had, at the time of the arrest, retainers. If the barrister attend the circuit for the purpose of business, that is sufficient. It was said by Lord Tenterden in this case, that in the small counties, where the business is light, it often happens that some of the most eminent counsel of the circuit have no brief, and yet it could not be said on that account that they are not practizing barristers on the circuit.

The privilege has been held to extend to a barrister who had been attending in the Hall of the Four Courts of Dublin, and had there received a brief in a case set down for hearing on the day of his arrest, but which prior to his receiving the brief had been postponed till the next day: *Rubenstein* v. ——, 10 Ir. C. L. R. 386. When a person goes to attend

a court of justice under such circumstances as to protect him from arrest when going, the privilege would be ineffectual unless it also protected him while staying there and on his return. The two latter privileges are auxiliary to the first. The object of all three is not to benefit the party, but to protect the administration of justice: *per* Coleridge, in *Ex parte Cobbett*, 7 El. & B. 957.

The privilege which is extended to a barrister while in court or on the circuit, and going to and returning from the courts, must be further extended to a barrister who is also a county judge, and who is liable to be called upon to preside in a court, not only at certain stated times, but at any hour of every day, except Sunday, to act in a judicial capacity in some matter in which he alone is competent to act: *Adams* v. *Acland*, 7 U. C. Q. B. 211.

The Chief Justice of the Common Pleas, in giving judgment in the case of *In re Hicks*, reported in another place, after deciding that an insolvent could not legally be committed under sec. 29 of 29 Vic. cap. 18, with an opportunity of shewing cause, and that it should appear in the order of committal that the insolvent has had notice of the order for delivery, &c., referred to in the above section, for non-compliance of which an order of committal was made, remarked, that it would be well if all these orders contained a short recital of matters, so as explicitly to bring the case within the 29th section, and set out the substance of the order made on the assignee's application, together with notice to the insolvent. Thus the service of the order, or *at least*, averment of notice being given of it to the insolvent, and a demand of the delivery, &c., of the things ordered to be delivered, and then notice of the application to commit and opportunity of being heard against it, and then the order to commit. The statute, it may be observed, is silent as to any alternative committal.

The presumption is, that as the reports now go to each certificated practitioner, they, one and all, know their contents. But it has been said, that one man may lead a horse to the water, but fifty cannot make him drink, and so perhaps it may be that some of the law-years—not the horses — do not very deeply study the reports. If they do, they do not profit much thereby—at least they certainly do not heed the many intimations from the courts, that irrelevant matter should not be thrust upon the judges nor charged to suitors.

The following remarks, extracted from a jugdment in a late case in the Court of Appeal, are amongst the latest of the "broad hints" on this subject. One learned judge remarked:

"A very inconvenient system and practice appears to have become prevalent in respect to the making up of appeal books. In this case I have lost much time, and have been put to useless trouble, by finding printed, as part of the evidence, pages of matter which I at last found out ought not to be inserted, and could not affect the decision; and this is far from being the only ill consequence attending the practice. We cannot expect those practitioners who bring before the court a mixed heap of chaff and grain, under the name of evidence, will be particularly industrious in sifting them apart, in order to save suitors the unnecessary costs—and the court will probable be obliged to impose this duty on its officers, by ordering that they tax no costs of the printed books to parties whose negligence swells their contents so unreasonably."

SELECTIONS.

AN OLD CIRCUIT LEADER.

(From the Law Magazine).

It is difficult to believe how short-lived is the fame of a favourite barrister on circuit. Such a man usually attains early the summit of success, and during a brilliant career is vastly esteemed, and admired, and courted, not only by the counsel and attorneys, and by the magistrates and country gentlemen, and other residents in the different counties which form his circuit, but also by such of their wives and daughters as have had the good fortune to obtain admission into the Assize Courts, and have there been delighted by the wit and eloquence of the favourite "counsellor." Such a man, within the limits of his circuit, is as famous as a man can well be.

But should it happen that he never attained a judgeship or other signal official dignity, but "died a Nisi Prius leader," it is marvellous how rapidly and completely the recollection of him fades from the memory of the public, and how soon his name is utterly forgotten, even in the fields of his former glory.

Probably there are not many men now surviving who are familiar with the name of John Jones, of Ystrad. But half a century has not elapsed since his name was universally renowned in the principality of Wales, as the idol of his countrymen and the irresistible leader of the old Carmarthen Circuit. The

Circuit itself, though only abolished in 1830, has so nearly fallen into oblivion that it may be expedient to make some mention of it before introducing its hero.

It was formed of the three Welsh counties of Carmarthen, Cardigan, and Pembroke, and the judges of it had exclusive jurisdiction in all matters both of law and equity arising within those counties. It was usually arranged that the Carmarthen Circuit should not begin till the Oxford had nearly closed; and thus the Oxford Circuit men were enabled to join it. The old Brecon circuit stood on a similar footing, being held before its own Judges for the counties of Brecon, Glamorgan, and Radnor. It was the etiquette of the Bar that silk gowns should not go the Welsh circuits. Nevertheless a very eminent set of counsel used to frequent them. On the Carmarthen Circuit Serjeant Williams was the leader for many years. He was followed by Taunton, afterwards a Judge of the Court of Queen's Bench, and Oldnall Russell, afterwards Chief Justice of Bengal. On the Brecon Circuit, Knight Bruce, afterwards Lord Justice, and Maule, afterwards a Judge of the Common Pleas, were well known for many years. The judges of the old Carmarthen Circuit for nearly a quarter of a century were Serjeant Heywood and Mr. Balguy. They were highly respectable gentlemen, and not without a considerable reputation as lawyers. But they each had the misfortune to be lame, so that, in the lapse of years, the inhabitants got to consider lameness as necessarily incidental to the judicial office, and when at length, on the deaths of these Judges they were succeeded by Mr. N. Clarke, who held the office provisionally during the interval between their decease and the abolition of the Welsh Judicature, a native of Carmarthen was overheard inquiring of a friend whether he had seen the new Judge, and he added, "God bless me, he can *walk* as well as you or I."

The Chief Justice of the Brecon Circuit, for many years, was Mr. Nolan, the King's Counsel, who was eminent for having written a treatise on the Poor Laws, which was, for many years, the standard work on that subject. He dined, during one of his circuits, with Lord Bute, who at the time was entertaining the Duke of Gloucester at Cardiff Castle; His Royal Highness, on learning that the Chief Justice was expected as a guest at dinner, expressed a wish to Lord Bute that he would give him some information about the Judge that he might have something to say to him. Lord Bute said that he knew nothing about Chief Justice Nolan, except that he was the author of a work on the Poor Laws. Accordingly when the Judge was presented to His Royal Highness, the Duke said, with an affable smile, "Oh! my lord, although I have never yet made your acquaintance, I know you well by your valuable book on the poor, and a very charming book it is."

To return to John Jones, the renowned leader of the "Old Carmarthen." He was born at Carmarthen in the year 1777, and very well born both on his father's and his mother's side. He was the only son of Mr. Thomas Jones of Carmarthen, who died in the year 1790, leaving a considerable landed estate to his son, and having appointed for his guardian, his kinsman, Mr. Serjeant Williams, who afterwards became celebrated as the editor of *Saunder's Reports*.

Mr. Serjeant Williams was desirous that his ward should have a first-rate education, and accordingly John Jones was sent to Eton where he remained for some years, and thence he was transferred to Christ Church, Oxford. After quitting Christ Church he proceeded to the Inner Temple, and commenced the study of the law, and shortly after became the pupil of his guardian. But there is reason to believe that he was not a very diligent student of the law. For his cheerful temper and keen enjoyment of intellectual amusements rather led him to the course of life pursued by the Templars in the days of Addison, and he perhaps somewhat answered the description of a "gentleman of wit and pleasure about town."

In 1805, having been called to the Bar, he joined the Oxford Circuit in conjunction with the "Old Carmarthen." As to the Oxford Circuit he neither had, nor desired to have, any business on it. His easy fortune at that time required no addition. But he went regularly to most of the assize towns, enjoying the diversions incidental to a life on circuit, and the society of the agreeable and well-educated companions whom he met with there.

On the Oxford Circuit of that day there was a class of men, which it is to be feared has now ceased to exist, who, like himself, were in opulent circumstances, and went the circuit with no wish to share the emoluments, but merely for its amusements and the pleasant society it afforded. To this class, in John Jones' time, belonged Sir Charles Saxton, Mr. Thompson of Paper Buildings—whose valuable library, enriched by his erudite and accomplished annotations in the margin of his favourite authors, was unfortunately burnt in the fire which commenced in Mr. (afterwards Judge) Maule's chambers. Another member of the same class was Mr. Garland, who used to drive round the circuit in a well-appointed curricle. Those were pleasant days, and John Jones in after years used to narrate very agreeably his recollection of them. But with respect to the "Old Carmarthen," his course was very different. By reason of his family connections he very soon got into business on that circuit, and applied himself to it in earnest. His talents were here speedily recognized, and he continued to rise rapidly till he became in extent of business one of the leaders of the circuit, brilliantly maintaining his position against Taunton and Oldnall Russell in many a hard fought contest. He was not a very learned man, but he had a legal capacity which

enabled him to act with surprising readiness and tact on the suggestions of his juniors, or those he found on his briefs. Again, he was no rhetorician, but he spoke with ease and fluency—and he had the qualities of sagacity, sound judgment, quickness and dexterity in handling a cause in the highest degree. Add to this that his self-possession and presence of mind never failed him, that he had great powers of ridicule and sarcasm, and an unerring knowledge of the temper and tastes of a Welsh jury. No one will be surprised to hear that a man so qualified became as powerful an advocate as ever practised at the Bar. Besides all these professional advantages, he was in his private capacity the darling of his countrymen; and he was also an especial favourite of the Judges of the circuit, whom he won not only by his frank and pleasant modes of conducting the business, but by the admirable dinners and very choice wines with which he regaled them and the principal members of the Bar on every assize Sunday at Ystrad, his seat in the neighbourhood of Carmarthen. He continued on the circuit till Serjeant Heywood and Mr. Balguy had been removed from it by death. As we have stated they were succeeded *pro tempore* by the well known Queen's Counsel, Mr. Nathaniel Clarke, who was, he said, quite astonished by John Jones's ability as counsel, and added that he believed Erskine himself did not conduct a cause more winningly.

After this description of the man and his powers, the reader will better understand a current tradition that on some occasions, after one of John Jones's felicitous replies, the jury, as soon as the Judge's summing up had closed, without waiting for the officer to take their verdict, would call out, "My lord, we are all for John Jones, *with costs.*"

The mention of Ystrad leads at once to recollections of that beloved abode and its pleasant hospitalities. No house in the principality entertained more frequent guests, and it may be confidently said, that no guest ever left without feeling that he had had a most agreeable visit, and had found his host one of the pleasantest of men. Of him it might be truly said:—

> "A merrier man,
> Within the limit of becoming mirth,
> I never spent an hour's talk withal."

In an able article in the *Carmarthen Journal*, published the day after his death, it was observed—

"In his private and public capacity he had few equals, and by his talents and public services he acquired a high reputation, and wielded a personal influence greater than any man in this or the neighbouring counties—probably the greatest influence of any private gentleman in the principality."

On the abolition of the Welsh Judicature Mr. Jones retired from the Bar, but his talents were not lost to the community, for he continued to discharge with great ability the duties of Chairman of the Carmarthenshire Quarter Sessions to the time of his death. The magistrates of the county and the profession testified their high sense of his services in this capacity by presenting him with a service of plate, on which they recorded their sense of his judicial services.

John Jones was for many years in Parliament and was engaged in many arduous struggles to gain that object. In 1818 he unsuccessfully contested the borough of Carmarthen, but was returned for the borough in the next year; and after some other contests he was returned member for the county of Carmarthen in 1837, and retained that seat till his death.

In politics John Jones was the intimate and attached friend of Sir Robert Peel, and, generally speaking, adopted his line of policy. Accordingly, when Sir Robert, in the year 1829, to the great and bitter indignation of his party, abandoned the anti-catholic principles which he had so often and so solemnly professed, and in conjunction with the Duke of Wellington brought forward, and carried, the great Act of Parliament for the Relief of Roman Catholics, Mr. Jones was persuaded, not a little against his own inclinations, to follow Sir Robert Peel in his tergiversation. His conduct in this respect was most disastrous to his own private fortunes. In South Wales there were scarcely any Roman Catholics, but there were a great number of persons bitterly and obstinately opposed to their relief. Amongst them was Mrs. Jones, of Tyglin, the daughter of his great uncle Mr. Jones, the proprietor of the estate. By his will he bequeathed it to his daughter in such terms as were decided by the Court of King's Bench to amount to a gift of an estate-tail, with remainder, "to my nephew, John Jones, now at Eton School." His daughter, on hearing that her cousin had been persuaded to give his vote in the House of Commons in favor of Roman Catholic relief, fell into a frenzy of passion, and vowed most solemnly that, if she could prevent it, not an acre of the Tyglin Estate should ever go to John Jones. And she immediately sent for her solicitor, and instructed him if possible to cut off the entail which had been made in his favor. This was done, and unfortunately, for Mr. Jones, too well done, for the Court of Queen's Bench, in a law-suit which took place after her death, between John Jones and a stranger to whom she had bequeathed the estate, decided after solemn argument that she had the power to cut off the entail and to deprive Mr. Jones of the estate in favour of her own devisee—and thus, by this calamitous vote, Mr. Jones was deprived of an estate with a rental of at least £3,000 a year.

Mr. Jones died in the year 1842. His funeral was attended by an immense concourse of mourners of every class. All the shops of the town of Carmarthen were closed, business was entirely suspended, and everything was done by the inhabitants to manifest the depth and sincerity of their regret. But eminent

and beloved as he was, he has already ceased to form a topic for public conversation. There are still some few who like to talk over the days that are gone by, and to recount his popularity and his triumphs at the Bar and on the hustings. But considering that a quarter of a century has scarcely elapsed since his death it is surprising, and somewhat melancholy, that so few tongues continue to speak of the once famous John Jones, of Ystrad.

FIRST REPORT OF THE JUDICATURE COMMISSION.

(From the Law Magazine.)

We rejoice to find that the changes advocated in this Magazine have found favour with the Judicature Commissioners. There has not, probably, for years been a Commission whose labours have proved so thoroughly satisfactory to the public. There is not the slightest hesitation in suggesting the eradication of proved abuses, however venerable from their antiquity. How best to promote the convenience of suitors, and of the public at large, has been the single aim of the Commission.

The Commissioners propose that the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, should be blended into one Court, to be called "Her Majesty's Supreme Court." This Court is to be divided into as many chambers or divisions as the convenient despatch of business may require. All suits are to be commenced with a document called the writ of summons, such writ to be specially endorsed with the amount sought to be recovered; a short statement of the facts constituting the plaintiff's cause of complaint—not on oath—called the declaration, to be delivered by the plaintiff to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The proceedings should not go beyond the reply, except by permission of the judge. As to the mode of trial, great discretion should be given to the Supreme Court, and any questions to be tried should be capable of being tried in any division of the Court, (1) by judge, (2) by a jury, (3) by a referee. There should be attached to the Supreme Court, officers called official referees. Evidence, as a rule, to be taken by oral examination in open Court, except upon interlocutory application, in which case the evidence, as a rule, is to be taken by affidavit. If Terms are not to be abolished, it is recommended that there should be three instead of four Terms, commencing on November 2, January 11, and May 1, in each year. No distinction to be made between business capable of being transacted in Term and out of Term. The venue for trials to be enlarged, and several counties to be consolidated into districts of a convenient size, and that such districts should, for all purposes of trial at the assizes, both in civil and criminal cases, be treated as one venue or county. Among other recommendations regarding juries, the Commissioners recommend that aliens, having been resident in this country for ten years, should be liable to serve as jurors, and that alienage should not be ground of challenge. The right of an alien to claim a trial by a jury *de medietate linguæ* to be abolished.

On the important subject of Appeals, the Commissioners, after some very proper and justifiable strictures on the inconveniences of the present appellate system, recommend the establishment of a Court of Appeal, consisting of six permanent judges, and three judges of the Supreme Court to be nominated annually by the Crown. A direct appeal to the House of Lords to be allowed in those cases where the respondent consents, but not otherwise. No appeal, as a general rule, to be allowed as to costs only.

We think that some exception may be taken to the name of Supreme Court as applied to a court from which there are a succession of appeals. We regret to find that the Commissioners have not thought fit to diminish the number of appeals. While putting an end to the absurdity of the Exchequer Chamber, and establishing a strong Court of Appeal in its stead, they yet allow the judgment of this Court to be subject to an appeal to the House of Lords. The consequence might be, that a well-considered judgment of nine judges might be upset by two or three law lords. We should rather prefer that there should be no appeal from the Court of Appeal to the House of Lords, but that the law lords should form part of the Court of Appeal. The appellate court would thus be strengthened, and the mischief of the double appeal abolished. Mr. Ayrton very properly questions "whether it is desirable to allow such facilities for appealing and repetition of appeals." The Commissioners seem, however, to think it beyond the scope of their authority to suggest any change with regard to the appellate jurisdiction of the House of Lords.

We rejoice to find that the Commissioners recommend that the present preposterous system of four legal Terms should be abolished, and that in case it should be thought advisable to retain any system of legal terms at all, there should be three Terms at convenient periods of the year.

DR. COLENSO.

Can Dr. Colenso be tried for heresy? Such, in effect, is the question to which public attention has once again been invited. Although the Bishop of Natal has been the "hero of a hundred suits," for some cause or other no competent tribunal has pronounced as yet on his orthodoxy. To only one indeed, that of the Bishop of Capetown sitting at Capetown as Metropolitan, has it ever been submitted.

It might perhaps have been raised before the Privy Council on the appeal brought by Dr. Colenso against Dr. Grey's decision (see 13 W. R. 550). But no doubt both parties were soundly advised in limiting their arguments to the question of jurisdiction. Again, the "merits of the case" might have been investigated before the Master of the Rolls in the *Bishop of Natal* v. *Gladstone and others*, 15 W. R. 29, L. R 3 Eq. 1. In that suit the defendants, if they had attempted to establish and had succeeded in establishing the plaintiff's heterodoxy, must have won the victory. They preferred to rest their argument on the supposed invalidity of the patent of Dr. Colenso, and abstained purposely from raising any argument on his opinions.

"I have not to consider" said the Master of the Rolls, in delivering his judgment, "whether the plaintiff, by false and erroneous teaching or doctrine, or in any other manner, has misconducted himself as a bishop. I have nothing to do with the question whether his works have or have not an heretical tendency. *That question might have been raised* and might have had an important bearing on the question whether the plaintiff is or is not entitled to be paid the salary in question; but that question not only is not raised but it seems to have been on both sides carefully excluded from the pleadings."

The result of this course of proceeding was total failure, and now the advisers of the Propagation Society, who were the real defendants, may possibly regret that a more extended line of defence was not adopted. The appeal from Lord Romilly would, moreover, have eventually reached the House of Lords, where the presence or at least advice of the bishops might have lent additional authority to the judgment which the lay peers would have delivered. This golden opportunity, however, was lost. Dr. Colenso still remains in possession of his bishopric and of the funds attached to it, and according to the opinion just published of the Solicitor-General, Sir Roundell Palmer, and Dr. Deane, it has become next to impossible to dislodge him. He cannot be proceeded against in Natal; he cannot be proceeded against, *as a bishop*, in England. As a clerk in holy orders, the learned writers intimate that he might be liable to penalties in an English Ecclesiastical Court. But this opinion is really theoretical, for it supposes first that Dr. Colenso should voluntarily put himself within the jurisdiction of our courts, and secondly, that his offence has been committed within two years of the commencement of a suit against him. With regard to the first point, there is little doubt from his public declarations that he would come to England on purpose to be tried, but the second is an insuperable objection. Much more than two years has elapsed since the famous commentary on the Pentateuch was published, and the bishop's ambition for martyrdom will scarcely be keen enough to induce him to publish the same opinions afresh in order to facilitate the action of his opponents.

But is it so certain, after all, that Dr. Colenso is not amenable to the general ecclesiastical law? He is continually claiming the position of a "Crown" bishop. Is he to be permitted to enjoy that distinction without submission to its inevitable disabilities? "It has been suggested," says the "opinion," "that the Crown, as visitor or as supreme in causes ecclesiastical or by virtue or in exercise of some other supposed power, may be able, either by Commissioners specially appointed or by means of the Privy Council to hear and determine the points raised against Dr. Colenso. We are unable to find the slightest ground on which this suggestion can be supported." On the other hand we venture to maintain that a trial "by Commissioners specially appointed" might legally be held. It is contended that such a mode of proceeding would be a revival of the High Commission Court which was abolished by the 16 Car. 1, c. 11. But that court existed under an Act (1 Eliz. c. 1), which was not an exacting, but a declaratory statute. By virtue of its provisions a permanent tribunal was erected, which was happily abolished by the Long Parliament, and the re-construction of which was forbidden by the 13 Car. 2, c. 2. The repeal of the sections of the 1 Eliz. c. 1, enabling the Sovereign to appoint a high commission court, leaves the ancient prerogative of the Crown as supreme visitor untouched. The law is laid down on this subject with great exactness in *Cawdrey's case*, Co. Rep. pt. v., p. 8. "It was resolved," says Lord Coke, "by all the judges that if that Act (*i.e.*, the 1 Eliz. c. 1) had never been made, the King or Queen of England, for the time being, may make such an ecclesiastical commission as is before mentioned by the ancient prerogative and law of England." If this statement of the law be accurate, the repeal of 1 Eliz. c. 1, really does not touch the question. The Crown had the power to appoint commissioners before the Act, and possesses it still, although the Act be now repealed. The point, at all events, we venture to submit, is worth discussion. It is by no means so clear as the "opinion" would seem to indicate. A suggestion supported by the high authority of Lord Coke can scarcely be deemed entirely destitute of foundation.

There remains a second method of trying conclusions with Dr. Colenso, which was pointed out in last Tuesday's *Times* by Mr. Forsyth. If the trustees of the Propagation Society again decline to pay Dr. Colenso his stipend, a new chancery suit will be the consequence; and on this occasion the defence that the plaintiff holds opinions not in accordance with the formularies of the Church of England can be set up. In either of these two ways, therefore, Dr. Colenso can, we believe, be brought to trial. It is certainly a "wrong," that if he really does hold heretical views, he should continue to draw the funds of the orthodox;

and in this case, as in others, it will probably be found that the old maxim will apply, and that the wrong is not without its appropriate remedy.—*Solicitors' Journal.*

CRIMINATING INTERROGATORIES.

During the last year there has been an unusual number of decisions upon questions concerning the practice which ought to be followed at Judges' Chambers in allowing interrogatories, which are now so much used in obtaining evidence in a cause before it comes to trial. We propose here to examine the state of the law on one branch of this question —viz., the right to administer interrogatories the answer to which may tend to expose the person answering to criminal proceedings, penalties or forfeiture. The cases are by no means in accordance with one another, and it will therefore be necessary to examine the more important decisions which have been given upon this subject.

The power of administering interrogatories was first given to litigants at Common Law, by section 51 of the Common Law Procedure Act, 1854, which enables either plaintiff or defendant, by leave of the court or a judge, to interrogate the opposite party "upon any matter upon which discovery may be sought." This section has been the subject of a great many decisions, but we shall confine ourselves here to the consideration of those cases in which objection has been raised to the administering of interrogatories on the ground that an answer to them might tend to criminate the person interrogated.

One of the first questions which arose on this section with reference to criminating interrogatories was, whether courts of law were bound to follow the principles and practice by which courts of equity were governed in dealing with bills for discovery. The cases of *Bartlett* v. *Lewis*, (31 L. J. C. P. 238), *Bickford* v. *Darcy* (14 W. R. 900), and *Pye* v. *Butterfield* (13 W. R. 178) have now established that the common law courts will not necessarily be governed by the rules which regulate discovery in equity, although they will examine those rules as a guide to assist them in determining their own practice in such cases.

The broad general rule in equity as to criminating interrogatories is, that "no person is compellable to answer any question which has a tendancy to expose him to a criminal charge, penalty, or forfeiture;" *United States of America* v. *McRae* (15 W. R. 1128). This rule is as well known at law as in equity; no witness is bound to criminate himself, and therefore, every witness is privileged from answering any question which has a tendency to criminate him. A witness, however, is not privileged from being *asked* such a question; he is only privileged from answering it—that is, the objection must come from the witness himself on his oath. So in equity a defendant, in order to protect himself from answering on the ground, that the discovery of the matters inquired after would tend to expose him to penalties, must state on oath his belief that such would be the case. A submission of the question to the Court is not sufficient (Daniell's Ch. Pr. 4 ed., vol. 1, 521, citing *Scott* v. *Miller*, 7 W. R. 561).

A party to a cause interrogated at law is clearly not bound to *answer* criminating questions: *Pye* v. *Butterfield* (13 W. R. 178), but the question raised on criminating interrogatories has usually been, not whether the party interrogated is bound to answer, but whether the other side is entitled to ask the question, and thus compel the party interrogated to rely on this privilege as a reason for not answering. This point must, of course, be raised when application is made for the necessary leave to administer the interrogatories, at which time the person whom it is proposed to interrogate is always entitled to be heard.

It will be convenient to enumerate shortly the cases on this point in the order of their date. In *May* v. *Hawkins* (3 W. R. 550, 11 Ex. 210), interrogatories inquiring as to a forfeiture were not allowed. The case was actually decided upon a point of practice, but Parke and Martin, B.B., both expressed an opinion that such interrogatories ought not be allowed. In *Osborn* v. *The London Dock Company* (3 W. R. 238) the most frequently cited of the earlier cases on this subject, it was held that interrogatories having a tendency to criminate might be administered, and that any objection to them on this ground must be made by way of answer on oath of the person interrogated. Alderson, B., said, "the proceeding is analogous to that of an examination of a witness at a trial. It seems to me that the same rule should be followed." And Parke, B., said, "The plaintiff must be put upon his oath; and when he finds any question pinch him, he must object to it." This case was followed in *Chester* v. *Wortley* (4 W. R. 325), where interrogatories were allowed in an action of ejectment, although they inquired into matters which might be evidence of a forfeiture. The same principle seems also to have been approved of in *Simpson* v. *Carter* (6 H. & N. 751); the report of this case is, however, only given very briefly in a note. Up to this time the decisions (*May* v. *Hawkins* only contains *dicta* to the contrary) seemed clear as to the practice of allowing criminating interrogatories. In *Tupling* v. *Ward* (9 W. R. 482) the Court of Exchequer first acted on a different principle. It was an action for libel, and it was admitted that the defendant, whom the plaintiff wished to interrogate, would not have been bound to answer, as the questions inquired as to the writing of the alleged libel. The Court refused, as a matter of general discretion, and without laying down any general rule, to allow the interrogatories, on the ground

"that it would not be fair to submit to the defendant questions which he is not bound to answer." In *Bartlett* v. *Lewis* (31 L. J. C. P. 230) interrogatories were allowed, although they had a tendency to criminate. In *Baker* v. *Lane*, an action for libel, criminating interrogatories were refused, but no reasons were given for this judgment. The case was, however, subsequently explained by the same Court in *Bickford* v. *Darcy* (14 W. R. 900), when the ground of the decision in *Baker* v. *Lane* was stated to be that the Court thought that the interrogatories were not put *bonâ fide* for the purposes of the action. The decision in *Bickford* v. *Darcy* was that criminating interrogatories should be allowed in that case, as they were *bonâ fide*, and were not directly and necessarily criminating. The interrogatories in *McFadzen* v. *The Mayor &c. of Liverpool* (16 W. R. 1212) were allowed, although of a criminating tendency. Bramwell, B., there says, "I think that unless we see the question to be clearly objectionable, we ought to allow it to be put, and let the objection be made when the party interrogated comes to answer the questions." Martin, B., dissented from the majority of the Court, on the ground that "a man ought not to be asked such questions that he must either criminate himself or refuse to answer them." *Edmunds* v. *Greenwood* (17 W. R. 142) was an action of libel. The interrrgatories there went directly to the questions in issue between the parties. They asked the defendant as to the way in which the alleged libel was composed, as to its publication and as to surrounding circumstances from which legal malice might be inferred. The Court refused to allow these interrogatories to be administered, as "their direct and express tendency was to make the defendant criminate himself, and if he answered in the affirmative, to subject him to criminal proceedings." The judgment concludes by saying that, "the express and avowed object here, is to put questions in order to compel the defendant to criminate himself. But in the absence of special circumstances, we are of opinion that interrogatories ought not to be allowed in actions of this description." The last case in the common law courts was *Villesboinet Tobin* (17 W. R. 322), which was an action for misrepresentation. There the interrogatories were not allowed. Keating, J., observed in his judgment, "that the cases on the subject are numerous, and difficult to reconcile." Montague Smith, J., says, "The only intelligable rule to be deduced from all the cases, including *Edmunds* v. *Greenwood*, seems to be that when interrogatories are put *bonâ fide* to elicit what is relevant to the issue, they may be allowed, though the answers may tend to criminate; giving the party interrogated the option of answering or refusing to answer on that ground. But where interrogatories are so put the Court and the Judge at chambers will require a stronger case and reasons than in ordinary cases."

The result, therefore, of the cases in the common law courts on this subject seems to be that the mere fact that interrogatories have a tendency to criminate will not *per se* be a reason for refusing them. It is, however, always a matter for the discretion of the judge at chambers, or of the Court, whether interrogatories should be allowed in any action. Neither party to an action has an absolute right to administer interrogatories. He can only do so by obtaining leave or showing some reason why interrogatories ought to be allowed. This being so, it seems that the judge or Court will be slow to allow interrogatories having a tendency to criminate, unless there is some special reason for them.

This question has recently, in *The Mary or Alexandra* (17 W. R. 551), come for the first time before the Court of Admiralty, which, by 24 Vic. c. 10, s. 17, has all the powers possessed by any of the superior courts of common law, to compel either party in any cause or matter to answer interrogatories. Sir. R. Phillimore allowed criminating interrogatories, saying "if the defendant states upon oath his belief that an answer to any particular interrogatory would subject him to penalties, he will not be compelled to answer such interrogatory. This decision was given on the ground that the questions were relevant and reasonable, and that a statement on oath of the person interrogated is necessary, and that it is not enough that he should submit that they are not proper questions. The judgment in *The Mary or Alexandra* thus agrees with the decisions at common law, so far as any principle can be obtained from those cases.

It may, at least, be safely assumed that, whatever difficulty there is in reconciling all the cases on this subject, there is a recognised distinction between the right to administer criminating and non-criminating interrogatories. It is more difficult to obtain leave in the former than in the latter case.

It is always much to be regretted that there should be any conflict between decided cases, but when such conflict does exist, it is peculiarly the time for suggesting what the law on the disputed point ought to be. It seems to us that the simplest and the best way of deciding this matter would be to ignore, on the application for leave to administer interrogatories, the question whether they are or are not criminating. Let this matter be left until the answer is made. Of course, if interrogatories are not relevant to the purposes of the action, they ought not to be allowed, but this applies to all interrogatories. There seems no reason whatever why criminating interrogatories should stand on a different footing from others. There is, as we have said, no privilege from being *asked* a question either in equity or at a Nisi Prius trial. In each case the person questioned must claim his privilege on oath, and the same principle ought to be applied to common law interrogatories.

All this question of criminating interrogatories would never have arisen if interrogatories might be administered at common law as in equity without obtaining leave first. If there is any objection to them the person interrogated could apply for any alteration he might wish to have made, but the first application should come from him, and not from the other side. Nothing so much encourages idle objections and fruitless resistance as the refusing leave for that which in the great majority of cases ought to be granted as a matter of course. The system invites all sorts of unnecessary and mischievous, because expensive opposition. It is now usual to oppose all interrogatories on all occasions, although they may be quite unexceptionable. If the objection had to come after they were administered, it could only be made when there was really some sufficient ground at least for discussion. This, however, is a matter which is not confined to the administering of interrogatories alone, it applies quite as forcibly to the necessity of obtaining leave to plead several matters, no matter how much a matter of course it may be to plead the required pleas. We hope that when any changes are next made in the practice at judges' chambers, the rule requiring leave to administer interrogatories, and to plead several matters, will be abolished—*Solicitors' Journal*.

LIABILITY OF THE FIRM FOR THE ACTS OF A PARTNER.

The question under what circumstances the receipt of a client's money by one member of a firm of solicitors constitutes a receipt by the firm so as to render them jointly and severally liable therefor, is a question which involves not only some consideration of the law of partnership, but also of the general relations between solicitor and client It is a fundamental axiom of the law of partnership, that the act of one partner does not bind the rest, unless it fall within the general scope of the partnership. Where it is sought to charge the firm with liabilities occasioned by the act of a single member, the first question is, whether the act which occasioned the liability relates to the partnership. If it does, then it is well settled that the act of the single partner binds all the others (*Hope* v. *Cust*, 1 East 53).

In those unfortunate cases which sometimes occur, where a suit is instituted to make the partners in a firm of solicitors liable for moneys misappropriated by a defaulting partner, the chief question is, whether the money so misappropriated came to the hands of the defaulting partner in the ordinary course of the business of the firm. If it did, then the firm are liable. And this, as we shall presently see, may lead to nice questions as to what is the ordinary course of business of a solicitor *qua* solicitor, when he is not acting in pursuance of any special authority given to him by his client.

As a general proposition it has been said that it is not in the ordinary course of a partnership business of solicitors to receive money for their clients. This point was raised in *St. Aubyn* v. *Smart* (16 W. R. 394, 1095), where a client who was entitled to a share in a fund in court gave a power of attorney to the firm of solicitors who had acted for him in the matter to receive the money. The power was a joint and several power, and one of the partners to whom it was forwarded availed himself of it to obtain the money, which he paid into his own account and afterwards absconded. The Lords Justices, affirming Vice-Chancellor Malins, held that this money must be treated as having come into the hands of the firm in the course of their business as solicitors, it being the ordinary course of business at the end of a litigation for the solicitors to receive the fruits of that litigation for their clients. The case went a good deal on the knowledge of the transaction which the firm were constructively deemed to have possessed; but is at any rate an authority for it being in the ordinary course of business for solicitors to receive money for their clients, when that money is the fruit of the litigation they have conducted to a successful issue. We shall presently see that the general proposition above stated must be accepted with considerable modification.

It is not within the scope of the ordinary business of a solicitor to receive money from a client for the general purposes of investment (*Harman* v. *Johnson*, 2 E. & B. 61). But it seems that if money be deposited with one partner by a client of the firm for the purpose of being invested in some particular security, and the partner misapply the money, the other partners may be made jointly and severally liable to account for it, on the ground of the transaction being within the ordinary course of business of solicitors.

Thus in the well known case of *Blair* v. *Bromley* (5 Ha. 556, 2 Phil. 354), the client had handed a sum of money to a partner in the firm for the purpose of being invested on a particular mortgage. The recipient partner presently represented to the client that the money had been so invested, and paid him regularly what professed to be the interest on the mortgage, until the partner became bankrupt. It was then found out, twelve years after the transaction took place, that the recipient partner had misappropriated the money. It was argued in that case that it was no part of a solicitor's ordinary duty to receive money to lay out on mortgage for his clients. That may be so where no particular mortgage security is in contemplation. But in *Blair* v. *Bromley* the representation was that a particular security was in contemplation That being so, to receive a client's money for the purpose of being invested on it was within the orninary course of business, and the defaulting partner had power to undertake on behalf of the firm the transaction which he professed-

ly undertook on their behalf; and, therefore, his unfortunate partner, though he had had no opportunity of knowing anything of what was being done, was necessarily held liable for the acts of the other no less than six years after the partnership had come to an end.

Vice-Chancellor Wood, in *Bourdillon* v. *Roche* (6 W. R. 618), considered at some length the position and duties of solicitors in this respect. The decision was that it is no part of a solicitor's business *quâ* solicitor to receive on behalf of his clients money coming to them upon payment of a mortgage debt, or to retain such money for the purpose of investment generally. For a specific investment, we have already seen, it is quite in the ordinary course of business so to retain it, as the money in fact merely passes through his hands, and he is not the custodian of it, unless during the limited period which precedes the re-investment of the fund. In *Bourdillon* v. *Roche*, where a mortgage had been paid off and the money was retained by the defendant's partner for re-investment, and misapplied by him, the bill, which sought to make the defendant liable as well as the estate of the partner who misapplied the money, was dismissed as against the defendant, upon the ground that there was no evidence that the money was received for the purpose of being invested on any specific security, and, therefore, that the transaction was not within the ordinary range of business of a solicitor.

The receipt of money to be laid out on a specified security is said to be within the ordinary course of business, but the receipt of purchase-money on a vendor's behalf not. *Viney* v. *Chaplin* (6 W. R. 562), which is the authority for the latter proposition, and is explained by the Vice-Chancellor in *Earl of Dundonald* v. *Masterman* (17 W. R. 548, L. R. 7 Eq. 504), only goes to this, that a solicitor as such has *not*, as against his client, authority to receive that client's money; but it does not touch the question now before us.

The cases appear to come to this, that a solicitor who acts strictly in his professional capacity does not receive money on behalf of his clients, unless to be invested in a *specific* security or applied in a particular manner. *Atkinson* v. *Mackreth* (14 W. R. 883), was a case where one of a firm of solicitors received a sum of money from a client, part whereof was to go in payment of their bill of costs, and the residue was to be applied towards effecting an arrangement with the client's creditors. The solicitor misappropriated the money It was argued that the purpose for which the balance of the money was given—viz., the arrangement with the creditors—was a general purpose analogous to the case of money being handed to a solicitor for investment generally, which is a scrivener's business, and not a solicitor's. The Master of the Rolls, however, held on demurrer that the liability was joint and several, thus admitting that the undertaking to apply the balance as above mentioned was within the scope of a solicitor's business.

In *Withington* v. *Tate* (17 W. R. 247) the question was whether a mortgagor was fairly entitled to assume that the mortgagee's solicitor was the proper person to receive the money as agent for the mortgagee. Lord Romilly, M. R., held that he was not, and on appeal Lord Hotherly, C., took the same view, that the mortgagor had paid the money on his own wrong, inasmuch as he was not authorised to pay it to the solicitors.

St. Aubyn v. *Smart* is noticeable for the question which arose in it as to the jurisdiction of the Court in these cases. That there is a remedy at law in most cases is certain, but, where the lapse of time has barred this, there is still a remedy in equity, provided there had been misrepresentation leading to the fraud complain d of. In *Blair* v. *Bromley* the misrepresentation was made in 1829, and the discovery of it was not made until 1841, while the partnership had been dissolved upwards of six years. At law, therefore, the remedy was gone. But in equity, in the opinion both of Sir James Wigram and Lord Lyndhurst, the effect of the misrepresentation was the same as if it had been made on t e day when the fraud originated by it was found out; and that the right to relief against the several partners was not gone by reason of the firm having been dissolved more than six years before.

In the latest case on this subject, the *Earl of Dundonald* v. *Masterman*, the Earl, in the course of an arrangement of his affairs, in which the defendants' firm were his professional advisers, remitted a bill for a large sum to England, which bill was endorsed to the member of the firm who had throughout taken charge of the Earl's affairs, and by him discounted. The balance of the amount so obtained was misapplied by the partner in question, who absconded; and the suit was instituted to make the remaining partners liable for the acts of their former partner. As in *St. Aubyn* v. *Smart*, the defendants were precluded from making out that the plaintiff had employed the defaulting partner, and not the firm, by the circumstance that the bills of costs were made out in the name of the firm, and discharged by payments made to them. The main question was, as in the other cases, whether it was within the ordinary business of the firm so to receive money for a client, and the Vice-Chancellor, following the foregoing cases, was clearly of opinion that it was. The bill was transmitted to England for the purpose of providing a fund to pay the creditors; it was endorsed to the defaulting partner; he discounted it. The cheque thus obtained was made payable to the order of the firm, and the defaulting partner obtained the money, part of which he appropriated by using the firm's name in endorsing the cheque It was one of those unhappy cases where some one or other innocent person must suffer, and the remain-

ing partners suffered because they had placed confidence in him, and held him out to the world as a person for whom they were responsible.

Another branch of the case, somewhat resembling *Coomer* v. *Bromley* (5 DeG. & Sm. 532), requires a passing notice. Two of the three partners—the defaulting and another—were trustees of a trust deed executed by the Earl, and a portion of the proceeds of the bill was paid to them. The Vice-Chancellor, as in *Coomer* v. *Bromley*, held that this money was paid to them as trustees, and not as members of the firm, and that the partnership was entitled to be discharged in respect of it. The first branch of the case resembles *Atkinson* v. *Mackreth*, to which we have already referred, although the circumstances are more complicated. What we deduce from the cases above, of which we have given an imperfect summary, is, that the scope of a solicitors business does extend to the receipt of money for *specific* objects, but not for general purposes, and that to receive money for arrangements with creditors, paying legatees, paying into court, and in short, for any specific purpose connected with the professional business then in hand, are within the scope of a solicitor's ordinary duty quite as much as they undoubtedly are at the present day within his every-day pratice.

It must not be forgotten that solicitors now act far more as general family agents than they formerly did. This fact will have to be borne in mind in considering the older cases, which were decided in days when the public required far less of the profession than they do now, that there is hardly a conceivable form of business, that a solicitor may not be called on to supervise or undertake on behalf of his client.—*Solicitor's Journal.*

The *Chicago Legal News* is responsible for the report of the judgment of Williams, J., in *Ticknor* v. *Ticknor*, a part of which we record as something "almost too good to be true." If the legal ability of this "gushing" judge is to be measured by his efforts in the poetical line, he must indeed be a treasure.

An application was made to remove some children from the custody of the mother, who after living in adultery with one Fishburn, subsequently married him, having obtained a divorce by consent from her first husband:—

"And yet no questions of greater difficulty and delicacy ever present themselves to a chancellor than those arising in this class of cases. The dearest rights and tenderest feelings of our humanity are involved in the issues which are to be determined, and the judge who can pass judgment upon questions with the settlement of which must be connected the crushing of long cherished hopes, the breaking of heart strings, upon which hangs the future happiness or misery of parents and their innocent offspring, without a painful sense of his responsibility, is more or less than man. In the case before me, the petitioner is the father of two sweet and promising children. They are bone of his bone and flesh of his flesh. He fondled them in their early infancy, nursed them in their sickness, fed and clothed them by his toil, and with the pride which only a father can know, watched their physical and mental development, as like buds they have been silently opening beneath his eye. If he is so depraved as the eloquence of the complainant's solicitors have represented him to be, from the exhaustless fountain of a father's love affection is yet poured forth for them. Whatever else he may be, *he is a father*, and so long as the sacred record exists, luminous with the love of our Father in Heaven, so long will the words, 'Like as a father pitieth his children,' be suggestive of unfathomable depths of human and divine sympathy and tenderness.

On the other hand is the mother, whose love antedated the birth of these little ones, who, for them, patiently bore the anxious sorrows of anticipated maternity, and those keener pangs through which they were ushered into being, whose arms were their cradle and whose bosom their pillow through the days and nights of helpless infancy. Were she the abandoned creature that she has been pointed to be by the defendant's counsel, still she is *a mother*, and the question of the Hebrew prophet has, by the lapse of time, lost nothing of its pregnant significance,—'Can a mother forget her sucking child that she should not have compassion on the child of her womb?' I assume, therefore that I have to deal with the parents who, whatever be their disregard of conjugal vows, or their personal delinquencies or crimes, have bosoms warmed with fire of parental love towards their offspring."

The mother carried the day.

The vice of irresistible drunkenness is an apt illustration of the transitional form of incapacity and irresponsibility in which physiological and pathological conditions combine. Nothing is more certain than the fact that a man having attained adult age, with all the responsibilities of a husband, father, and citizen, becomes an incorrigible drunkard, and quite incapable, from bodily causes, of performing his duties. He is too often a brutal ruffian, commonly a prodigal and a fool, yet the law of England does not provide for an inquiry into his capability of self control, except in so far as to whether he be insane or not Pending the solution of this insoluble question, he breeds drunkards to the third and fourth generation, ruins his family, and too often it is only bodily weakness, suicide, raving insanity, or an early death from disease, which saves him from the gallows. Surely common sense, Christian ethics, and medical science are agreed here, that it is a question of capability for the performance of duty with which society has to deal, and not a metaphysicial question as to insanity. Probably in practice such a method of dealing with these cases would prove the most efficient check on the vice itself.—*Lancet.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law.*)

In re Hicks, an Insolvent.

Insolvent Act, 1865, *sec.* 29—*Order for committal without summons to shew cause.*

An insolvent cannot legally be committed under sec. 29 of 29 Vic. cap. 18, without an opportunity of shewing cause, and it should appear in the order of committal that the insolvent has had notice of the order for delivery, &c., for non-compliance of which an order of committal is asked.

[Chambers, April 22nd, 1869.]

This was an application to discharge a prisoner on a writ of *Habeas Corpus*.

The return set out an order of the Judge of the County Court of Prince Edward, for the commitment to the county gaol of the insolvent, for nine months, unless certain moneys and notes were sooner delivered up according to a previous order.

The order, directed to the sheriff, &c., was as follows:—

"Upon the application of the official assignee for the County of Prince Edward, and upon reading an order made by me on the twenty-seventh day of February last past, and the affidavits thereto attached, by which order the said D. S. Hicks was directed to deliver *to one of the persons in said order* named, the sum of twelve hundred dollars, and also certain promissory notes in said order mentioned, upon or before a day now past, and upon it appearing to me that said money and notes have not, nor hath any portion thereof been delivered as ordered as aforesaid.

"I do order that the said D. S. Hicks be imprisoned in the Common Gaol of the County of Prince Edward for the space of nine months, unless said sum of money and notes be sooner delivered. And I do order you, the said sheriff of the County of Prince Edward, to take, or cause to be taken, the said D. S. Hicks, and him safely to convey to the common gaol at Picton, in the said County of Prince Edward, and there to deliver him to the keeper thereof, together with this precept. And I hereby command you, the said keeper of the said common gaol, to receive the said D. S. Hicks into your custody in the common gaol, there to imprison him for the space of nine calendar months, unless the said sum of twelve hundred dollars and notes shall be sooner delivered, and for your so doing, this shall be your sufficient authority."

The order was made under section 29 of the Insolvent Act of 1865, which enacts that, "If, after the issue of a writ of attachment or assignment, &c., the insolvent retains or receives any portion of his estate, &c, the assignee may make application to the judge by summary petition, and after due notice to the insolvent for an order for the delivery over to him of the effects, documents or moneys, so retained, and in default of such delivery in conformity with any order to be made by the judge upon such application, such insolvent may be imprisoned in the common gaol for such time, not exceeding one year, as such judge may order."

Many objections were taken to the sufficiency of this warrant.

C. S. Patterson, in support of it, conceded that he could not place it on any higher ground than an order to commit for unsatisfactory answers to interrogatories, or for not appearing on a judgment summons.

J. A. Boyd, for the prisoner.

Hagarty, C. J., C. P.—One most formidable objection, is the absence of any averment of notice to the insolvent, or of any opportunity given to him to shew cause against his commitment to gaol. The order appears to be made merely on proof of his non-compliance with the previous order, to deliver over the money and notes.

The very nature of the proceeding would seem to require the insolvent to be called on to shew cause before being committed. Many reasons may be suggested why the order was not complied with at once. Illness or other disability, the intermediate loss or destruction of the property might render compliance excusable or impossible, or at all events operate on the exercise of the discretionary power of commitment.

The often cited case, *Ex parte Kinning*, 4 C. B. 511, is directly in point. The judge there had power to commit for any time not over 40 days if the debtor did not pay the debt at such time as ordered by the court or judge. The order to commit set out the order to pay, default in payment after demand and service of original order, and then, without averring any further notice to defendant, or opportunity given him to be heard, he was committed for forty days.

The Court of Common Pleas discharged him on *Habeas Corpus*. The act of committal was held to be a judicial, not a ministerial act. *Maule*, J., adds "upon every principle of law and justice it is right that the party should have an opportunity of being heard before this punishment is inflicted upon him, * * * the lebtor is entitled to notice, and has a right to be heard before he can be committed for disobedience of the order."

Wilde, C. J., *Coltman* and *Creswell*, J. J., all give judgments to the same effect.

The law is fully reviewed in our own case of *Bullen* v. *Moodie et al.*, 13 U. C. C. P. 132, and the same view expressed. See also *Baird* v. *Story et al.*, 23 U. C. Q B.

I have nothing before me warranting the imprisonment of the insolvent except this order, and it seems to me to be defective. For all that appears therein, the insolvent may never have had any notice of the order made by the judge for the payment and delivery of the money and notes. It merely avers that such an order was made, and the money and notes have not been delivered in accordance with it.

This objection is in addition to that already discussed as to the committal without an opportunity given to insolvent to be heard. The latter defect seems to be fatal, without reference to any of the other points taken

I think I am bound to order the discharge of the prisoner

Prisoner discharged.

Note.—It would be well if all these orders should contain a short recital of matters, so as explicitly to bring the case within this 29th section, and setting out the substance of the

order made on the assignees application, and notice to the insolvent. Thus the service of the order, or *at least*, averment of notice being given of it to insolvent, and a demand of the delivery &c., of the things ordered to be delivered, and then notice of the application to commit and opportunity of being heard against it. and then the order to commit. The statute it may be observed is silent as to any alternative committal.

Regan v. McGreevy.

Examination of judgment debtor—Residence within jurisdiction—Member of Parliament.

An order will not be made for the examination of a judgment debtor whose home is in the Province of Quebec, though temporarily residing in Ontario attending to his duties as a member of Parliament.

[Chambers, May 7, 1869.]

O'Brien shewed cause to a summons calling on the defendant, a judgment debtor, to shew cause why he should not be examined before the Judge of the County Court of the County of Carleton, under Con Stat. U. C. cap. 24, sec. 41. He filed an affidavit of the defendants' brother, from which it appeared that the usual place of residence of the defendant was at the City of Quebec, in the Province of Quebec, and beyond the jurisdiction of the Court, and that he now resides there: that the said defendant has resided and had his domicile at the said City of Quebec all his life, and never resided or had his domicile elsewhere: that he came to Ottawa to attend to his Parliamentary duties as a member of the House of Commons of Canada for the Western Division of the City of Quebec, which he represents as a member of the said House of Commons, and that he returned to the said City of Quebec at the end of last week: that the defendant owns real estate in the City of Ottawa to the value of five thousand pounds, far more than sufficient to satisfy the claim of the plaintiff in this cause five times over, and that the plaintiff and his attorney are perfectly well aware of his owning such property, which is registered in his own name.

He contended, 1. That as the defendant did not reside within the jurisdiction of the court he could not be examined under the section referred to, nor could the order be enforced against him if he failed to attend, nor could he be punished for contempt in not attending.

2. That the defendant was privileged as a member of Parliament: *Reg.* v. *Gamble & Boulton*, 9 U. C. Q. B. 546, and that now was the time to take the objection, and not upon any subsequent application to commit him for contempt in case he should fail to attend: see *Henderson* v. *Dickson*, 19 U. C. Q. B. 592.

Henderson supported the summons.

Hagarty, C. J., C. P.—Refused to make an order for the examination of the defendant, on the ground that he did not reside within the jurisdiction of the Court within the meaning of the statute. He doubted whether the defendant had, as a member of Parliament, any such privilege as claimed on his behalf.

Walkem v. Donovan.

Law Reform Act, 1868, sec. 17, and schedule A.—Entry on issue.

[Chambers, June 9, 1869.]

This was an action brought in the Common Pleas. The defendant desiring to bring it down to the County Court for trial, gave notice of trial for the same, making the entry required by the above act on the issue book alone.

O'Brien, for defendant, obtained a summons calling on plaintiff to show cause why the issue filed and served herein, and the notice of trial served herein, and all subsequent proceedings, should not be set aside for irregularity, in this, that the seventeenth section of the Law Reform Act, 1868, had not been complied with, by making an entry in the said issue filed and served, and said notice of trial and subsequent proceedings in words or to the effect in form A. in the schedule to said act.

Cause being shewn, it was contended that the word issue meant Issue Book, which did contain the notice required, and that the defendant had no defence on the merits.

O'Brien contra. The word "issue" means joinder of issue, and "entry" refers to an entry on record, and the notice should appear of record. The words "subsequent proceedings" must refer to other matters than the record merely.

Adam Wilson, J.—I think the entry is sufficiently made by being made on the Issue Book in place of the *venire facias* The summons must be discharged but without costs.

APPEAL CASE.

The Municipality of the Town of Simcoe v. the County of Norfolk.

Assessment Act—Equalization of Municipalities for County purposes.

Held, that the aggregate value of Municipalities to form the basis for the calculations for equalization for county purposes, under sub. sec. 2 of sec 71 of the Assessment Act, 32 Vic. cap. 36 is the value of the municipality as returned in the last revised Assesssment Roll, and that it is not in the power of County Councils to vary such valuation.

[July 5th, 1869.]

Wilson, Co. J.—This is an appeal by the Town of Simcoe against the amount at which the aggregate assessment of the said Town was fixed by the County Council in the equalization of the different Townships and Towns of the County of Norfolk for County purposes, under section 71 (and sub-sections thereof), of cap. 36, Stats. of Ontario, 32 Vic., for the year 1869.

The County Council of Norfolk has equalized the Town of Simcoe at the sum of $600,000 and then taken the interest on that amount at six per centum, thus making an aggregate valuation of the Town at $360,000, while the assessor of the Town of Simcoe has returned the Roll of the said Town as finally revised at $505,860. The Town Council contend, that the amount the Town is liable to be rated at, for County purposes, should be six per centum on the said sum of $505,860, capitalized at ten per centum, which would give $303,516 instead of $360,000. The difference in dispute is therefore the sum of $56,484, (say $57,000 for convenience of calculation), which if

taken from the aggregate valuation of the Town of Simcoe, must be added to the aggregate valuation of the Townships, or some of them, as the aggregate valuation of the whole County must not be reduced

The Warden of the County, Daniel Matthews Esq., and Charles Robertson Esq., the Deputy Reeve of Windham, appear for the County Council, and Daniel Tisdale Esq., of the firm of Tisdale and Livingstone, appears for the Town of Simcoe.

The County Council admit, that the aggregate valuation of the Town, must be ascertained by six per centum interest on an aggregate valuation of the Town, capitalized at ten per centum, but contend that they, the County Council, have the right (under sec. 74 aforesaid) to fix such aggregate valuation of the Town, upon which the six per centum is to be calculated, and the ten per centum capitalized, instead of being bound by the amount "returned on the roll" They further contend, that even if wrong in this contention, the town of Simcoe must be assessed *this year*, for County purposes, on the equalization of last year; in other words, that the change of the law (if any in this respect) cannot be taken advantage of by the town of Simcoe, so as to avoid being assessed for County purposes this year, upon last year's equalization. They cite section 74 of said Act to support this argument. *Mr Tisdale*, on behalf of the town, contends that the County Council is bound by the amount returned on the Simcoe Roll, and that the interest at six per centum on that amount, capitalized at ten per centum, must be the aggregate valuation for the town, and that any other construction would render sub-section 2 of section 71 nugatory, and of no effect.

And further, as to this statute not applying to this year's assessment, *Mr Tisdale* also contends; that there is nothing in section 74, or any other section of the Act, to warrant a conclusion that the old Act is entirely repealed, and that all proceedings of the County Council must be under this statute.

The Warden produced a letter from the Hon. M. C. Cameron, expressing the opinion of that learned gentleman on the question; He (but under some doubt) is in favor of the position contended for by the town of Simcoe, but admits that his partner, Dr. McMichael, entertains the opposite view, and states that the Council of York had also adopted that construction of the statute; that is, that the County Council may treat the capitalized value as *alterable*, instead of being bound to take the assessed value for the purpose of capitalization.

The 71st section of the Assessment Law of 1869 provides that the Council "may for the *purpose* of *County rates* increase or decrease the *aggregate* valuations, and adding or deducting so much per centum as may in their opinion be necessary to produce a just relation between all the valuations of real and personal estate in the county"

Then sub-section 2 of section 71 provides that, "In *equalizing* the rolls of Towns and Villages, the County Council *shall* take the interest of the amount returned on the rolls at six per centum, *such capitalization shall be the aggregate valuation* for such Towns and Villages for the *purposes* mentioned in the preceding section." The difficulty arises in determining what the purposes in the preceding section are. For the purpose of County rates—the increase or decrease is to be made by section 71; if this is the only purpose referred to in sub-section 2, then the capitalized value cannot be altered; but if this capitalized value is the aggregate valuation for the *purpose of ascertaining* by comparison, whether it is a just valuation with respect to other municipalities, then of course this aggregate may be increased or decreased in the discretion of the County Council.

I can find no decisions upon this point, and must therefore rely entirely upon my own view of the statute And after carefully considering it, I am of opinion that the contention of the town of Simcoe is correct, and that the County Council did not adopt the correct method in equalizing the roll of Simcoe. By reading section 71 and sub-section 2 thereof together, I can come to no other conclusion but that the County Council should, in equalizing the roll of Simcoe, have taken the interest at six per centum on the amount returned on the Roll, and capitalized the same at ten per centum. I think that the statute fixes such last-mentioned capitalization as the aggregate valuation for the town, and that the County Council have no power to change it. It may, of course, be argued that this decision will enable assessors in towns and villages, by a low valuation, to give such Towns and Villages an undue advantage over Township Municipalities, but although I admit this, and see a necessity for further legislation upon this point, I am still of the opinion that my decision is in accordance with the true rendering of the Statute. I am also of opinion that the statute applies to the assessment for the present year, and that therefore the Town of Simcoe should only be equalized for County purposes for this year, on the sum of $303,000 instead of $360,000, and I therefore allow the appeal of the Town of Simcoe, and equalize their aggregate assessment for County purposes at the said sum of $303,000: this leaves the total aggregate equalization of the County at the sum of $57,000 less, and it devolves upon *me*, according to the provisions of the statute, to divide and add this sum to, or among, the several Townships of the County, or to some of them. In the absence of any evidence produced before me, and in the absence of any action of the County Council, it appears to me that my proper course is to divide and add the said sum of $57,000 pro rata, according to their previous equalization by the County Council, among the several Townships of the said County, thus:—

Townships.	Equalization by County Council.	Added by Judge.	Total.
Townsend	$1,140,000	$13,500	$1,153,500
Windham	735,000	8,800	743,800
Middleton	360,000	4,400	364,400
Houghton	285,000	3,300	288,300
Walsingham	760,000	9,000	769,000
Charlotteville	700,000	8,300	708,300
Woodhouse	825,000	9,700	834,700
Town of Simcoe say $360,000	360,000	.....	303,000
Am't ded'ct'd by Judge .. 57,000	$5,165,000	$57,000	$5,165,000
$303,000			

which I decide as the aggregate valuations of the said Town of Simcoe and of the said Townships of the said County of Norfolk for the present year for County purposes.

ENGLISH REPORTS.

CHANCERY.

Booth v. Curtis.

Goodwill an incident of the premises, and not personal to the trader.

[V. C. S., 17 W. R. 393]

Goodwill is sometimes, but incorrectly, viewed as something of a personal nature, appertaining to the person who carries on the business, and not to the premises where the business is carried on. So far as it consists in the connection to which the departing trader is able to introduce or recommend his successor, the former view is correct; but goodwill, properly speaking, is an incident of the premises, and inseparable from them, it being definable as the probability that customers who have before resorted to the shop will do so again, and presupposes the continued existence of the shop, so that by the removal of the shop the goodwill properly so called, is at an end. Thus, in the recent case of *King* v. *The Midland Railway Company*, 17 W. R. 113, the Vice-Chancellor Giffard held the mortgagee of a shop entitled to the price paid for the goodwill of the business where the shop had been sold to the railway company, on the ground that the mortgage included it as an incident of the premises; and in the case before us, where the lease of a freehold public house had been sold and a premium realised, the third of such premium was claimed by the widow of the intestate owner, as being in fact the consideration for the goodwill, and, therefore, personal estate. But the Vice-Chancellor Stuart held that the goodwill could not be separated from the fee simple, and was in other words an incident of it.

Morton v. Woods.

Mortgage—Landlord and tenant—Tenancy at Will.

[Ex. Ch., 17 W. R. 414.]

Two points of considerable importance were decided in this case. The plaintiffs having already mortgaged their land once, mortgaged it again to the defendants. The mortgage deed recited the fact of the first mortgage, and also provided that the plaintiffs were to become tenants to the defendants, at a specified rent for ten years, but that the defendants might at any time re-enter and determine the lease. This deed was executed by the plaintiffs, the mortgagors, but not by the defendants, the mortgagees, but the plaintiffs remained in possession. Subsequently, before any rent had been paid, the defendants distrained upon the plaintiffs for the agreed rent, and the plaintiffs raised the question whether there was any tenancy at all between the parties.

They contended that there was no tenancy, first, because the defendants had no legal estate at all in fact, or, as this appeared on the face of the deed by estoppel either. Secondly, that as the intention of the deed was to create a term of ten years, and, as this had not been carried out in consequence of the non-execution of the deed by the plaintiffs and as no rent had been paid there was nothing to shew that any tenancy at all had been created

The doctrine of estoppel by deed, viz, that "no man shall be allowed to dispute his own solemn deed" (*Goditite* v. *Bailey*, Cowp. 601), is well known, and if a lessor purport to grant a lease, he is estopped from affirming as against his tenant that he had no legal estate to grant. There are several cases, however, which are often cited to prove that here is no estoppel when the real facts appear on the face of the deed, and in *Morton* v. *Woods*, reliance was placed on those cases as showing that the plaintiffs were not estopped from saying that there was no tenancy, as there was no legal estate in the plaintiffs out of which a tenancy could have been created, and as this appeared on the face of the mortgage deed. On this point judgment was given for the defendants, following *Jolly* v *Arbuthnot*, 7 W. R. 127, on the ground that there was an estoppel, and that the plaintiff, therefore, could not deny on this ground that they were tenants to the defendants.

The Court decided also in favour of the defendants that there was a tenancy which entitled them to distrain for the rent reserved As no deed had been executed creating a term of ten years, it was clear that under 29 Car. 2, c 3 and 8 & 9 Vic. c. 106, no such term existed, but the court were of opinion that there was a tenancy at will and at the amount of rent mentioned in the deed.

The decision of this latter point is not based upon any general proposition of law, that a tenancy at will is created at the agreed rent wherever there is an agreement for a tenancy for a certain time at a fixed rent and entry is made, but no actual tenancy is created on the agreed term for want of a deed under 8 & 9 Vic. c. 106. Such an inference from the judgment is expressly guarded against. The court say, "It is contended that as the parties intended to grant a lease for ten years, it is contrary to that intention to hold that an estate at will was created. That might, perhaps, be so in an ordinary case of a mere lease for years between landlord and tenant, but this instrument is a mortgage, and these further provisions which relate to the tenancy are all meant as a further security for the repayment of the interest, and the intention of the parties must be gathered from the whole instrument."

Although the application of this decision is thus restricted it will often be quoted for a tenancy between mortgagor and mortgagee is often created by a mortgage deed. It is convenient for both parties, as it gives the mortgagor a right to the legal possession of the land as long as he pays the interest, and it also gives the mortgagee an additional security for the recovery of the interest by distress. *Morton* v. *Woods* will also be often cited on the other branch of the decision, as it adds the authority of a judgment of the court of Exchequer Chamber to the principle laid down in the Court of Chancery in *Jolly* v. *Arbuthnot*.

Lloyd v. Lloyd.

Will—Construction—"Property"—Real Estate.

A testator specifically devised his real estate, and devised and bequeathed all his other property to his brother and nephew upon trust, to continue the same in its then state of investment, or to call in and invest the same in Government or real securities, and apply the income of his residuary estate as therein mentioned.

The testator became entitled to real estate other than that specifically devised after the date of his will.

Held, that such real estate passed by the devise of all his other property.

The court relied chiefly on the absence of the words "*executors and administrators*" in the gift to the trustees, and the use of the words "*devise and bequeath*" and "*income of residuary estate.*"

[M..R. 17 W. R. 702]

Edward Lloyd, by his will dated in January, 1863, devised his house and lands in the parish of Naburn to his wife for life, and at her decease to his eldest daughter, Georgina, her heirs and assigns, or in the event of her dying before her mother without issue, to his second daughter Edith, her heirs and assigns; and bequeathed certain personal effects to his wife, and then proceeded thus: "I devise and bequeath all my other property whatsoever and wheresoever, to my brother the Reverend Yarburgh Gamaliel Lloyd, and my nephew Yarburgh George Lloyd upon trust, to continue the same in the investments on which it shall be standing at the time of my decease, or at their discretion to call in the same and invest it in their names on Government or real securities, or debentures of railways and municipal corporations, and to apply the same in manner following:—To set apart such a portion of the said residue, as with the sum of £300 a year settled on my said wife, will amount to one half of the total income arising from my residuary estate, and the said settled property united and to pay the interest of such sum to her during her natural life, and I bequeath the income of the remainder of my said residuary estate to my said two daughters, whom I commit to the care of their mother as their sole guardian. And I direct that my trustees shall pay to my said wife, and after her decease shall apply for their maintenance and education such part of their income as they shall think proper until they attain respectively the age of twenty-one years, or marry with their mother's consent, and that on respectively attaining that age or marrying as aforesaid, the said remaining trust fund shall be equally divided between them, and the sum reserved as aforesaid for their mother's life shall be divided in the same manner at her decease. Should I leave any other children, they shall take equal shares with their sisters in the furniture and property bequeathed to them."

The testator at the date of his will had no real estate, except the house and lands specifically bequeathed. Between the date of his will and his death, however, he became entitled to real estate of considerable extent and value.

On the death of the testator, his daughters, as his co-heiresses-at-law, claimed to be entitled to the residuary real estate, on the ground that he died intestate as to it, and this suit was accordingly instituted by them to obtain the opinion of the court as to the construction of the will.

Sir R. Baggally, Q.C., and *Brodrick*, for the plaintiffs, submitted that the residuary real estate did not pass by the gift of all his other property, the terms in which the limitations as to it were declared being inconsistent with the testator having meant to include real estate: *Coard* v. *Holderness*, 3 W. R. 311, 20 Beav. 147.

Jessel, Q. C., and *Babington* for the testator's widow and executors.—We contend that the residuary real estate did pass. *Coard* v. *Holderness* goes very far. *Stokes* v *Salomons*, 9 Ha. 75, contains almost every element in this case. The directions which are applicable only to personal estate, ought to be construed as referring only to such portions of the residuary estate as may consist of personalty, to which such directions may be applicable. As a general rule the residuary devise of "property" does pass real estate, especially when, as here, the testator has just made a specific devise of real estate, and may therefore be supposed to have had it in his mind: *Saumarez* v. *Saumarez*, 4 My. & Cr. 331; *Re Greenwich Hospital Improvement Act*, 20 Beav. 458

Sir R. Baggallay in reply.

Lord Romilly, M.R.—I think that the residuary gift here does pass the real estate. The testator begins by giving real estate specifically, then he devises and bequeaths all his other property whatsoever and wheresoever to trustees. It is true he does not devise it to them and their heirs, but then on the other hand he give it to them *simpliciter*, and does not use the words executors and administrators, which weighed with me in deciding *Coard* v. *Holderness*. And then he speaks of the income arising from his residuary "estate." I think, therefore, that I must hold that the real estate does pass.

Craven v. Smith.

Costs—Slander—Damages under £10—30 & 31 Vict. c. 140 s. 5—Record before the Court.

The fifth section of 30 & 31 Vic. c. 146, which enacts "that if in any action commenced after the passing of the Act in any of the superior courts the plaintiff shall recover a sum not exceeding ten pounds, if the action be founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at Chambers shall by rule or order allow such costs," applies to all actions, and the fact of the county court having concurrent jurisdiction in an action affords a *prima facie* presumption for granting a certificate for costs in such action.

The court will make use of its own records to inform itself of a matter which may not have been brought formally before it on affidavit.

[Ex. 17 W. R. 710.]

This was an action of slander, in which a verdict went by default for the plaintiff.

A writ of enquiry was executed on the 7th December, 1868, before Mr. Under-Sheriff Burchell, in the Sheriff's Court, Red Lion Square, and damages to the amount of £5 were awarded by the jury.

The Under-Sheriff was asked to certify for costs, but, under the belief that he had no such power, he refused, but expressed his opinion that, as a matter of right, the plaintiff was well entitled to costs, using these words, "I would certify if I could."

Application was made to Mr. Justice Blackburn at Chambers, to allow the plaintiff's costs, and on the learned judge's refusal, a rule to the following effect was obtained by *Anderson*: "that the defendant show cause why the plaintiff should

not be entitled to his costs in this action, and why the master should not be at liberty to tax the same"

Against this rule *Francis* now showed cause.—In the first place, there are no sufficient affidavits before the court to inform it of the nature of this action. There is nothing to show that it is not an action which might have been tried in a county court. It has been before an officer of this court, and all that was laid before him ought to have been brought here on affidavit In the second place, if the case of *Gray* v. *West*, 17 W. R. 479, L. R. 4 Q B. 175, is pressed on me, I contend that that case has not decided that in all actions of slander a plaintiff is entitled to costs. The effect of it only comes to this, that the power of certifying for costs is confined to cases where the county court has concurrent jurisdiction. In *Gray* v. *West* the plaintiff had recovered much beyond what would have entitled her to costs in a superior court, under the general law applicable to actions of slander, but here all that is before the court is a bare statement that the jury awarded £5, and that the judge said "I would certify if I had the power." Section 34 of 28 & 24 Vic. c. 126, has been repealed, but section 5 of the present County Court Act carries out the intention more fully. The section applies to actions of slander, and the Legislature has there fixed £10 as a standard under which damages are not to carry costs, with a view of discountenancing trivial and frivolous actions.

Anderson in support of the rule, was not called upon by the court.

Kelly C B.—This rule must be made absolute. The first question which we have to determine is, whether we are at liberty to look at the record in order to judge of the nature of this action. The reasons suggested against our doing this are, firstly, that no affidavits on this point are before the Court; secondly, that the nature of the action is not alluded to in the rule. Now, I think that the Court is at all times at liberty to look at its own record. Our practice in making rules absolute for new trials, without requiring the record to be brought before us by affidavit, is analogous with and supports this view.

The second question is, whether we are called upon to look at what occurred before our brother Blackburn at Chambers, when he refused to make an order in this matter, and it is said that in consequence of his refusal the matter now comes before us as an appeal from his judgment. I am of opinion that we cannot without affidavits look to that which took place before the learned judge, and we must, therefore, in the present case, disregard entirely all that passed before him, and act in this matter as if no previous application had been made.

The third question we have to solve is, whether we are to allow the plaintiff in this action his costs. Now this was an action of slander as we learn from the record, and a very grave charge of felony was deliberately made by the defendant against the plaintiff The jury by finding a substatial verdict of £5 marked the strong view they took of the case, and we have also the opinion of the Under-Sheriff, that the plaintiff was well entitled to costs, but he did not believe he had the power of granting them. Now I am of opinion that the Under-Sheriff clearly had the power of certifying for the plaintiff's costs in this action although he supposed that he had not. The words "any action" used in the beginning of 30 & 31 Vic. c. 142, s. 5, certainly include an action of slander, an action which cannot be brought except in one of the superior courts, and for the trial of which a plaintiff must necessarily come here if he wishes to vindicate any aspersion on his character. I am, therefore, of opinion that this was a very proper case for a certificate of costs being granted by the judge who tried the case, but I go further and say that when any action such as the preeent is tried, an action which, if tried at all, must be tried in one of the superior courts, there is an imperative duty on the judge to certify unless some good cause to the contrary be shewn. There is always a chance that the action may be of a nature that ought not to be tried at all, and in such case there would properly be a field for the exercise of the discretion of the judge.

Bramwell, B.—I am of the same opinion. This was an action for slander, and we have the slander stated. It is very forcible, and imputes a felony to the plaintiff. Section 5 includes an action of slander, and consequently where damages under £10 are awarded, the plaintiff gets no costs unless the judge who tries the case certifies for them, or they are allowed by the Court or a judge at Chambers. If this had been a primary application to us I should not have hesitated at all; and when I consider how bad the slander was, and that the jury awarded substantial damages I must come to the conclusion that the action was a right and proper one to bring; and from this it follows, as a logical consequence, that it is right and proper that the plaintiff should have his costs. Mr. Francis has ingeniously argued that by section 5 the Legislature meant to set a standard of £10, under which damages were not to carry costs, with a view of discountenancing trumpery actions, but I cannot agree with him. The meaning of the section is, that where the plaintiff gets less than £10 he must satisfy the judge that he has good reason for coming into a superior court where the County Court has jurisdiction; but where there is no concurrent jurisdiction — where an action, if brought at all, must be brought in a superior court, there is, I think, at once a *primâ facie* case in favor of the certificate being granted, and the onus lies on the opposite party to disprove it. It is said that in reviewing this matter after it has been before my brother Blackburn, we are exercising an appellate jurisdiction, and that we ought, therefore, to have before us all the evidence that was then produced at Chambers before we can overrule his decision. Now I think we have quite as much as he had on which to come to a decision, and we have moreover, the reason of his decision, and that was, "that he never did grant such certificates." As to *Gray* v. *West*, that case is not only an authority for the present case, but it is even more than is wanted by the present plaintiff, for the judgment in that case seems to go so far as to say that a judge ought to certify in *all* cases of slander; I do not go so far as that, but I think that in this case as real damages have been awarded, as the action could not have been brought except in a superior court, and as it was one which it was quite pro-

per to bring, we ought certainly to make this rule absolute.

Pigott, B.—I am of the same opinion. An action of slander is clearly within the meaning of section 5. Now comes the question, have we materials before us on which to form an opinion as to the nature of this action. I think we have, and they are furnished to us by the record. Both parties are at liberty to examine the record, so there can therefore be no surprise on either side. I cannot imagine that any injustice or inconvenience can arise from our making this use of it. And now having materials so furnished to us, we come to the affidavits. Without blindly following the Under-Sheriff, but looking at the slander as it is stated I concur in his opinion, and think that he was right when he said "that he would certify if he could." When my brother Blackburn refused to grant an order in this matter, all that I think he meant to say was, that before he granted such an order he would require strong proof of the reasonableness of bringing an action of this nature.

Cleasby, B.—It must not be supposed that we are now deciding that the Court takes judicial notice of the record as of an Act of Parliament.

I find that in a rule in arrest of judgment, a rule grounded entirely on the record before the Court, the practice in the Queen's Bench and in this court differs from that pursued in the Common Pleas. The rule as there drawn up is, on "reading the record of *nisi prius* between the parties;" here and in the Queen's Bench these words are not used as if the record were constantly before the Court. I will say nothing on the other points, as I agree with the judgments of the Court.

Rule made absolute.

Hudston v. The Midland Railway Company

Railway company—Personal luggage—Carrier.

A took a first-class return ticket by railway from N. to L. and back, subject to the following condition: "Luggage: first-class passengers are allowed 112 *lbs.* . . . of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge." A. on his return journey brought with him on the railway a spring horse," which he had bought for the use of his children. The toy weighed 78*lbs.*, and was an improvement on the old "rocking-horse," being about forty-four inches in length and standing on a flat surface. The company refused to carry this toy unless a sum of 2*s.* 6*d.* was paid. A., under protest, paid the amount, and then brought an action in the county court. The learned judge decided in favour of the company, on the ground that the article in question was not personal luggage.

On appeal to this Court,

Held, that the judgment of the county court judge was right. [Q. B., 17 W. R. 705.]

Appeal from the County Court at Derby.

The appellant sought to recover damages from the respondents in consequence of their refusing to carry a "spring horse" as and for his personal luggage.

On the hearing of the case before the county judge at Derby it was proved that the appellant (who was a stock-broker) on the 10th March, 1868, took a first-class return ticket from Beeston, near Nottingham, to King's-cross, and that he took no luggage with him, but while in London he bought, for the use of his children, a child's toy called a "spring horse," weighing 78 lbs. It was an improvement on the old rocking-horse, being about forty-four inches in length, and standing on a flat surface. On the return journey, however, the respondents refused to allow the appellant to take this toy with him as his personal luggage, and demanded a charge of 2*s.* 6*d.* for its carriage. The appellant objected, but subsequently paid the charge under protest. On the railway ticket so issued and delivered to the appellant there was the following printed condition—"This ticket is issued subject to the regulations and conditions stated in the company's time-tables and bills."

The following were the regulations referred to in the foregoing condition so far as concerned the matter in question:

"Luggage: First-class passengers are allowed 112 lbs., second-class 100 lbs., and government passengers 56 lbs. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge. All excess of luggage above the weight allowed will be charged for according to distance."

Before the learned judge at the County Court the appellant contended that according to the terms of the respondent's contract with him, as set forth on the railway ticket referred to, and in the time-tables and bills published by the respondents, he was entitled as a first-class passenger to take the "spring horse" in question with him, and have the same carried as his personal luggage free of charge, it being under the allowed weight and not within the restriction in the respondent's bills, "of merchandise or other articles carried for hire and profit." The respondents have a fixed tariff for excepted articles, but that tariff does not appear in their acts or public time-tables. The respondents contended that the spring horse did not come within the meaning of the words "personal luggage," inasmuch as it was not for his personal use and convenience as a traveller, but was an article for the carriage of which they were entitled to charge according to their usual custom and that of other specified railway companies.

On the 11th May the learned judge gave judgment for the respondents upon the ground that the horse in question was not such an article as a passenger would usually carry with him, but gave the appellant leave to appeal.

The question for the opinion of the Court is whether under the above circumstances the appellant was entitled to take with him the spring horse in question free of charge, or whether the respondents were entitled to charge for the carriage of the same.

Macnamara, for the appellant.—The question is whether this toy is personal luggage. The Court will construe this regulation against the company and in favour of travellers. It must be taken that the company are cognizant of the habits and wants of travellers. The decided cases on that point show that it is impossible to draw a definite line, but the words personal luggage must be construed with reference to those things that are usually carried by travellers in each particular case; thus, sailors going to a seaport it is submitted may take their bedding, or the cricketer his cricket things, the fisherman his fishing tackle, or the sportsman his gun. The company here have used words of exclusion; they have therefore placed a meaning upon the

words personal luggage—that is, articles which a traveller carries with him, not being merchandise nor for profit, is personal luggage. In *Phelps* v. *The London & North-Western Railway*, 13 W. R. 782, 34 L. J. C. P. 259, where an attorney took with him certain document and bank notes (which were held not to be personal luggage) for use in certain causes in a county court, Chief Justice Erle in his judgment says—"But still the habits of mankind must be considered to be within the cognizance of the railway company, so that anything carried according to usage for personal use would be a matter for which the company would be responsible as luggage of a traveller on a journey." [Lush, J.—No doubt personal luggage means more than what a passenger requires for his own personal use and convenience on a journey; the difficulty is to define what it does include.] A liberal construction, therefore, should be put upon the regulation, and will include different things at different times, according as the wants of travellers vary. For instance, if a family goes to a watering place the toys of the children may be taken as personal luggage. [Hannen, J.—Should you say a four-post bed was personal luggage?] In *Cahill* v. *London and North-Western Railway Company*, 9 W. R. 653, 10 C. B. N. S. 154, the luggage consisted of merchandise; the same observation applies to *Belfast Railway Company* v. *Keys*, 9 W. R. 793, 9 Ho. of Lds. 556. He also cites, Angell on Carriers, 3rd ed. s. 115; Story on Bailments, 6th ed. s. 499.

A. Wills (*J. C. Carter* with him), for the respondents.—The court must look at the nature of the thing carried. This is in the nature of furniture; if this may be carried as personal luggage why may not a table, or chair, or bed. [Lush, J.—What do you say to a bath?] Perhaps it might; but take the case of a person daily travelling to town on business; in this way he might furnish his house. He also relied on the cases cited on the other side, and the note to Story on Bailments, 6th ed. s. 499. This is not an article that is usually carried by travellers under ordinary circumstances; it was not for the traveller's personal use or convenience.

Macnamara in reply.—This is not furniture, but a child's toy. It is personal luggage if carried for the traveller's own use or for his family. The size of the article is immaterial, as it is within the weight allowed.

Lush, J.—I am of opinion that the judgment of the county court judge must be affirmed. It must be taken that the company intended by their regulations to express the same thing as was expressed by their own Act of Parliament, although they have used a different phraseology. The regulation was that passengers should carry a certain weight of luggage, not being merchandise or other articles carried for hire or profit free of charge. Now it has been contended that the articles excluded by this rule are only those articles which are carried for hire or profit, and that if a thing is ordinarily carried by passengers, within the proper weight, such an article is personal luggage. I admit that it is extremely difficult to frame a definition which shall embrace all that is included within these words. I cannot say that I am satisfied with any definition yet given, but at all events the interpretation put on these words by the respondents is too narrow—namely, that it embraces only those things that the traveller takes for his own personal use and convenience while travelling. I am not inclined to put so narrow a limit to the words. The words "ordinary luggage" mean something more than what a passenger wants for his own personal use and convenience. It describes a class of articles, and has reference to a description ordinarily and usually carried by passengers as their luggage. Taking this to be the meaning of the regulation it is intended to have regard to those things which are usually carried by them. The article in question goes beyond that limit. This was an article called a child's toy. It was a spring horse substituted for an improved rocking horse, 78 lbs. in weight and 44 inches in length, and cannot come within the meaning of a toy, which is something to be carried in the hand; nor that of personal luggage in the sense I have mentioned, namely, that description of luggage which passengers usually carry.

Hannen, J., concurred.

Hayes, J.—I quite agree. I think the interpretation to be placed on these words must vary according as the habits and wants of travellers change. Pistols in America may be the ordinary luggage of travellers there, but at the present time they are not so here. It is said that this is a toy for a child, but it seems to me to be more like a horse; instead of the child carrying it, the horse is to carry the child. It would require a special carriage for it, a horse box in fact. The weight is quite exceptional, and without laying down any definition it is sufficient to say that this is within it.

Judgment for respondents.

Young v. Austin.

Bill of exchange—Co-temporaneous agreement in writing—Demurrer.

To an action on a bill of exchange by the drawer against the acceptor the defendant pleaded that he accepted the bill upon a certain condition—viz., that the plaintiff should renew the bill, if the defendant did not receive payment of certain moneys from C. before the bill became due.

Held, a good plea, and that it was not necessary to state in the plea that the condition was in writing.

[C. P. 17 W. R. 706.]

The declaration was on a bill of exchange by the drawer, against the acceptor, payable to drawer two months after date.

Plea—The defendant says that he accepted the said bill upon a certain condition agreed upon between the plaintiff and defendant as part of the consideration for the said bill, viz., that the plaintiff should renew the said bill for a further term of two months beyond the date at which the said bill was payable, if, when the said bill became due, the defendant should not have received payment from the Corporation of the City of London of a certain sum of money then due to him as compensation, and the defendant accepted and delivered to the plaintiff, and the plaintiff received and always held the said bill upon and subject to the said condition, and at the time when the said bill became due, and at the time when this action was brought, the defendant had not received the said money and compensation, of all which the plaintiff had notice; and the defendant did all things necessary to entitle

him to have the said bill renewed, according to the said agreement, yet the plaintiff did not renew the said bill; but wholly refused so to do, and commenced the action contrary to the terms of the said agreement and condition. Demurrer, and joinder in demurrer.

Finlay, in support of the demurrer.—As the contemporaneous agreement is not stated to be in writing the plea is bad on general demurrer: *Flight* v. *Gray*, 3 C. B. N. S. 320; *Kearns* v. *Durrell*, 6 C. B. 596; *Gillett* v. *Whitmarsh*, 8 Q. B. 966; *Abbott* v. *Hendricks*, 1 M. & G. 791; *Adams* v. *Wordley*, 1 M. & W. 374; *Forquet* v. *Moore*, 22 L. J. Ex. 35.

MacKellar, in support of the plea.—The bill was given as an escrow: Byles on Bills, 9th ed. p. 96; *Pym* v. *Campbell*, 4 W. R. 528, 6 El. & B. 370; *Wallis* v. *Littell*, 10 W. R. 192; 2 Taylor on Evidence, ed. 1868, ss. 980, 1058, 1038; *Lindley* v. *Lacey*, 13 W. R. 80; *Bell* v. *Lord Ingestre*, 19 L. J. Q. B. 71; Storey on Bills of Ex. edit. par. 239, p. 242; *Foster* v. *Jolley*, 1 C. M. & R. 703. It is not necessary to state that the agreement was in writing: Byles on Bills, 9th ed. p. 97; *Salmon* v. *Webb*, 3 Ho. of Lds. 510; *The Thames Haven Dock & Railway Company* v. *Brymer*, 5 Ex. 696.

Finlay, in reply, cited 1 Wms. Saund. 276, n. 1 & 2, 211 B. n. i; Stephens on Pleading, 401, 4th ed; *Anon.* 1 Salk. 519; Bullen on Pleading, 283; *Case* v. *Barber*, Sir T. Raymond's Rep. 590; *Taylor* v. *Hillary*, 1 Gale Rep. 22; *Villiere* v. *Hanley*, 2 Wilson, 49.

Bovill, C. J.—It has been stated that the bill must be treated as an escrow. There is nothing to show in the pleading that it ever was accepted as an escrow. It appears that there was a bill, which was accepted by the defendant, and that on the bill there was an absolute agreement to pay in two months. But at the time the bill was accepted there was an agreement entered into between the plaintiff and the defendant, that the plaintiff should renew the bill at the expiration of the two months for a further term of two months if the defendant should not receive payment of a certain sum of money from a third party. This is an action between immediate parties. There is no doubt a defendant may prove in such an action that there has been no consideration at all, or a total failure of consideration. There is no question of that sort here. The plea states nothing in that nature—it assumes that there has been a good consideration, but that the note was not to be paid on account of another agreement. The defendant is not at liberty to set up a contradictory parol agreement opposed to the express written contract stated in the bill; but it is clear that he is at liberty to set up another written agreement, in which the whole rights and liabilities of the parties are stated. That being so, the question arises, whether in a plea it is necessary to state that such an agreement was in writing. If the agreement is by parol, it is bad, and if it is written, it is good. It is stated in Byles on Bills, 9th ed. p. 97, "though it be necessary that the agreement affecting the operation of the bill should be in writing, it is not necessary to aver that it is in writing," and the rule is there correctly laid down in the case of *Adams* v. *Wordley*, 1 M. & W. 374. There the objection was taken by special demurrer, but it was stated in argument that although that was the case, yet if there is a special demurrer any point could be taken advantage of—any point that could be raised by general demurrer. Special demurrers are done away with, and therefore the case only proves that such an objection was good on special demurrer. The case of *The Thames Haven Dock* v. *Brymer* was also cited. This was an action of covenant upon a deed against the assignees of B. by which B. agreed to sell, and the company to purchase, certain lands. In the declaration there was the averment that B. and his assignees were ready to have deduced a good title, but that the company discharged B. and the plaintiffs from so doing, and from the execution of a conveyance. It was contended on behalf of the company that this averment was insufficient, inasmuch as it is not shown that the discharge was by deed. This objection is not pointed out as a special cause of demurrer. It is conceded that the discharge would not be good unless it were by deed; but it is said that if the averment had been traversed it could not be proved otherwise than by production and proof of a deed, and so he contended that on general demurrer it must be taken to be by deed, the only way in which it can be good: and so it was decided in the Court of Exchequer. We think that the Court of Exchequer was right in holding the averment sufficient upon general demurrer. It is the same point in this case, and the rule laid down by Byles, J., is correct. It was then argued that *Forquet* v. *Moore*, 22 L. J. Ex. 35, required that there should be an averment that the agreement was in writing: if not the plea was bad on general demurrer. This case was decided before the passing of the Common Law Procedure Act, 1852. Baron Parke only said that such a plea was demurrable, for not alleging the agreement to have been in writing; but it is questionable whether it might not have been good after verdict. He did not go on to say that it was bad on general demurrer, which the plaintiff here is required to show in order to make us decide that the plea is bad. There is no hardship done to the other side in deciding that it is not necessary to make the averment, for if at the trial it turns out that the agreement was not in writing he would not be able to give it in evidence of it.

Keating, J.—The judgment must be for the defendant. The only point in the case is whether the want of the statement in the plea, that the agreement was in writing, makes the plea bad. The omission does not make the plea bad on general demurrer.

Brett, J.,—If the agreement stated in the plea was in writing, and made at the same time as the bill, it formed part of the same contract, and is therefore binding on the parties. The more proper course would have been to have stated in the plea that the agreement was in writing. It is not, however, a good objection to the plea now that special demurrers are done away with. Mr. Finlay omitted to show that such a plea had ever been held bad on general demurrer. Now that special demurrers are done

away, and as we are not bound to say that such an objection is good on general demurrer, we will not do so.

Judgment for the defendant.

Potter v. Rankin.

Commission to take Evidence—Cost of Professional Assistance

[L. J. Nov. 23, 1868.]

This was a rule calling on the plaintiff to show cause why the master's taxation should not be reviewed, because he had, in taxing the costs as respects a commission to take evidence at Calcutta, refused to allow the expenses (on the defendant's side) of legal assistance to the Commissioners, who had employed attorneys to put the verbal questions for the plaintiff and the defendant.

The Court held that there was no absolute right to have such assistance, that it was a matter of discretion whether it was proper to allow it, that the master had exercised his discretion, and that as there was nothing to induce the Court to take a contrary view they would not interfere.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Baum & Co. v. Dilworth.

(*Pittsburgh Legal Journal.*)

Any alteration of a specialty by parole, makes the whole contract parole.

Where an action of assumpsit lies and the amount which the plaintiff seeks to recover appears by a writing under seal, such writing is admissible.

The question of the extension of a contract, is one of fact for the jury.

Error to the Court of Common Pleas of Allegheny County.

Lucas for plaintiff in error.

Melton contra.

Sharswood, J.—The first error assigned is to the admission in evidence of the agreement of February 27, 1862. This agreement was under seal, and purported to be executed by one of the members of a firm. The action was assumpsit, and both in the original and the amended declaration the agreement in question was set out, not as the cause of action, but as inducement to a parole promise by the defendants to the plaintiff. Any alteration of a specialty by parole makes the whole contract parole; covenant cannot be maintained upon it; the terms of the speciality are in effect adopted, and become a part of the parole agreement: *Vicary* v. *Moore*, 2 Watts 451; *Vaughn* v. *Ferris*, 2 W. & S. 46. It follows *ex necessitat* that the agreement under seal was admissible, to be followed, as it was, by evidence of an extension or alteration by parole: *Charles* v. *Scott*, 1 S & R. 294. Where an action of assumpsit lies, and the amount which the plaintiff seeks to recover appears by a writing under seal, said writing is admissible: *Mehaffy* v. *Share*, 2 Penna Rep. 361. If there was a new contract by parole within the scope of the partnership, which was a subsequent and distinct question in the cause, it mattered not whether the agreement as originally executed bound the firm or not.

The second error assigned is in admitting evidence of the price of timber in April, 1863. This was objected to, because the breach of the agreement occured, if at all, as early as June 1, 1862; and that should therefore be the time at which the difference between the contract and the market price should be ascertained. But Graham Scott had testified that "during the spring of 1863, about April 1, Baum called at Dilworth's office. Plaintiff asked him what about the six rafts to fill out the contract. He stated he had them coming down, and would deliver them. Dilworth was satisfied with that. These six rafts were to be paid for, same as original contract, in four months from delivery." This certainly was evidence for the jury that there had been a parole alteration and extension of the original agreement, which was by its terms to be performed June 1, 1862. The mutual promises of the parties, the one to deliver and the other to accept and pay, were ample consideration to sustain it as a new contract. The learned judge would, therefore, have erred if he had ru'ed out this evidence.

The third error assigned is to the answer to the defendant's first point, "that the contract given in evidence in this case being executed by Baum alone, is not the covenant of John Carrier." It is unnecessary to consider whether the answer is right, as the point itself was immaterial and might have been declined. The answer did the plaintiff in error no injury. The learned judge himself, after expressing his opinion on the point presented, remarked that the suit was not on the contract under seal, but on a separate and distinct agreement by word of mouth by Baum, one of the firm, to deliver at a subsequent day the rafts which had not been delivered under the original contract, at the price therein agreed on. Whether that contract was bin ing as within the scope of the partnership business, was another and different question.

Neither can the fourth assignment of error be sustained. The contract declared on was not under seal, but parole, though it referred to and incorporated with it a sealed writing. The action of assumpsit could therefore be maintained.

The fifth assignment is to the instruction that the jury must find from the evidence when the time limited in the contract for delivery of the timber expired. This may be considered in connection with the sixth assignment, that there was error in submitting to the jury whether there had been an extension of the contract, without evidence. I have already referred to the testimony of Graham Scott, and to one of the objections made to this testimony that it showed no consideration. As to the remaining exception taken to it, that it did not refer to the timber included in the written agreement, but to another lot, that surely was a pure question of fact to be responded to by the jurors, and not by the court.

The seventh error is disposed of by what has already been said on the second, and the eighth was to the refusal of the court to answer a point as to the sufficiency of the declaration, which had clearly nothing to do with the trial of the issue; *Halderman* v. *Martin*, 10 Barr 369.

Judgment affirmed.

Fawcett v. Bigley.

(*Pittsburgh Legal Journal.*)

An agent's narrative of a past occurrence cannot be received as proof against the principal, of the existence of such occurrence.

Mellon for plaintiff in error.

Acheson contra.

Error to the District Court of Allegheny County.

Agnew, J.—The offers to prove the declaration of John West, made after the accident, that it was caused by the omission of Bigley to furnish proper lines and assistance to secure the boats, was properly rejected. Clearly they were but the statements by West of a past transaction, and not declarations made in the course of Bigley's business, contemporaneous with and qualifying or explaining the acts in which he was engaged as the agent of Bigley. They came clearly within the rule that the narrative of an agent of a past occurrence cannot be received as proof, against the principal, of the existence of such occurrence: 1 Green's Ev., sec. 110; *Patton* v. *Minsinger*, 1 Casey 393; *Hann y* v. *Stewart*, 6 Watts 487.

If West knew the facts, he could be called to prove them. But after the accident he stood in antagonism to his employer. The boats were in his charge, and if they were lost by his negligence he might be held responsible by Bigley for the loss he had caused. It was now his interest to lay the fault at Bigley's door for not furnishing proper lines and help.

The error assigned to the rejection of the alleged rebutting evidence is not sustained. The plaintiff in error has furnished neither the declaration showing the nature of the alleged negligence, nor the evidence given by him under it. We are not in a situation to judge whether the evidence offered as rebutting was really so, or was only cumulative to that given in chief. We must therefore take the statement of the judge in the bill of exception as true that the plaintiff had gone fully into this part of his case in chief, and had called and examined this witness twice as well as many others, and that the evidence offered was not rebutting.

Judgment affirmed.

SUPREME COURT OF WISCONSIN.

Emma Schneider v the Provident Life Insurance Co.

An "accident" within the meaning of a policy of insurance means an event which happens from some external violence or *vis major*, and which is unexpected, because it is from an unknown cause, or is an unusual result of a known cause.

Negligence of the person injured does not prevent it from being an accident.

Therefore in an action on a policy of insurance against accident, the negligence of the insured is no defence.

A policy of insurance against accident contained a clause against liability for injury resulting from the assured "wilfully and wantonly exposing himself to any unnecessary danger." The assured attempted to get on a train of cars while in slow motion, and fell and was killed.

Held, that the negligence was not wilful or wanton, and the company were liable.

This was an action on a policy, by which Bruno Schneider was insured against injury or death by accident. The policy contained a clause that the company should not be liable for any injury happening to the assured by reason of his "wilfully and wantonly exposing himself to any unnecessary danger or peril."

The assured attempted to get on a train of cars after it had started, but was moving slowly, but fell and was killed. On the trial the plaintiff was nonsuited, on the ground that the evidence showed the case to be within the exception as to wilful exposure to danger.

The opinion of the court was delivered by

Paine, J.—The position most strongly urged by the respondent's counsel in this court, was that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident" which has never been established either in law or in common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, when it can readily be seen afterwards that a little greater care on their part would have prevented it. Yet such injuries having been unexpected and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, "Accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the assured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause; or is an unusual effect of a known cause, and therefore not expected."

An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene, a hundred times without injury. The next time the gun is discharged, or the lamp explodes. The result was unusual, and therefore unexpected. So there are undoubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore when an injury occurs it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald* v *The Railway Passengers' Assurance Co.*, 26 E. Law & Eq. 432, not as a direct authority, but as containing an implication that

the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident; that was a railway accident, and the only question was, whether the injury was occasioned by an accident of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence if it had existed.

The general question as to what constituted an accident was considered in two subsequent cases in England. The first was *Sinclair* v. *The Maritime Passengers' Assurance Co.*, 3 El. & El. 478 (E. C. L. R. vol. 107), in which the question was, whether a sunstroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, &c., and while admitting the difficulty of giving a definition to the term accident which would be of universal application, they say they may safely assume "that some violence, casualty, or *vis major* is necessarily involved." There could be no question in this case that all these were involved.

In the subsequent case of *Trew* v. *Railway Passengers' Assurance Co.*, 6 Hurl. & Nor. 839, the question was, whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held that if the death was occasioned by drowning, it was accidental within the meaning of the policy. And in answer to the argument of counsel they said: "If a man fell from a housetop, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases."

There was no suggestion that there was any question to be made as to the negligence of the deceased, and yet the court said: "We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of the policy, whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

Now either of these facts would seem to raise as strong an inference of negligence as an attempt to get upon cars in slow motion. Yet the court said that although the drowning was occasioned by either one of them, it would have been a death within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark except upon the assumption that the question, whether the injured party was guilty of negligence contributing to the accident, does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and if so, whether it was within any of the exceptions.

This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence falling short of "wilful and wanton exposure to unnecessary danger" would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

The question therefore remains whether the attempt of the deceased to get upon the train was within this provision, and constituted a "wilful and wanton exposure of himself to unnecessary danger?" I cannot think so. The evidence showed that the train having once been to the platform, had backed so that the cars stood at some little distance from it; while it was waiting there the deceased was walking back and forth on the platform (of the depot). It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, or as fast as a man could walk, he attempted to get on and by some means fell either under or by the side of the cars and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left, would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger within the meaning of the policy.

The judgment is reversed, and a *venire de novo* awarded.—*American Law Register.*

SUPREME COURT OF THE UNITED STATES.

William Ward et al v. Francis L. Smith.

The fact that an instrument is made payable at a bank does not make the bank an agent of payee to receive payment, unless he actually deposits the instrument there, or in some express manner authorizes the bank to act for him.

When an instrument is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency

of the country, or in bills which pass as money at their par value by the common consent of the community.

The doctrine that bank bills are a good tender unless objected to at the time, only applies to current bills which are redeemed at the counter of the bank, and pass at par value in business transactions in the place where offered.

Payment of a check in the bills of a suspended bank, not known to the parties to be suspended, is not a satisfaction.

Where the debtor and the creditor's known agent to receive the money, reside in the same jurisdiction, the fact that the creditor is a citizen of a power at war with the debtor's government, and resident in the hostile state, does not absolve the debtor from his obligation to pay, and if he does not, he is liable for interest.

In error to the Circuit Court of the United States for the District of Maryland

In August 1860, the plaintiff in error, William Ward, purchased of Smith certain property in Virginia, and gave him for the consideration-money the three joint and several bonds of himself and co-defendant, upon which the present action was brought. These bonds, each for a sum exceeding four thousand dollars, bear date of the 22d of that month, payable, with interest, in six, twelve, and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, at Alexandria."

In February 1861 the first bond was deposited at the bank designated for collection. At the time there was endorsed upon it a credit of over five hundred dollars; and it was admitted that subsequently the further sum of twenty-five hundred dollars was received by Smith, and that the amount of certain taxes on the estate purchased, paid by Ward, was to be deducted.

In May 1861, Smith left Alexandria, and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds, which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, Ward deposited with the bank to his credit, at different times between June 1861 and April 1862, various sums in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank endorsed the several sums thus received as credits on the first bond; but he testifies that he made the endorsement without the knowledge or request of the plaintiff. It was not until June 1865 that the plaintiff Smith was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and the defendants of his refnsal. The cashier thereupon erased the indorsements made by him on the bond.

The defendants (plaintiffs in error) claimed that they were entitled to have the amounts thus deposited and endorsed credited to them on the bonds, and allowed as a set-off to the demand of the plaintiff. They made this claim upon these grounds: That by the provision in the bonds, making them payable at the Farmers' Bank, in Alexandria, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted—whether the instruments were or were not deposited with it—the agent of the plaintiff for their collection; and that as such agent it could receive in payment equally with gold and silver the notes of any banks, whether circulating at par or below par, and discharge the obligors.

A. G. Browne and *F. W. Brune*, for plaintiffs in error.

R. J. & J. L. Brent, for defendants in error.

Field, J. [after reciting the facts.—It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank when due to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar, only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorised to receive in its payment depreciated notes of the banks of Virginia. The fact that these notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

In *Ontario Bank* v. *Lightbody*, 13 Wend. 105, it was held that the payment of a check in the bills of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be

considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction of his agent within a reasonable period after it is brought to his knowledge: Story on Prom. Notes, §§ 115, 389; *Graydon* v. *Patterson*, 13 Iowa 256; *Ward* v. *Evans*, 2 Ld. Raym. 930; *Howard* v. *Chapman*, 4 Carr. & Payne 508.

The objection that the bond did not draw interest pending the civil war is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of states in rebellion and citizens of states adhering to the National Government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal, "The rule," says Mr. Justice Washington, in *Conn* v. *Penn*, 1 Peters C. C. R. 496, "can never apply in cases where a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money;" *Denniston* v. *Imbrie*, 4 Wash. C. C. 395. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul* v. *Christie*, 4 Harris & McHenry's Rep. 167.

Here the principal debtor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between Marbury, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor being within the Union lines, could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not in that event an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

Magill v. Magill.

Rules of Court cannot be suffered to become instrumentalities to defeat the rights of suitors.

Where a respondent in her answer to a libel in divorce, through haste and surprise and the rapid movements of libelant, failed to claim an issue to try the facts denied therein, as she should have done, under the 80th rule of the Court of Common Pleas, but within eleven days thereafter she applied to the court for leave to amend her answer in that respect, in view of the fact that the amendment, if allowed, would not have delayed the final result, it should have been granted.

Appeal from the Common Pleas of Allegheny County.

Thompson, C. J.—Rules are indispensable aids in the *routine* business of courts, and to this only they properly apply. Being subject to the authority which gives them existence, they are administered in subordination to the rights and equities of suitors. In other words, they are not to be instrumentalities to defeat those rights; but their provisions are always adhered to when, in any neglect of them, rights have accrued which it would be inequitable or unjust to disturb. Where, however, a failure to comply with their requirements in any given case, is the result of mistake, haste, or surprise, and positive injury is likely to ensue to a party, courts will not adhere to them simply on account of the rule, at the expense of justice and the just rights of parties. Hence amendments to fulfil requirements, are generally allowed, when offered without unreasonable delay, and before much expense and costs have accrued.—*Pittsburgh Legal Journal.*

ORPHAN'S COURT.

Estate of L. Coates Stockton.

(Legal Gazette.)

1. The action of assumpsit for use and occupation is not a common law remedy, but under the Statute, 2 Geo. II. cap. 19, sec. 14, it lies whenever one man holds possession of the real estate of another under an agreement expressed or implied.
2. The action may be sustained by a sheriff's vendee against the tenant in possession at the time of the sale, and the damages will be measured by the value of the use of the land between the time of the acknowledgment of the deed and the removal of the tenant.

In the matter of the Estate of L. Coates Stockton, deceased.

Sur exceptions to Auditor's report.

Opinion by Brewster, J., delivered July 3, 1869.

The deceased was, in his lifetime, tenant of the premises, No. 216 Market Street, under a lease executed by George W. Conrad. There was a mortgage on the property, prior in date to the lease. Suit was brought upon the mortgage, judgment obtained, and the premises sold to George A. Twibill, October 5, 1863. The purchaser obtained his deed from the Sheriff March 7, 1864. Shortly thereafter he served a notice upon the tenant to quit, with which the tenant

complied June 6, 1864. He subsequently died; and upon the settlement of the administrator's account, Mr. Twibill claimed, "for use and occupation of the premises from the date of the sheriff's sale, October 5th, 1863, to the day of the removal, June 6th, 1864." The auditor disallowed the demand, the claimant excepted, and the sole question, therefore, for our consideration is whether a sheriff's vendee, who notifies the tenant to quit, can thereafter claim for the occupation of the land up to the date of the removal?

Ordinarily it would seem to be strange that a man should be permitted to occupy land admitted to be the property of another without making the owner some compensation. It would also appear to be remarkable if the owner of land could not—as can many other parties—waive the tort and sue in assumpsit. It must be conceded that Mr. Twibill could have maintained ejectment and recovered mesne profits. And if so, why should he not be permitted to abandon the fiction of force, and sue upon the implication to pay for what was taken, which would prevail against him who spoiled the freehold of a load of coal or a bushel of apples? It is familiar law, that the tort may be waived and assumpsit brought for the value of goods obtained by fraud. *Hill* v. *Perrott*, 3 Taunt. 273; *Edwards* v. *Newman*, 1 B & C. 418; 2 D & R. 568. For goods tortiously taken, *Brewer* v. *Sparrow*, 7 B & C. 310. For tolls improperly exacted, *Waterhouse* v. *Keen*, 4 B. & C. 211. For moneys obtained by detention of deeds, *Pratt* v. *Vizard*, 5 Barn. & Ad. 808. For moneys obtained by fraud or duress, Buller's Nisi Prius, 132. And by illegal seizure and distress, see cases cited 1 Stephens' Nisi Prius, 343.

The difficulty of applying these principles to the action for use and occupation is that this remedy seems to have been unknown to the common law. Assumpsit for use and occupation is the creature of the statute, 2 Geo. II. c. 19, sec. 14, by which it is enacted that "it shall and may be lawful to and for the landlord, where *the agreement* is not by deed, to recover a reasonable satisfaction for the lands * * held * * by the defendant in an action on the case for use and occupation."

As the act of Parliament speaks of "agreement not by deed," it has been held that assignees of a bankrupt tenant, entering upon their own motion, were not liable for the balance of the year's rent. *Naish* v. *Tatlock*, 2 H. B. 320. Other cases to the same effect are cited by Gibson, C. J., in *Mackey* v. *Robinson*, 2 Jones, 172.

From these authorities it would seem to be very clear that the statute only gives the remedy where there is an agreement. But this agreement need not be express—it may be implied. Thus use and occupation lies where the tenant holds over. 3 Stephens' N. P. 2718. And we are told that to support the action the plaintiff must prove,

1st. An occupation by the defendant.

2nd. That such occupation was by permission; *Ibid*, 2718; and that "the action only lies where there is an actual contract, either express *or implied*."

As to this implication of contract Mr. Stephens further tells us that "The terms of the statute may seem in strictness only to include the cases in which the relation of landlord and tenant exists. But the Courts have given a wide and liberal construction to it; and it now appears to be settled that wherever one party occupies by the permission of another, although no agreement for such occupation was in contemplation between the parties, the fact of the one having occupied by the sufferance of the other is sufficient to raise an implied assumpsit by the other to pay for his occupation." *Ibid* 2721.

In the case before us the sheriff's vendee could have brought his ejectment the day after he received his deed. He permitted the tenant to occupy the premises for three months. This, in the language of the authority quoted, raised an implied assumpsit by the tenant to pay for the occupation; and the exception is therefore sustained, unless there is something to be found in the Pennsylvania cases to which we have been referred requiring us to rule otherwise.

In *Potts* v. *Lescher*, 1 Yeates 576, it was simply held that a "contract, express or implied, must be proved." The Court intimates that proof of coming into possession by permission of the plaintiff would raise the implication.

Bank v. *Ege*, 9 Watts, 436, is also relied on as decisive against the claim. The plaintiff there, after giving the three months' notice, (and thus disaffirming the lease,) claimed rent under the lease. The Supreme Court simply decided, that as the landlord had repudiated the agreement, he could claim nothing under it. So, too, in *Hemphill* v. *Tevis*, 4 W. & S. 535, the sheriff's vendee gave the notice to quit, and yet claimed rent under the lease which he had thus formally disaffirmed. I say under the lease, for, although the reporter states that it was "assumpsit for use and occupation," the Court put the case, in their opinion, upon the distinction between such an action — which they decided could be brought—and a suit upon the lease, which they declared could not be maintained. Judge Sergeant, referring to *Bank* v. *Ege*, (already cited,) and to the notice given by Mr. Tevis, says:

"The tie thus broken could not be knit together again by the defendant's remaining in possession, or any act short of a mutual contract between the parties for a new lease. The defendant's not surrendering the possession (if such were the case), did not have that effect, however it might operate as to the claim for use and occupation founded on possession. We think the lease was at an end by the notice, and that the purchaser could not afterwards sustain an action founded upon the contract to recover rent. If the defendants are liable at all it can only be for use and occupation, or on some other ground than the contract."

Mackey v. *Robinson*, 1 Jones, 170, simply decided that an owner could not maintain an action on a lease to which he was not a party. Chief Justice Gibson admits, that use and occupation will lie where the defendant has held by the plaintiff's permission.

It will thus be seen, that no one of the cases relied on by the accountant, is at all conclusion against this claim. On the contrary, they all

support Mr. Stephens' statement, that mere permission or sufferance raises the implied assumpsit. Indeed it is difficult to understand why there should be a distinction between this and many other kindred cases familiar to the student. The law presumes a promise to pay the man who saws wood, or does any work for another, upon simple command, or indeed, by bare permission. The person who uses the goods of another is supposed to have promised to pay what they are reasonably worth. What distinction should there be between land and merchandise, the title and circumstances being all admitted?

Accordingly we find Mr. Justice Lowrie saying, in *Bettinger* v. *Baker*, 5 Casey, 69. "If at the time of the acknowledgment of the sheriff's deed there be a lessee in possession, * * sec. 119 makes him the tenant of the purchaser on the terms of his lease; and if the lease is of later date than the lien on which the sale is made, * sec. 105, requires him to give up the possession within three months after the purchaser shall choose to give him notice to do so; and to pay the purchaser all the rent, or the value of the use of the land," &c. This law makes the lessee under a lease of later date than the lien, a tenant at will of the purchaser.

In *Brolaskey* v. *Ferguson*, 12 Wr. 434, it was held, that there must be a priority of contract—but it was added "that the proof may be either direct or presumptive." And in *Hayden* v *Patterson*, 1 P. F. Smith, 255, M. Justice Agnew says: "Wherever the owner himself could maintain an action for use and occupation, undoubtedly the same remedy lies in favor of the purchaser of his title at sheriff's sale," &c.

We do not regard the provisions of the Act of June 16, 1836, Br. Dig. 450, as interfering with the claim, for the special remedy, or the recovery of damages for detention of the premises can only be invoked where the "person in possession * shall refuse * * to comply with the notice to quit." Indeed the complainant must swear that the person is in possession "at the time of the application" to the justice. That was impossible in this case, for the tenant had complied with the notice; and it is plain that the law referred to can never be invoked where the occupier moves away the last day of the three months.

It would seem to be contrary to all equity that he should not pay for what he has thus enjoyed. We do not, however, see that the claim can extend back prior to the acknowledgment of the deed. The Act says that the purchaser may "after the acknowledgment of the deed," give notice; and to that date his claim would seem to be limited by *Bank* v. *Wise*, 3 Watts, 394; *Braddee* v. *Wiley*, 3 Watts, 362. *Borrell* v. *Dewart*, 1. Wr. 133; *Hayden* v. *Patterson*, 1 P. F. Smith, 265.

Subject to this modification of the claim, the exception is sustained.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—I have to request an answer in your next issue to the following case:—

"A. B." laid an information before a J. P. against "C. D." for using grossly insulting language to him "A. B" on the public street contrary to a By-law of the town.

"A. B. proved his case but did not prove the By-law. Defendant "C. D," called one witness and then took objection that the By-law had not been proven. The magistrate held that by calling the witness it left it optional with him to insist on proof of the By-law, or not, and that he could legally convict without such proof. What is your opinion?

Lex.

[There can be no two opinions it seems to us in respect to the case submitted by "Lex." The proof of the By-law was an essential part of the plaintiff's case. We think the magistrate was wrong if he proceeded to convict without such proof.—Eds. L. J.]

Parties practising Law without being duly admitted, and representing to the public that they are Barristers and Attorneys.

To the Editors of the Law Journal.

Gentlemen,—There are several gentlemen within our County, who represent to the public that they are barristers, attorneys and solicitors, and by so doing, they seem to be doing quite a lucrative business; it has been much spoken of amongst the profession that a stop should be put to it, some are of opinion that it cannot be done, others that it can, and now I beg that you will give your opinion in your next issue.

The mode of proceeding is as follows, viz.: the unfortunate client wishes to have an appearance entered or may wish an action brought, he comes to one of the above gentlemen, who says that he is a lawyer, and who receives his retainer and what fees he can get when the machinery is set to work. This is done by an attorney in the county town allowing his name to be used, and attending to the agency business, on the understanding that the portion allotted to him are agency fees, the county town attorney in the proceedings is certainly the attorney in the proceedings, but

virtually he is the agent of one of the above named gentlemen, and a cloak in a good many respects for him, and a cheat on those who are duly qualified to practice the law.

This I certainly think is prevented by the Consolidated Statutes of U. C., cap. 35, sec. 1. These persons are also in the habit of receiving fees under the representation aforesaid for their opinions, and in fact to my own knowledge from municipalities.

Lex.

Clinton, July, 13, 1869.

[We think the case put by our correspondent is expressly provided for by sec. 17 of the Attorneys' Act, cap. 35 Con. Stat. U. C. and that the attorneys who assist such unqualified persons in the practices mentioned, would certainly be liable to the penalties therein set out.—Eds. L. J.]

REVIEWS.

The Canadian Parliamentary Companion. Edited by Henry J. Morgan, author of the Bibliotheca Canadensis, &c. Fifth Edition. Montreal: Printed by the Montreal Printing and Publishing Company. 1869.

We have to thank the editor for a copy of the new edition of this well-known and now well-established publication. The fifth edition is an enlarged and improved one. It contains in five parts all such information as one would expect to find in a work of the kind, either in reference to the Parliament of the Dominion or to the Local Governments or Legislatures. The work opens with a list of the Queen's Privy Council of Canada. Then we have a short biography of Sir John Young, the Governor of the Dominion, and of each of his staff. Next we have each of the Deputy Heads and chief officers of the Departments laid before us in a panoramic form, showing all that each has done and suffered for the good of his country. This is followed by a short sketch, giving the legal qualifications of senators and members of the House of Commons. All this is introductory matter. Part I. of the work, then opens with a biographical sketch of each member of the Senate, prefaced by a short account of the venerable Clerk, and concludes with a note of the changes in the Senate since the last edition of the work. This part of the work, though embracing biographies of seventy-two senators, is condensed within thirty-six pages. Part II. gives an explanation of certain Parliamentary terms and proceedings, and embraces twenty-four pages. Part III., which is devoted to the House of Commons, opens with a short sketch of the well-known and popular Clerk, expands in a series of biographies of the 181 members of the collected wisdom, and, having exhausted 75 pages of the work, concludes with a note of the changes in the membership of the House since the last edition. Part IV. is devoted to the Local Governments and Legislatures of Ontario, Quebec, Nova Scotia, and New Brunswick, and hands down to posterity all connected with the Local Governments and Legislatures in appropriate language. This part of the work occupies eighty pages. Mr. Morgan, the editor, by the publication of this and similar works, is doing good service to his fellow-men, and is doing much to mark his day and generation in the great stream of time. It is to be hoped that he reaps some rewards of a substantial kind as fruits of his industry. It is well that his name should live after him, but it is very desirable that his body should not be in the meantime neglected. Man cannot live by fame alone. That kind of fame which gives to the famous a little of this world's dross "on account," though earthy, is often convenient, and sometimes necessary.

Parliamentary Government in England, its Origin, Development, and Practical Operation. Edited by Alpheus Todd, Esq., Librarian of the House of Commons of Canada. London: Longman, Green & Co. 1869.

We have received the second volume of this valuable work, and had intended to have reviewed it in this number; but, considering the importance of the work, and the pressure of other calls on our time, we did not like to give it a "slip-shod notice," and so have deferred our review of it till our next issue.

Lord Eldon, when he was handsome Jack Scott of the Northern Circuit, was about to make a short cut over the sands from Ulverstone to Lancaster at the flow of the tide, when he was restrained from acting on his rash resolve by the representations of an hotel-keeper. "Danger, danger," asked Scott, impatiently; "have you ever *lost* anybody there?" Mine host answered slowly, "Nae, sir, naebody has been *lost* on the sands, *the puir bodies have been found at low water.*—*Jeaffreson.*