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DIARY FOR MARCH.

1. SUNDAY..... *2nd Sunday in Lent.*
2. Monday ..... Recorder's Court sits. Last day for notice of trial for Co. Ct.
8. SUNDAY..... *3rd Sunday in Lent.*
10. Tuesday ..... Quarter Sessions and County Court sittings in each county.
12. Thursday..... Sittings of Court of Error and Appeal.
15. SUNDAY..... *4th Sunday in Lent.*
9. Monday..... Last day for service for York and Peel.
17. Tuesday..... Chancery Sittgs. Ex. and Hg. Hamilton and Sandwich. Last
22. SUNDAY..... *5th Sunday in Lent.* [day of notice for Brantford and London.
24. Tuesday ..... Chan. Sitt. Chatham. Last day of notice for Simcoe.
26. Thursday .... Declare for York and Peel.
29. SUNDAY ..... *6th Sunday in Lent. Palm Sunday.*
3. Tuesday..... Chy. Sitt. Brantford & London. Last d. not. Guelph & Sarnia.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

MARCH, 1863.

THE LATE SIR JOHN B. ROBINSON, BARONET.

The present year will long be remembered as that in which two much respected judges were taken from among us by the hand of remorseless death.

In our last number we had to deplore the death of that good and able man, the late Mr. Justice Burns. In the present number we are called upon to chronicle a still greater loss—that of the late Sir John Beverley Robinson, who for many years was Chief Justice of Upper Canada, and, at the time of his death, President of the Court of Error and Appeal.

Our duty is a sad one. We had hoped for many years to have been spared the necessity of performing it, but the Judge of all men, and Ruler of all things, has otherwise decreed.

The life of Sir John was a long and momentous one. He was no ordinary man. His example was a good one; his very name became among us a household word, typical of honor, honesty, and truth.

The family of the late Baronet is of old and good standing in Yorkshire, England. His lineage is traceable back to Nicholas Robinson, of Lincolnshire, gentleman, who lived in the reign of King Henry VII. The family afterwards removed to Yorkshire, and were settled there in the early part of the reign of Queen Elizabeth, living near Cleasby, a small village upon the Tees. One of their descendants, John Robinson of Cleasby, was married, in the reign of Charles I., to a daughter of Christopher Potter, Esq., by whom he had four sons. Two of these died young. Another, John, became Bishop of Bristol, and afterwards of London, in the reign of Queen Anne, and was a Lord Privy Seal; he also held the office of Ambassador to Sweden from 1683 to 1708, and was First Plenipotentiary at the Congress of Utrecht in 1712. Another son, Christopher, was the first of the family who emigrated to America. He had been educated at Oriel College, Oxford, and came out to Virginia as private secretary to Sir William Berkeley, Governor of the colony, in the reign of Charles II. Here he remained; became shortly afterwards Secretary for the Colony, and married, leaving a son, John, born in 1683, who subsequently became President of the Council of Virginia. This Mr. Robinson married Katherine, daughter of Robert Beverley, of Rappahannock, formerly of Beverley, in Yorkshire, England. From this marriage sprung ten sons, and on the breaking up of the "Old Dominion" by the war of independence some of the family espoused the Revolutionary cause, and their descendants are now in Virginia, connected with the Beverleys, Randolphs, and other old families of that State. Others adhered to the side of the Crown, and fought for it during the war. Among the latter was Colonel Beverley Robinson, who became a noted loyalist. His name and that of his residence, "Beverley," upon the Hudson, are connected with all the principal events of the revolutionary contest in that part of the country. He was at last attainted of treason by the American Government, and his property confiscated. By his marriage with Susannah Phillipse he had several children, one of whom, Sir William Robinson, K.C.H., Commissary-General, served in Canada in 1812; and another, Sir Frederick Phillipse Robinson, G.C.B., was in 1815 Commander-in-Chief of His Majesty's Forces in Canada, and Provisional Governor of the Upper Province. Another of the family, who adhered to the Crown, was Christopher Robinson, father of the late Baronet. This gentleman was educated at William & Mary College, at Williamsburg, Virginia, which institution he left on the breaking out of hostilities between the colonists and parent country. By Sir Henry Clinton he was commissioned to an ensigncy in the Queen's Rangers, then commanded by Colonel Simcoe, in which corps he served till the peace, in 1783, when the regiment was reduced. He then went, in company with many other U. E. Loyalists, to New Brunswick, where he resided for a few years, below Fredericktop, on the St. John River. In 1784, he married Esther, daughter of the Rev. John Sayer, and four years afterwards removed with his wife and children to Canada.

The father of Sir John first settled at L'Assomption, but three years afterwards removed to Berthier, where his

second son, John Beverley, was born, on the 26th July, 1791. In the following year, at the solicitation of Major-General Simcoe, his former commanding officer, he removed to Upper Canada, where he first settled at Kingston, and shortly afterwards came to Toronto. Here he commenced the practice of law, and on the formation of the Upper Canada Law Society was elected one of its first benchers. He afterwards represented the United Counties of Lennox and Addington in the Legislative Assembly, and also held a commission as Deputy Ranger of Woods and Forests for Upper Canada. Of his public career there is little recorded, but he was well known to have been a gentleman of great courage and much kindness of disposition. He died, having for many years been a sufferer from gout, on the 4th November, 1798, leaving a family of three sons and three daughters. His eldest son, Peter, represented for many years the County of York in the Legislative Assembly, and afterwards became a member of the Legislative Council and Commissioner of Crown Lands, and he died in the year 1838. William, his youngest son, a gentleman of considerable ability and highly esteemed, is still living. He has also been in the House of Assembly, having for many years represented the County of Simcoe, he was at one time Inspector General of the Province, afterwards Commissioner of Public Works, and is now one of the two Commissioners of the Canada Company.

John Beverley having been left an orphan at the early age of seven years, Mr. Stuart, father of the late Archdeacon of Kingston, a gentleman universally respected, owing to his former friendship to Mr. Robinson, and attracted by the qualities of the lad, undertook the guardianship of his future course of life; and having placed him under the tuition of Dr. Strachan, now the venerable Bishop of Toronto, John Beverley accompanied him as a pupil, on the opening of the grammar school, to the village of Cornwall. Sir John Robinson's school-boy life was a true index of the future man. From the first he evinced that love of study, that untiring perseverance, and that steady industry, which so particularly characterized him in after years. He excelled in classics and English literature, and was proficient in mathematics. His mind, we are told, was wonderfully comprehensive; he could master the contents of a book sooner than any of his companions, and, owing to his extraordinary memory, could not only retain what he read, but, on a mere perusal, was able to repeat long passages from favorite authors with accuracy. He advanced with great rapidity at school, and soon attained the foremost place among his fellows. Uniting with his scholastic attainments uniform good conduct, he naturally became a great favorite with his tutor, a feeling which afterwards matured into a staunch and enduring friendship. It lasted, uninterruptedly even for a single day, through every phase of their varied lives, and terminated only in his death. Nor should we omit to mention that at this early age Sir John Robinson evinced a love of truth and amiability of disposition, and displayed in a marked manner those sentiments of piety and virtue, which continued to influence his future life. In the pastimes of the play-ground he took the same lead as he did in the school: few could match him in manly exercises and feats of agility; and his pleasantry and readiness to oblige made him the idol of his school companions, and their valued friend in after years. Among his cotemporaries, there were no less than four, besides himself, who attained to an eminent position on the bench—the present Chief Justice of Upper Canada, the Hon. Henry John Boulton, the late Chief Justice of the Common Pleas Sir James Buchanan Macaulay, and the late Mr. Justice Jones; a circumstance not only remarkable of itself, but strongly suggestive of the merits of the training, scholastic as well as social, which fitted so many men, all at one time boys together at a village grammar school, for such high standing in legal honors.

At the age of sixteen, having a strong desire to study law, he placed himself under articles to Solicitor-General Boulton, with whom he studied for three years. During this period he acted for a friend as Clerk of the House of Assembly, and having given general satisfaction, at the close of the session his services were rewarded by a vote of £50, "for his extraordinary attention to the duties of his office."

Unable to continue his studies during Mr. Boulton's absence from the country, he entered the office of Attorney-General Macdonald, and there completed the remainder of his time. Before, however, he could be called to the bar, his services were required in a far different capacity. In 1812 the American Government declared war against Great Britain, and chose Canada, as being the most vulnerable part of the empire, for attack. True to the traditions of his ancestors, he at once exchanged the pen for the sword, and forsook all private enterprises to follow the fortunes of the British flag. In the capacity of Lieutenant in the York Militia, he accompanied General Sir Isaac Brock in the bold expedition which resulted in the capture of Detroit. After the surrender of that important fortress, he was placed in the detachment which formed a guard over General Hull, who, with a large part of his force, had been brought down from Lake Erie as prisoners of war. On the return of the detachment, they were again sent, with recruited numbers, on active service, to the Niagara frontier. On the 13th of October, the memorable battle of Queenston Heights was fought, where the gallant Brock was killed, together with his aid-de-camp, Attorney-General

Macdonald. In this engagement Lieutenant Robinson commanded a flank company of militia, and was mentioned in Sir Roger Sheaffe's despatch as having "led his men with great spirit." Immediately after the action he was again detached to escort the American prisoners to Kingston, among whom was Colonel (now General) Scott, late Commander-in-Chief of the United States Army. Here Lieutenant Robinson's military career ended, for on his return to Toronto he learned to his great surprise that he had been appointed to the position of his former principal, as Attorney-General of Upper Canada. This office, by rule of rotation, properly fell to Solicitor-General Boulton; but having had the misfortune to be taken prisoner by a French privateer, on his voyage to England, he was unable to profit by the opportunity for promotion The appointment of Mr. Robinson, who had then hardly attained his majority, and might be said not to have completed his studentship, met with warm approval, and was strongly recommended by Judge Powell, "as fully justified by the high character the young student had already attained for legal knowledge, and the zeal and assiduity which he always brought to the performance of every duty that devolved upon him."

Having been called to the bar by a special rule of the Court of King's Bench, which was afterwards confirmed by an act of Parliament, Mr. Robinson performed the duties of his position until the year 1815, when Mr. Boulton returned to Canada, and assumed the office of Attorney-General, Mr. Robinson being appointed Solicitor-General in his stead.

Shortly after his appointment to the office of Solicitor-General, he procured leave of absence, and proceeded to England, in order to be called to the bar of the mother country. He was then however, only able to complete some of his terms, and was not called to the English bar, as a member of the Honorable Society of Lincoln's Inn, until 1823.

In 1817, Mr. Boulton became a Judge, and Mr. Robinson was again appointed Attorney-General, which office he continued to hold until his subsequent elevation to the bench. It was during this tenure of office that the celebrated controversy between the North West Company and Lord Selkirk occurred, ending in a most calamitous manner, and causing various criminal prosecutions to be instituted, the management of which necessarily devolved upon the Attorney-General. Time will not permit us to enter into the details of these important trials; and we cannot better describe the ability with which Mr. Robinson vindicated himself against the charges which had been preferred by Lord Selkirk, and the manner in which he conducted himself throughout, than in the words of Lord Bathurst's despatch to the Lieutenant-Governor of Upper Canada, in May, 1829. His Lordship stated, "that he had laid the report of the Attorney-General before H. R. H. the Prince Regent, and that he should not do justice to the Attorney-General if he were to forbear expressing the satisfaction which he had derived from his detailed explanation, and desiring the Lieutenant-Governor to assure him that the temper and judgment with which he had conducted himself during the whole of these long and difficult proceedings, had received His Royal Highness' entire approbation."

In the year 1821, Mr. Robinson entered the House of Assembly as the first representative for the town of York (now the city of Toronto), for which constituency he continued to sit until his appointment as Speaker of the Legislative Council. He at once joined himself to the Tories, and, with the same rapidity that attended his former promotions, he was soon the recognized leader of that party. In the following year, he was charged with a mission to England, for the settlement of the difficulties that had arisen between Upper and Lower Canada, relative to the apportionment of certain customs duties collected at Montreal. The general satisfaction which was entertained at the success of his efforts was suitably expressed in a vote of thanks from both branches of the Legislature. During this visit to England, the Imperial Government, in recognition of his public services in the colony, offered him the appointment of Chief Justice of the Mauritius; but he preferred to earn his well-deserved promotion among his own people, to whom he was strongly bound by ties of a private as well as of a public nature.

The refusal of this appointment redounds greatly to the credit of Sir John Robinson. The office was a valuable one not only from its high position, but from the remuneration attached to it which was nearly three times that of the highest official in Canada. His decision in this matter has shown more forcibly than any act of his life how great a love he bore to his native land, and establishes the fact, that his public acts were influenced solely by motives of the purest patriotism, and not by any sordid or selfish hope of personal advancement. He subsequently declined the proffered elevation to the bench in this country on the retirement of Chief Justice Powell, and it was only at the earnest solicitation of his friends that he was induced, on the retirement of Sir William Campbell in 1829, when the Chief Justiceship again became vacant, to accept that high office.

The political career of Sir John Robinson has been assailed times innumerable, and as often defended; but in this he has only shared the fate of all who have embarked upon the stormy sea of political life. It is neither our province nor desire to enter upon a discussion of the

merits or demerits of the policy of the government of which Sir John Robinson was the head, and which ruled Upper Canada for so many years. If, viewing his political conduct by the light of modern experience, it can be said that in his opposition to Responsible Government he erred, all will admit that his error was of the head, not of the heart.

Sir John held the doctrine that parliamentary representation was essentially different from delegation; that as a representative, he was neither elected to legislate for a particular class, nor to advocate exclusive interests; nor was he a mere agent, with defined powers, and intrusted, as it were, with proxies of the votes of his constituents, to give effect to limited instructions. He claimed the right of individual judgment, and that he was intrusted with discretionary powers, to be exercised as conscience and circumstances suggested. In an address to his constituents he thus expressed himself: "You will do me the justice to remember that I have always plainly told you that there was no object I could propose to myself in my political career, for which I would exchange the satisfaction I desire to enjoy at its close, in the reflection that I have ever moved in that path which my judgment pointed out to be the right one. Whenever it shall appear that this conduct disqualifies me for running the race of popularity, I shall cheerfully submit to the consequences."

As a parliamentary leader, Sir John has scarce ever been equalled in this colony. Amid the turmoil and excitement attendant upon constitutional changes, he not only kept his obligations to his friends, but, without pandering to their passions, gained the honorable estimation of even his bitterest opponents. The secret of his success was his sterling honesty of purpose, and his unbending integrity in its performance. He could be courteous and conciliating to all, without weakening his influence or compromising his principles; and both friend and foe applauded that reliability and truthfulness, which at once despised artifice and all kinds of deceit. As a speaker, Sir John Robinson had few equals. He was a good debater, forcible in expression, and convincing in argument. His ability in responding to an opponent was unmatched. Never taken by surprise, he has been known, after a long and stormy debate, conducted against him by no mean antagonists, to rise, without the slightest preparation, and grapple with every proposition, leaving no argument unanswered or misstatement uncontradicted. He had great command of language. His speaking did not, perhaps, often rise to eloquence, in the general acceptation of the term. He seldom attempted to electrify, or appeal to the feelings and passions of his audience; he looked upon eloquence and wit as weapons of delicate nature, the use of which was blunted and impaired by frequent employment. But on the few occasions when he appealed to the loyalty of his followers, or repelled, in a burst of virtuous indignation, some ill-intentioned personal attack, he seldom failed to rally his friends into enthusiasm, and cover his opponents with shame and confusion. On one occasion he thus replied to an opponent: "My acquaintance with the honourable member is of long standing, and I have derived a respect for his character as an individual that has not been destroyed by the extreme injustice he has exhibited towards myself individually, as a member of this House. In his private relations I see there is much to esteem, and I respect him for his integrity in personal transactions; but from my observation of his public conduct during the time we had sat together in a former parliament, I must declare it to be impossible that any candid and honorable mind can seriously approve of it, for it was at once ungenerous and unjust. He seemed to have a mind formed for brooding over the most unworthy suspicions, and suffered feelings not of the most amiable or enviable kind so far to overcome his judgment and obscure all sense of justice, that he would, with a degree of heat and impatience that almost prevented his utterance, inveigh against the public authorities of his country, and support his convictions by statements of fancied grievances, which vanished the very instant they were examined. So here the honorable and learned member, upon an occasion that neither called for nor justified such a display of temper, has sought relief for his mind by bringing up charges against me, which, if there was the slightest foundation for them, ought to disgrace me as a public officer and a man. All this time has he been wearing the smile and holding out the hand of friendship, while it is now quite evident he has been tormented with a feeling towards me, for which God knows I have never given him cause, and which goads him on to conduct in the highest degree unjustifiable and indefensible. * * * * As to his personal attacks upon me, I beg him to be assured that I regard them with unqualified contempt. I know the motives by which they are prompted, and I expect he will proceed to the last inch in his attempts to injure me; but I defy his efforts; I ask no indulgence; I serve a just Sovereign; that conviction is sufficient to render me fearless and independent; and I assure the honorable and learned member that all such efforts will recoil, as fit they should do, upon his own head."

The fruits of Sir John Robinson's life as a legislator are to be found in the pages of our statutes. Several of our most important acts were framed by his own hand. They bear evidence of his great legislative ability, and of his clear perception of an existing evil or defect, and the remedy most fitted to remove it. They show his strong attachment

to monarchical institutions—his intention to preserve the relations of the Province with the empire; and they are further characterized by that close approximation to those British institutions which have so long been our pride and our boast.

Sir John Robinson's political life may be said to have ended upon his elevation to the bench, though by the nature of his appointment as Chief Justice he was till the Union, President of the Executive Council and Speaker of the Upper House. Little of general interest occurred in the proceedings of that chamber from the time he entered it until the union of the Canadas in 1840, when he ceased to be a member.

On the 4th December, 1837, commenced the Rebellion, headed by the late William Lyon Mackenzie. Every loyal subject flew to arms. Sir Francis Head, in his despatch to the home government, mentioned, that "one of the first individuals he met, on going to the City Hall, with a musket on his shoulder, was the Chief Justice of the Province." Among the necessary consequences of this disloyal outbreak were several prosecutions for high treason. Sir John Robinson was the Judge whose painful duty it became to try the unfortunate Lount and Mathews, who had been ringleaders in the rebellion, and their execution has been made the ground for affixing a stigma upon the authorities of that time. It has been asserted that the Government were in receipt of a despatch from England, forbidding capital punishment for political offences without the approval and sanction of the Imperial authorities; but like many other charges made under similar circumstances, we believe this to be quite incapable of proof, and altogether contrary to facts. We believe that in truth no such despatch was known to, or received by, the Government. So clear is the memory of the Chief Justice from the imputation of having advised the Lieutenant-Governor to carry out the extreme penalty of the law, that he had ceased for some time previously to be a member of the Executive Council. Indeed we are not sure that Sir John was ever a member of Sir Francis Head's cabinet. In passing sentence on the prisoners, he very properly dwelt upon the enormity of their crime, but his remarks were imbued with compassionate and sorrowful feeling; and a gentleman (in court at the time) has remarked, "that after the prisoners had pleaded guilty, and the sentence of death was passed on them, of the three individuals concerned the Chief Justice was certainly the most painfully affected."

The last political act of Sir John Robinson was his able reply to Lord Durham's Report, in 1840, the merits of which were thus reviewed by the *Times*: "After having given it a most attentive perusal, we feel warranted in saying, though without absolutely committing ourselves to the opinions of the author, that it contains a larger stock of useful and authentic information, in regard to the present position, wants and prospects of that colony, than any other production on the same subject we have happened to meet with." The independent spirit and true patriotism evinced by Sir John Robinson upon this occasion, is entitled to the greatest praise. By the manner in which he wrote he placed himself in direct antagonism to the views of the Governor and his advisers. The greatest exertions were used, both by threats and promises, to induce him to withdraw his opposition. They proved, however, of no avail.

Though we may lament the absence of so great and conscientious a statesman from the halls of the senate, yet, for the sake of his fair fame, we rejoice that he was no longer arrayed in the strife of political warfare. For two-and-twenty years his star, clear and brilliant, never paled or waned During that lengthened period the voice of the people was unanimous in admiration of his talents, and in praise of his integrity; and even his former opponents, forgetting past differences, vied with his friends in the strength and sincerity of their applause.

Neither time nor space will permit us to enter into the details of his judicial career, or to particularize his decisions, which occupy so large a place in the many volumes of our Queen's Bench reports. His judgments firmly establish his fame as a jurist, and will be ever a mine of priceless value. They will for all time remain a noble monument in memory of departed wisdom—a vast storehouse of legal wealth, from which ready supplies of judicial knowledge may hereafter be drawn. In this youthful country we have had no state trials of such importance as to be recorded with legal accuracy, and perused with interest as matters of history; and though there are many cases in our reports which have caused some stir at the time, and have involved deeply important interests, yet they are so chiefly connected with individual enterprise, that it would be impossible to review them in the limited space of a memoir.

Sir John Robinson was, we believe, the youngest Chief Justice that ever sat in a British court of justice. His reputation at the bar had qualified him for the post, for he certainly had no equal in his day, and his judicial career has established the propriety of his early elevation. His practice at the bar, though from the commencement large and lucrative, considering the circumstances of the colony, was necessarily limited. It may seem strange to those who knew Sir John as a statesman and a Judge, and have observed his determination of character, to be told that it was by slow degress that he obtained that self-possession which so distinguished him in the senate and on the bench. Such, however, was the fact. In the first case he ever

brought before a jury, he experienced a partial failure. It was an action of assumpsit. The young advocate was entirely confused in his address to the jury, and after some few and incoherent remarks in explaining the nature of the action resumed his seat. Mr. Justice Scott, who had entrusted to him his business on ascending the bench, was presiding at the time; and his lordship, either out of disappointment in his friend, or of remembrance of his former zeal for his clients' interests, leaned over his desk, and in ill-disguised astonishment exclaimed, "*Why! is that* ALL?" Indeed Sir John's nervousness was no slight obstacle to overcome, for he himself said that it was literally true that for some time after he had been called to the bar, he never saw one of the jury. That he surpassed his cotemporaries at *nisi prius*, we are not prepared to affirm; we think he had certainly his equals; but in soundness and depth of legal knowledge, he was preëminent.

But, distinguished as was his reputation in the senate and at the bar, it was on the bench he displayed the highest perfection of his attainments. We know not in which judicial capacity we admired him most. At *nisi prius* he presided with calmness, courtesy and dignity. His strict impartiality and love of truth was proverbial; and whether it was a Queen's counsel or the most inexperienced barrister on the rolls, he paid the same attention to his argument, and gave to each equal consideration and protection. His love of order, and his sense of the respect due to the dignity of a court of justice, made him prompt to suppress any indecorum; and when disapproval or even censure was called for, he befittingly expressed his opinion, though always in a courteous manner. His addresses to the jury were delivered with ease and grace, and were clothed in the clearest and simplest language. He was remarkable for his accuracy in stating the whole facts of the evidence, and it was seldom that a new trial was granted on the grounds of his misdirection on points of law. In sentencing prisoners, full of tenderness and compassion, he indicated the charitable feelings of his heart; and the kind and wholesome advice he was in the habit of giving to those who had entered on a career of crime, and for whose reformation there was yet some hope, was marked by the deepest feeling.

In full court, Sir John Robinson was always the pride and favorite of the bar. The reputation he enjoyed, and the weight of his opinion, greatly increased the business of the court in which he presided. He was always distinguished for his readiness and acuteness, and he had seldom any difficulty in grasping the most intricate cases. In his hands the business of the court was never in arrear, and the knowledge of unfinished work was a burthen on his mind, to relieve himself from which he would use the most strenuous exertion In every case that was reserved, he gave his decision in writing; and though some of his judgments are considered lengthy, the fault, if it exists, may be accounted for by his great anxiety to make them clear and satisfactory. Few opinions will ever command more respect, or carry more weight, than those delivered by Sir John Robinson. They are remarkable for their lucid argument, deep learning, strict impartiality and pure justice; they are untinted by fanciful theories, prejudice, or political bias; and they bear evidence of that careful research, that deep thought, that unwearied application and untiring patience, which he brought to bear on every subject that came under his consideration. In whatever branch of jurisprudence we examine his judgments, we find evidence of his intense study. Equity or common law, civil or criminal law, pleading, practice, and evidence—all exhibit the same copiousness of research, and the profound comprehensiveness of his legal attainments. He may be said to have studied law as a science, but in the words of Mr. Whiteside, "he objected to the triumph of form over substance, of technicality over truth;" and though he gave to legal objections their full force and effect, his quick apprehension of facts soon separated the chaff from the grain.

It was seldom that his judgment was not upheld by the majority of his court, or affirmed on appeal; and, with one exception, his decision has never been reversed on reference to England. In the well known case of *Paterson et al.* v. *Bowes* (4 Grant 170), for the recovery of £10,000, on a bill filed by some of the inhabitants of the city of Toronto, on an alleged breach of trust on the part of the mayor of the city, Sir John Robinson's opinion was only supported by one other judge, upon the appeal from the Court of Chancery. He, however, adhered to it, and in a judgment of great length and undoubted ability, stated his objections to the conclusion of his brother judges. Mr. Justice McLean, the present Chief Justice, supported Sir John; and though the case was carried to England upon the strength of their opinion, it is the only instance in which their decisions were not upheld by the Privy Council.

As an equity judge, Sir John Robinson was no less entitled to respect than in the courts of common law. One of the most important appeals was the case of *Simpson* v. *Smith* [Error and Appeal Cases], where the Court of Chancery held, that under the 11th section of the Chancery Act of this Province, they might, under certain circumstances, refuse redemption, notwithstanding twenty years had not elapsed since the mortgagor went out of possession. In the result of this case an immense tract of land and important interests were at stake; it involved the whole of the property known as Smith's Falls. The judg-

ment of the Court of Chancery was appealed from to the four judges who at that time sat in the Court of Appeal. They were equally divided in opinion, and the case was carried to England. There the court was unanimous, and the Right Hon. Pemberton Leigh (now Lord Kingsdown) remarked, with reference to the judgment of the Chief Justice, that "he never saw a judgment more elaborately and carefully reasoned, or more admirably expressed."

The last case of public interest which occurred during the period Sir John Robinson presided in the Court of Queen's Bench, was the famous Anderson Extradition case. The sympathy that was evinced both here and in England on behalf of the fugitive, is of too recent date to be forgotten. Opinions were freely expressed; public meetings were held; newspapers teemed with leading articles, and the anti-slavery views of their correspondents; and even the judgment of the court was anticipated. The Chief Justice had probably formed a decided opinion upon the argument; for in deferring the decision of the Court, a few days afterwards, on account of one of the judges not having arrived at a conclusion, he stated that his own mind was made up, and he was then ready to express it. The following week the judgment of the court was delivered, in favor of the surrender of the prisoner, McLean, J., dissenting; and though their judgment was neither in support of nor against slavery, but based entirely upon the consideration of the treaty existing between the United States and Canada, so strongly prejudiced was public opinion that the popularity of the bench seemed likely to suffer. But, in the words of an able English cotemporary, "These judges, proof against unpopularity, and unswayed by their own bitter hatred of slavery, as well as unsoftened by their own feelings for a fellow-man in agonizing peril, upheld the law made to their hands, and which they are sworn faithfully to administer. *Fiat justitia.* Give them their due. Such men are the ballast of nations." The case was afterwards brought up before the Court of Common Pleas; and having been argued there on a technical point that had not been raised in the Queen's Bench, the prisoner was discharged. Though no judgment was given in the Common Pleas upon the broad question as to the right of the United States authorities to the slave, each of the judges was careful not to express dissent from the decision of the other court. (In re Anderson 11 U. C. C. P.)

Canada has never had a judge who so completely enjoyed the confidence of the entire legal profession as Sir John Robinson. His natural affability, his unassumed dignity and unruffled temper, made him not only revered but even loved. By his brother judges he was regarded with admiration and no opinion were they so anxious to obtain, or valued so high. The proudest of the bar had never to complain that they received no credit at his hands for eloquence or ability, and the humblest barrister who occupied the furthest bench had never to murmur that his feeble efforts met with no encouragement. Even the youngest student approached him with respectful assurance, and there are many who will recall with grateful remembrance the kind and assisting hand he extended to them. To all he exhibited the same patient attention and equality of temper; and it was truly remarked by the learned Treasurer of the Law Society, that during all the time he sat on the bench, extending over a period of nearly the third of a century, no one could recall an unkind expression, or remember a single instance of impatience. But the appreciation of his judicial services was not confined to the precincts of the courts. The whole country has borne testimony to his worth. People had long been accustomed to look with confidence to his decisions, to regard the purity of his administration of justice as the foundation of their liberties, and his impartiality as the palladium of their most cherished rights. Nothing that we can pen will add to the unsullied purity of his character, for never did ermine grace truer nobility. Blameless did he preserve the chastity of his oath. With no cause unheard, no judgment perverted, "he did well and faithfully serve our Lady the Queen and her people in the office of Justice; he did equal law and execution of right to all the Queen's subjects, rich and poor, without having regard to any person."

In the month of June last, Sir John Robinson took his farewell of the bar. He was still to remain among them as President of the Court of Appeal, but the close connection that had hitherto existed between them was then finally severed. He had seen nearly all his former companions pass away, and only one of his early compeers was there to witness the close of his long, useful and eventful career. As he had been the youngest of his Sovereign's judges, so he now retired, having presided a longer period than any Chief Justice before him, in any of the courts of Her Majesty's dominions. The Bar presented him with suitable addresses, and the Law Society honored him with the most magnificent banquet that ever took place within the Province.

Sir John Robinson received not only a full share of distinction in his native country—the gratitude and respect of his fellow-colonists having elevated him to a position second only to Her Majesty's representative—but he also won well merited honors in England. In 1838 he was offered a knighthood, which honor, for private reasons, he respectfully declined. In 1850, our gracious Sovereign was pleased to appoint him a Companion of the Bath; four

years afterwards he received from Her Majesty his patent as a Baronet of the United Kingdom; and on his last visit to England, in 1856, the University of Oxford conferred upon him the honorary degree of Doctor of Civil Law.

It is not the common fortune of public men to have their services appreciated during the performance of their labors, or to be admitted as "prophets in their own country." It happens, however, that the services of some men are so valuable, and their merits so universally recognized, that they receive as it were by public acclamation their meed of honor. Sir John Robinson never appeared in public without receiving that attention to which his virtues and services entitled him.

His literary attainments were of no ordinary nature, Accomplished in the classics, he has been frequently known to choose a Latin author to occupy his leisure moments on the circuit. He took great interest in science, and was extensively read in philosophy and history. He excelled in the ease and elegance with which he composed and was a complete master of every branch of English literature. Some of his charges to grand juries are master-pieces in their way, and his addresses on public occasions were remarkable for their erudition and classic beauty. One of the finest of these addresses he delivered on laying the foundation-stone of the Provincial Lunatic Asylum. It will bear favorable comparison with similar productions of the ablest writers, and its vein of thought and purity of style can scarcely be surpassed. His frequent quotations showed his familiarity with the writings of the best poets, and a few fragments of his youthful productions in verse indicate his taste for that attractive literature. He took great interest in studying the works of British statesmen, and the writings of the English essayists were his delight.

On the foundation of the University of Trinity College, Sir John Robinson, in recognition of his virtues and high attainments, was elected Chancellor by the unanimous voice of its Senate. This high position he greatly valued, and he devoted much of his time and ability in promoting the interests of the institution, to which he was warmly attached.

Sir John Robinson's social life exercised a great influence on the masses. His love of virtue, his abhorrence of vice, and his avowed enmity to immorality and excess, exercised, through force of example, an undoubted influence for good on the minds and morals of the people. The purity of his life was a pattern to all, and his unvarying consistency was watched and imitated by the pious and good. His private life gained for him, if possible, more thoroughly the affections of the people, than even his public services.

The personal appearance of Sir John Robinson was particularly attractive. His features were refined and impressive, and his open countenance, full of benevolence and dignity, was scarce ever clouded with a frown, or darkened by reservedness. The dignity and gracefulness of his deportment was noticeable by the most casual observer. With an entire absence of affectation, he had that ease of movement, that refinement of taste, and suavity of manner, which is the certain index of a well-bred man: in fact he was a true type of "nature's gentleman."

The leading trait in Sir John's character was his loyal obedience to the call of duty. "Indeed," said a cotemporary, "it was his persistent devotion to duty that led to the great mistake of his life. Gifted with a healthful and active mind, together with a strong and vigorous constitution, he overlooked the great truth, that none of nature's laws can be transgressed with impunity, and that there are boundaries which human exertion must strive in vain to pass; and with a zeal and noble self-devotion which neither the premonitory warnings of disease nor bodily suffering could abate, he weighed down his earthly tenement by incessant toil, and, rather than seek the necessary repose which length of services permitted, and impaired health demanded, he sacrificed his valued life in obedience to the sacred dictates of conscientious duty."

It is difficult, in a limited space, to give a true estimate of Sir John's character. He had none of those peculiarities or eccentricities which frequently characterize the dispositions of great men. The nobility of his mind, in the contemplation of the realities of life, had that contempt for the vanities of the world, without which no man can be truly great. He rose above the sordid appetite of loving money; and he would rather have sacrificed all that he had, than have it even supposed that he had gained personal advantage at the public expense. On one occasion, in return for his public services, he was offered a whole township by the Imperial Government, but declined to accept it.

Sir John had the faculty of order and great method in all that he did. He was gifted with remarkable accuracy and strength of memory; he was one of those "who never forgot anything;" and from all parts of the country he was frequently appealed to, to explain the relationship of present affairs with the distant past.

His manners and tastes were simple and unaffected. He was of easy access, obliging to all, amiable, cheerful and instructive. He was humble without ostentation, complaisant without design, courteous without flattery. His conversation was varied with lively illustrations of wit and humour. It was one of his rules never to speak of on judicial matters in public, and he had the happy facility of unbur-

thening his mind from his onerous judicial labors when in the company of his friends. His amusements were simple, and regulated with prudence. In his younger days he was a good horseman, and in later years found constant enjoyment in improving the garden attached to his residence. Generously hospitable, none enjoyed sociability more than Sir John, and it was his greatest pleasure to promote good humour and happiness. He had a largely extended circle of friends, and retained to the last the intimacy of his early associates. He daily won golden opinions from his more recent acquaintances. He was not dogmatical or pertinacious in his private opinions, nor did he ever betray the least anxiety to lead in conversation, or to disparage the opinions of others; at the same time he never disguised his decided contempt for anything tricky, ignoble or mean. His kind heart was always ready to welcome or advise a friend, and his hand was at all times open to relieve any urgent case of suffering or necessity. With such pleasing virtues, few could help loving him. There was something "homespun" about him: his geniality of manner, his amenity of disposition, his genuine kind-heartedness, and his downright honesty of purpose, made him the idol of society, and the valued companion of all who were honored by his friendship.

Nor must we omit the mention of his beautiful domestic life. His home was a pure and happy one, and was hallowed by the virtues of his amiable family. A true and tender husband, a kind and indulgent parent, a sincere and constant friend, he was endeared to all his intimate acquaintances, and was little less than adored by the members of his family.

Sir John was emphatically a good man; an upright, God-fearing Christian, who, by deeds of piety and love, let his light shine before men, and served his God above many. His attachment to the Church of England, in whose principles and doctrines he had received careful instruction, was deep-seated and unwavering. It was one of his dearest objects in life to promote its welfare, and establish it in his native land. He honored it by his religious excellencies, as well as by an open advocacy of its cause in its temporal struggles. Though he was uncompromising in the doctrines taught by his Church, the charity of his religious opinions extended to all denominations of professing Christians. He had love without bigotry, zeal without fanaticism. His ideas of religion were enlarged and noble, not confined to the preciseness of a ceremonial, or a mere profession of belief. He made it a rule never to speak ill of any one, observing the divine command, "Love thy neighbour as thyself." To be of use, or to give pleasure to his fellow-creatures, was an element of his nature, and essential to his happiness. Another admirable trait in Sir John's character was his strict observance of the Sabbath. On that day he resolved never to perform any secular duty, and, no matter how great was the press of business, or how strong the temptation, nothing could induce him to make an exception to this sacred rule. Indeed the lofty religious sentiment of Sir John Robinson was the talisman to his happiness. It exalted his mind above the vanity of worldly things; it endowed him with a loyalty of character, an honesty of purpose, and an integrity in the performance of duty. Supported by this sentiment, neither his intercourse with the world, nor his arduous public services, could dull the amiability of his disposition; nor could the fatigue of long confinement, or the irritability of pain, ruffle the exquisite sweetness of his temper.

For many years of his life, Sir John was a severe sufferer from hereditary gout. His last attack, which in the end proved fatal, extended over a period of nearly six months, during which time he was frequently subject to severe and acute pain. He bore it throughout with singular patience and hopefulness. Early in January, contrary to the express wish of his friends, he presided at the Court of Appeal, and on his return home persisted in preparing his judgments. The effort was his last. On the night of Wednesday, the 21st, his disease assumed an aggravated form, which compelled him next morning to take to his bed, from which he never afterwards rose. On the following Saturday and Sunday there was a slight change for the better, but on the Monday the disease again assumed a more serious aspect, and twenty-four hours afterwards all hope for his recovery had vanished. He died on Saturday, 31st January. All the beauties of his Christian graces shone forth in his last hours. Peaceful, happy and resigned, retaining his consciousness almost to the last—surrounded by his own beloved ones, in whose sorrowful prayers he calmly joined; cared for and soothed by all that skill and tender affection could bestow, in the blessed assurance of a heavenly rest, he gently resigned his soul to Him who gave it.

At the request of the Law Society, and many influential citizens and friends, the funeral was allowed to assume a character which would permit of an expression of public feeling. On Wednesday, 4th February, the remains were removed from his late residence to Osgoode Hall, to be conveyed thence to their last resting-place. The Hall and Court were hung with black, which, as it wound round the white Caen pillars, had a mournful and impressive effect. Thither were assembled all classes of society. The Militia appeared in full force, together with the Officers of Her Majesty's troops in garrison. The Clergy of all denominations, the Judges of the Courts, the members of the Bar,

the Universities, the County Council, the City Corporation, and citizens of every class, creed and calling, swelled the ranks of the mournful procession, in token of their last homage to his memory. The weather, though intensely cold, could not suppress the feelings of the people. The streets were thickly lined; every store was closed; business was universally suspended, and black was hung from many of the windows facing the streets through which the cortege passed. From the Cathedral, where the service was read to a densely crowded audience, the procession continued its way to St. James's Cemetery. There the last offices were performed; the Church offered one more prayer; friends dropped one more tear, and the cold earth closed over all that was mortal of SIR JOHN BEVERLEY ROBINSON.

So lived in honor and died in peace the greatest man that Canada has ever produced.

SPRING ASSIZES, 1863.

EASTERN CIRCUIT.

HON. CHIEF JUSTICE DRAPER.

Cornwall	Wednesday	18th	March.
Brockville	Tuesday	24th	"
Kingston	Monday	30th	"
Perth	Wednesday	8th	April.
Ottawa	Tuesday	5th	May.
L'Orignal	Monday	11th	"

MIDLAND CIRCUIT.

HON. MR. JUSTICE HAGARTY.

Belleville	Monday	16th	March.
Cobourg	Tuesday	24th	"
Whitby	Monday	6th	April.
Peterborough	Tuesday	14th	"
Lindsay	Tuesday	21st	"
Picton	Tuesday	28th	"

HOME CIRCUIT.

HON. MR. JUSTICE MORRISON.

Milton	Tuesday	17th	March.
Barrie	Monday	23rd	"
Welland	Tuesday	31st	"
Hamilton	Monday	6th	April.
Niagara	Monday	20th	"
Owen Sound	Tuesday	12th	May.

OXFORD CIRCUIT.

HON. THE CHIEF JUSTICE OF UPPER CANADA.

Woodstock	Tuesday	17th	March.
Brantford	Tuesday	24th	"
Cayuga	Wednesday	1st	April.
Stratford	Tuesday	7th	"
Berlin	Monday	13th	"
Guelph	Monday	20th	"
Simcoe	Tuesday	28th	"

WESTERN CIRCUIT.

HON. MR. JUSTICE RICHARDS.

London	Monday	16th	March.
St. Thomas	Wednesday	25th	"
Goderich	Tuesday	31st	"
Chatham	Tuesday	14th	April.
Sarnia	Tuesday	21st	"
Sandwich	Tuesday	28th	"

HON. MR. JUSTICE CONNOR.

City of Toronto	Monday	16th	March.
York & Peel	Monday	13th	April.

JUDGMENTS.

QUEEN'S BENCH.

Present: McLEAN, C. J.; HAGARTY, J.; CONNOR, J.

February 7, 1863.

Darling v. *Weller.*—*Held*, that a mere retainer does not bind an attorney to register and re-register judgments. Rule absolute to enter non-suit.

Winter v. *Keown.*—Rule absolute for new trial on payment of costs within a month, else non-suit.

Cornwall v. *Gault.*—Rule absolute for new trial. Costs to abide the event.

Jenkins v. *Davis.*—Rule absolute to enter non-suit.

Fortune v. *Cockburn.*—Judgment *non obstante* on second issue.

The Queen v. *Corwin.*—*Held*, that on an indictment for manslaughter in the short form given by the Legislature, not in terms charging an assault, there can be no conviction for an assault. Conviction quashed.

The Queen v. *Shuttleworth.*—Conviction affirmed.

Craig v. *Bowen.*—Rule *nisi* discharged.

Present: McLEAN, C. J.; HAGARTY, J.; CONNOR, J.

March 2, 1863.

Lomas v. *British American Insurance Co.*—Verdict to be entered for defendants on the second plea. 1st plea and replication to the second plea bad on demurrer. Rule absolute.

Provisional Corporation County of Bruce v. *Cromar.*—Judgment for defendant on demurrer, and rule *nisi* for new trial discharged.

Robertson v. *Freeman.*—Judgment for defendant on special case.

Glass v. *Whitney.*—Judgment for defendant on demurrer.

Thayer v. *Fuller.*—Rule absolute for new trial without costs.

Cataraqui Bridge Company v. *Holcomb.*—Rule *nisi* discharged.

Hendershott v. *Hendershott.*—Rule amended by directing new trial upon payment of costs.

Present: McLEAN, C. J.; HAGARTY, J.; CONNOR, J.

March 7, 1863.

Oswald v. *Rykert.*—*Held*, that after a return of *nulla bona* to a *fi. fa.* goods, issued to the county in which the venue is laid plaintiff may issue at once *fi. fa.* lands to other counties, but cannot issue a *fi. fa.* goods to a different county, and make a seizure in that county, concurrently with the issue of a *fi. fa.* lands to that county. Rule absolute without costs.

Colgan v. *Hayden.*—Rule *nisi* for new trial discharged.

Ham v. *Lasher.*—Rule absolute for new trial. Costs to abide the event.

Gayner et al v. *Salt.*—Rule *nisi* granted.

Bleakley v. *Easton.*—Verdict reduced to $2,200.

Bleakley v. *Easton.*—Judgment for plaintiff on demurrer. McLean, C. J., *dubitante.*

Irwin v. *Ingraham.*—Rule absolute for new trial on payment of costs.

Murray v. *McCarty.*—Rule discharged.

Regina v. *Dawes.*—Conviction affirmed.

Ganton v. *Size.*—Rule absolute for new trial. Costs to abide the event.

Buffalo and Lake Huron Railway Co. v. *Hemmingway.*—Rule *nisi* granted.

COMMON PLEAS.

Present: DRAPER, C. J.; MORRISON, J.

March 2, 1863.

Bullen v. *Moodie.*—Judgment for sheriff and his deputy, but for plaintiff against remaining defendants.

Held, that an ex parte order to commit a judgment debtor, though a justification to a sheriff, is no justification to plaintiffs or their attorney.

Baldwin v. *Elliott.*—New trial on payment of costs.

Allan v. *Fisher.*—Rule discharged.

McAlpine v. *Township of Ekfrid.*—Rule absolute on payment of costs.

Munn v. *Galbraith.*—Rule discharged.

Kaley v. *Donaldson et al.*—If plaintiff elect to take verdict for $100, appeal dismissed, otherwise allowed.

Bender v. *Joselin.*—Rule discharged.

Thompson v. *Falconer.*—Rule absolute without costs.

Reg. v. *Pierce.*—Defendant convicted for celebrating a marriage after having been expelled from the church, and while defendant was not a clergyman. Conviction held good.

McKay v. *Maguire.*—Appeal allowed as to new trial.

Whyte v. *Fee.*—Appeal allowed and a nonsuit entered in court below.

Simpson v. *County of Lincoln.*—Rule absolute to quash by-law.

Maynard v. *Gamble.*—Rule absolute to set aside nonsuit.

Smith v. *Evans.*—Rule absolute for new trial without costs.

Matthewson v. *Henderson.*—Judgment on demurrer for defendant on 4th and 5th pleas; for plaintiff on 6th, 7th and 8th pleas. Leave given to plaintiff to amend on payment of costs.

Crawford v. *Beard.*—Judgment for defendant on demurrer.

Smith v. [illegible]*ner.*—Rule absolute for new trial without costs.

Thompson v. *Crawford.*—Rule absolute to set aside nonsuit and enter verdict for £35.

Phelps v. *Wilson.*—Rule absolute for new trial on payment of costs.

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

March 7, 1863.

The Queen v. *Port Huron, Whitby and Scugog Railway Co.*—Rule granted to the agent of the Attorney General.

Hodgins v. *Hodgins.*—Rule to reduce verdict by the sum of £39 9s. 1d. (Richards dissentiente.)

Hennecker v. *British America Assurance Company.*—Judgment for plaintiff on demurrer to 2nd and 5th pleas: judgment for defendants on demurrer to replication to third plea. Rule absolute to enter nonsuit, on application of Galt, Q.C., made rule to enter nonsuit instead of verdict for defendants.

Crooks v. *Dickson.*—Judgment for plaintiff on demurrer.

Cornell v. *Power.*—Rule for new trial discharged.

McGuffin v. *Ryall.*—Verdict for defendant on 1st, 5th and 7th pleas: verdict for plaintiff on other issues. Damages, $908. Wood obtained a rule *nisi* to enter judgment for plaintiff on issues found for defendants *non obstante veredicto*. Rule to enter for judgment *non obstante veredicto* discharged. RICHARDS, J., dissenting. Defendant obtained rule to reduce verdict. The other rule being discharged unnecessary to express any opinion as to this rule. RICHARDS, J.—I think the plaintiff entitled to recover, notwithstanding the verdict for the defendant.

Turner v. *Corporation of Brantford.*—Judgment for the defendants on demurrer to 2nd plea.

Cochrane v. *Commissioners of Peterborough Town Trust.*—Appeal allowed, and judgment entered for the defendants on demurrer, on ground that defendants are sued as a corporation, and should have been sued as trustees.

Re Bright v. *City of Toronto.*—Rule discharged with costs.

Ex parte David Mason and Church. Rule absolute for a *mandamus*.

Snider v. *Snider.*—Rule absolute to reduce damages to 1s.

Buck v. *McCollum.*—Judgment for tenant on first plea and for demandant on second plea.

McKay v. *Rayner et al.*—Rule absolute on payment of costs.

Huntingdon v. *Lutz.*—Rule absolute for injunction.

Shaw v. *Morton.*—Stands.

Bank of Upper Canada v. *Grand Trunk Railway Co.*—Stands.

Reg. v. *Corporation of Paris.*—Stands for judgment in term.

Reg. v. *Northern Railway Co.*—Stands for judgment in term.

SELECTIONS.

SELECTIONS FROM OLD REPORTERS AND TEXT WRITERS.

In "The Epistle Dedicatory" to Croke's Reports, Sir Harbottle Grimston writes of the reporter, his father-in-law, that he was continued a judge of the Court of King's Bench, "till a certiorari came from the great judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory."

The gravity of the poor laws was enlivened, and the sterility of settlement cases agreeably refreshed, by a catch introduced by Sir James Burrow into the report of *Rex* v. *Norton* (Burr. 124). The reporter says, "I do not find the case of *Shadwell* and *St. John's Wapping* (which had been cited in the argument) in any printed book or manuscript. But I guess it to be the same case which I have heard reported in the form of a catch, to the following effect (if my memory serves me right):—

"A Woman having a Settlement,
Married a Man with none;
The Question was, he being dead,
'If that she had, was gone.'
Quoth Sir *John Pratt**—'Her Settlement
SUSPENDED did remain
Living the husband: but, him dead,
It doth *revive* again.'"

CHORUS *of Puisne Judges.*

Living the Husband; But, him dead,
It doth revive again.

The case of *The King* v. *Burford* is thus reported in Ventris (1 Vent. 16):—

"He was indicted, for that he scandolose & contempuose prepalavit & publicavit verba sequenta, viz.: That none of the justices of the peace do understand the statues for the Excise, unless Mr. A. B,, and he understands but little of them; no, nor many parliament-men do not understand them upon the reading of them. And it was moved to quash the indictment for that a man could not be indicted for speaking such words; and of that opinion was the court: But they said he might have been bound to his good behaviour."

Words spoken of an attorney, "Thou canst not read a declaration," per quot, &c. THE COURT. The words are actionable though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes, &c.—Judgment was given for the plaintiff (*Jones* v. *Powel*, 1 Mod. 272.)

"One of the cases in Littleton," says Mr. Wallace (The Reporters, 3d ed. 193,) "would present but a bad idea of the manners at Oxford, in 1625. We find, at least the Principal

* Then Lord Chief Justice.

of St. Mary's Hall libelling one of the Masters of Art, and a Commoner of the same Hall, '*pur ceo que il appel luy* Red Nose, Mamsey Nose, Copper-nose, Knave, Rascal, and Base Fellow, *et autres words non dissonant*, (Ralph Bradwell's case, Lit. 9).

"Another case speaks as ill of the behaviour of communicants in those days of Archbishop Laud. The Reverend Mr. Burnet sues one Symons in the High Commission Court, '*pur ces que appel luy fool en leglise et dit a lui Sirrah! Sirrah!*' and because, moreover, he, Burnet, being vicar there, Symons, at Whitsuntide, after the Communion was ended, took the cup and drank all the wine that was left: and that when Mr. Burnet took the cup from him 'Symons violently *reprise ces hors de ces mains arriere in facie Ecclesiæ devant que les parishioners fueront tons dehors leglise.*' It is curious and perhaps worth noting, that the court decided that all the wine that was left after the communion belonged to the parson. The same declaration will be found, I believe, in the rubric to the Book of Common Prayer, printed in the time of Charles II. It shows the doctrine of that day, though at present a special and more reverent provision is made for the case," (Burnet *v.* Symons Lit. 154).

In an appeal of death, the defendant waged battel, and was slain in the field; yet judgment was given that he should be hanged, which the judges said was altogether necessary, for otherwise the lord could not have a writ of escheat, (Co. Litt. 390, n.)

An English monk goes into France, and there becomes a monk; yet is he capable of any grant in England, because such profession is not triable, and also because all profession is taken away by statute, and by our religion holden as void, (Ley's case, 2 Roll. 43).

It is a rule of law, that *idem non protest esse agens et patiens*; and therefore a man cannot present himself to a benefice, nor sue himself. So no man can summon himself; and therefore if a sheriff suffer a common recovery, it is error, because he cannot summon himself, (Dyer, 188 a; Owen, 51). A man cannot be both judge and party in a suit; and therefore if a judge of the Common Pleas be made judge of the King's Bench though it be but *hac vice*, it determines his patent for the Common Pleas; for if he should be judge of both Benches together, he should control his own judgment; for if the Common Pleas err, it shall be reformed in the King's Bench. Littleton, Chief Justice of the Common Pleas, made Lord Keeper, yet continued Chief Justice. So Sir Orlando Bridgeman was both Lord Keeper and Lord Chief Justice of the Common Pleas at the same time, for these places are not inconsistent, (1 Sid. 338, 365).

If one that is seised in fee of an orchard, makes a feoffment of it to J. S., and goes into the orchard and cuts a turf or a twig, and delivers it in the name of seisin to the feoffee over a wall of the same orchard, the feoffee then being on other land not mentioned in the feoffment, this is a void livery, (2 Roll. 6, pl. 5). As to when a man shall give and take by his own livery, see Perkins, s. 205.

An infant brought an action of trespass by her guardian; the defendant pleads that the plaintiff was above sixteen years old, and agreed for sixpence in hand paid, that the defendant have license to take two ounces of her hair; to which the plaintiff demurred; and adjudged for her, for an infant cannot license, though she may agree with the barber to be trimmed, (*Scroggan* v. *Stewardson*, 3 Keb. 369.)

A woman shook a sword in a cutler's shop against the plaintiff, being on the other side of the street; and in trespass for assault and battery, there was a verdict of the assault and not guilty of the battery. It was prayed to give no more costs than damages, and so granted; which was noble, (*Smith* v. *Newman*, 3 Keb. 283).

The following is the charter given by William the Conqueror to Norman Hunter:—

I William the third year of my reign
Give to thee Norman Hunter
To me that are both leef and dear
The Hop and the Hopton
And all the bounds up and down
Under the Earth to Hell
Above the Earth to Heaven
From me and mine
To thee and thine
As good and as fair
As ever they were
To witness that this is sooth
I bite the white wax with my tooth
Before Jug Maud and Margerie
And my youngest son Henry
For a bow and a broad arrow
When I come to hunt upon Yarrow. *

A. the attorney of *B* brought an action against *C.* for saying to *B.* "Your attorney is a bribing knave, and hath taken twenty pound of you to cozen me." Judge Warburton held the words not actionable, for an attorney cannot take a bribe of his own client; but Hobart said he might when the reward exceed measure, and the end of the cause of reward is against justice; as if he will take a reward to raze a record, &c. And Hobart says, after he had spoken, Justice Warburton said that he began to stagger in his opinion, so that the plaintiff had judgment, (Hob. 8, 9; and 1 Roll, 53.)

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 32.)

BAILIFF'S ASSISTANTS.

There is no provision in the statute authorising bailiffs to appoint deputies. If the right to appoint was a question to be determined on common law grounds merely, the bailiff would probably be held to have the power; for, as already observed, the general rule with regard to all ministerial officers is, that they may appoint deputies. But the express provision enabling clerks to do so, plainly implies that bailiffs are not authorized to exercise any such power. Both clerk and bailiff are ministerial officers; but to a certain extent the Legislature may be supposed to have trusted the principals—clerk and bailiff—in the execution of both offices, making special provision, however, in the case of the clerk that the duty of his office might, on certain contingencies, be executed by deputy. A bailiff, doubtless, may call in assistance, when necessary, in the execution of his duty; and every such assistant, acting under the direction of his principal, will be within the protection of the statute, and be held in law to be the

* See Speed, 424, b; 2 Roll. Abr. 181; Merton's Anglorum Gesta, in Vita IV. 1.

principal's deputy (though not deputy-bailiff) while doing any particular act—as in securing, keeping possession of property seized, or the like, under the bailiff's direction. Indeed such assistants are recognized in several sections of the statute. Section 195 provides that no action is to be brought against a bailiff, "or against any person acting by his orders and in his aid," &c.: and in sections 184, 196 and 197 assistants are referred to. It does not appear essential to due service of the ordinary summons, to appear that it should be made by the bailiff of the court, if duly served by any literate person, it is apprehended it would be sufficient, though no charge could be taxed for the service or mileage, unless effected by an authorized person. In practice it is not unusual to appoint a person a bailiff (*pro hac vice*) to effect a particular service, where the circumstances warrant such a course; and in that case the regular expense of service would be chargeable in the usual way. But all process of execution and warrants must be executed by the bailiff personally.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Your solution of the two following points no doubt would be of interest to your readers, as they are cases that frequently occur, and recently came up in my court.

Say—Attachments are got out against an absconding debtor, fourteen days before the sittings of the court. Of course, pursuant to the act, judgment could not be given the first court, there not being thirty days before the court. A creditor has a claim of three dollars against the absconding debtor, which is too small a sum to get an attachment on; but as the amount does not require personal service, sues his claim in the ordinary way, and gets service by having the summons left with the debtor's wife. Court sits; and the plaintiff gets his judgment for three dollars; has an execution issued, and orders the bailiff to seize and sell the goods he holds by virtue of the attachment. As the attaching parties have as yet no judgments, should the bailiff sell and satisfy the three dollars claim or wait, and let that claim come in *pro rata* with the attachments; or should the claims under the attachments take priority over the execution?

Again: A creditor sues out an attachment against an absconding debtor. The bailiff finds perishable property, which he takes to the clerk. The creditor orders the clerk to sell the goods. The clerk asks for indemnity. Creditor cannot procure satisfactory security. To keep the property until the sittings of the court would cost more than the value of the property. What disposition of the property can the clerk make?

Yours truly,
CLERK 6TH DIVISION COURT CO. NORFOLK.

[Goods when seized under attachment are properly handed over to the custody of the clerk of the court, and are held by him according to the requirements of the statute. These goods are in the custody of the law for a certain purpose, and would not be liable to seizure under "the three dollar execution," nor could the execution creditor in that suit share *pro rata*.

The attaching creditors would, we think, take priority. If the claim, with costs, came to $4, possibly the judgment creditor might sue out an attachment upon the judgment and come in for a share. The words in sec. 199 are, any person indebted, &c., "*or* upon any judgment."

The provisions of section 213 leave it optional with the clerk to require security, or to sell without it. In the case put we think it would be advisable for the clerk to sell the goods. The original fault would lie with the bailiff, who ought not to seize perishable goods without a bond, as required by and upon the conditions mentioned in sec. 214.]—EDS. L.J.

SARNIA, February 18, 1863.

To the Editors of the Law Journal.

GENTLEMEN,—There appears to be considerable doubt as to the construction of secs. 101 and 102, 22 Vic. cap. 19. I take the liberty of addressing you and requesting your opinion on the subject. As it is a question of general interest to those practising in the court, I am persuaded you will kindly give it an insertion in your next issue.

Quære—Is not the 102nd section, 22 Vic. cap. 19, explanatory of 101st section; and if so, has the judge power to examine the plaintiff to a suit where the opposite party objects, and where the amount claimed exceeds $8.

I remain, yours, &c.,
ENQUIRER.

[We think the judge has *the power* in every case to examine the parties, but that such power should be sparingly exercised, or be confined to cases in which, from their nature, there is a poverty of unexceptionable evidence, yet still sufficient to raise a presumption when the parties' oath is taken to supplement it.]—EDS. L. J.

THE EFFECTIVE WORKING OF THE DIVISION COURTS.

We have received a long communication from a writer who speaks upon "an experience of over twelve years in the Division Courts." He desires to see some general supervision as to their mode of working, "which would place the practice and administration of law and justice, in what was intended for an almost domestic and poor man's tribunal in the different localities, upon a uniform plan." And as a matter of fact he asserts "that the plan of procedure is not uniform, or else those who work in those Courts do not all work to the plan."

With all respect for our correspondent, we entirely disagree with his views as to a remedy for the alleged evil. The Division Court system contains *in itself* ample power

to remedy evils of the kind and to secure uniformity of procedure. It is, no doubt, very difficult to secure complete uniformity on all points, when some thirty functionaries are engaged in administering a particular law, with the aid of some five hundred ministerial officers, and when each of the thirty functionaries act so far independently that the one is not legally bound by the decision of another.

But has uniformity been earnestly studied? We fear that earnestness amongst officials is rather a rare virtue, otherwise we might naturally suppose that those who have public duties to perform would be *anxious* to have all the aid possible in fitting themselves for the discharge of those duties. And without just now referring to other helps, we cannot but feel surprised that no conference of the county judges (as amongst the assistant barristers in Ireland) has taken place for years, at which matters of procedure could be discussed, the younger officers benefiting by the matured experience of their senior brethren, and all deriving advantage from the inter-communication of views and opinions. No one but the ignorant man, or one puffed up by vanity, can be indifferent to what has been urged or done by others situated as he himself is, under circumstances similar to those upon which he may at any time be called upon to deliberate and act; and only the blockhead would despise the advantages to be gained from free discussion amongst experts on a subject of common interest to all.

The same remarks apply, though not with the same force, to all subordinate officers. The expense of such a conference, say once in a year or once in two years, would be very trifling, and we cannot help thinking that there is a little supineness in quarters where it should not exist, or such meetings would have taken place.

But then, it may be said, there is a Board of Judges appointed to settle conflicting points, and from time to time to frame guiding rules for procedure. This is very true, but a general conference would also be of infinite value, and enable *all* to profit by the knowledge and experience of each. We have heard, moreover, no general desire expressed for a meeting of the Board of Judges—some perhaps not desiring to be fettered by rule, preferring the arbitrary exercise of individual humour; others fearing a ruling on various points would show the practice sanctioned by them to be wrong; and others again perfectly indifferent to the matter, only anxious to go through business as easily as possible, without one thought or aspiration towards efficiency and improvement in the system with which they are connected.

Whatever the causes of indifference, it must eventually, if continued, lead to evil results; people will not separate the system from its administration, and confounding both, or rather judging of one by the other, will at some day be attacking the system itself, and seek to replace it by something else. It is certainly a good rule not to argue *et abusu contra usum*, but those who suffer through want of uniform and proper administration will be inclined to adopt Pope's idea touching administrative value, and say—

> For forms of Government let fools contest,
> Whate'r is best administered is best,

and admit the truth of Bacon's axiom: "The life of the laws *lies in the due execution and administration of them.*"

We put these considerations very strongly before our readers, particularly officers of the courts. If there be but a tithe of truth in the allegations of our correspondent, and which will form material for remark in several numbers to come, there is a criminal indifference to what is right, or positive ignorance, in more than one quarter from which better things might be expected. For ourselves, we shall not hesitate to speak out when facts properly authenticated, coming from an unprejudiced quarter, are laid before us. We believe the Division Court system to be admirably adapted to the purposes for which it was designed, and that where real tangible evils exist the fault is due to administration, mal-administration or feeble administration, and not to the law itself (though we are willing to admit that there is some room for improvement in detail). To be consistent, therefore, we can give no uncertain sound when doings are exposed which are calculated to bring the system into disrepute.

The *Law Journal* bases its claims to usefulness, so far as the Division Courts are concerned, in no small part on the advantages it offers as a channel of communication for what passes and is decided in all the courts, and because it enables judges, clerks and bailiffs, to know what is done in other counties, as well as affords a field unsullied with political prejudices in which subjects of interest and importance can be suggested and discussed, and knowledge advanced and error dissipated.

Our columns have always been open to just complaints, and to information or suggestions, from practitioners, officers and others, on matters within the scope of the publication; and thus to some extent our official and other readers have had the advantage of a monthly conference and the friendly light of information on difficult or complicated points, from all parts of Upper Canada. We have not received, it is true, all the aid we ought to have expected, seeing that the county judges in Upper Canada expressed themselves favourable to the undertaking some eight years ago—"recognizing in the plan of publication a source of *great public utility in advancing the sound administration of justice* in courts which from their local character so immediately comprehend the interests evolved

from the masses of a peculiarly industrious and progressive people."

Such assistance as we have received we would gratefully acknowledge, but regret that not more than four or five of the judges are to be numbered amongst those who assisted us with materials for this work of "public utility."

It has ever been our aim to turn the information and assistance given to the best possible account, to enable subordinate officers to act with confidence and safety in the discharge of their duty, and to secure uniformity as well as soundness in administration, that the public may derive all the advantage which the Division Courts are calculated to confer "upon a peculiarly industrious and progressive people."

In this spirit we welcome the communication now before us; and with a very few regular correspondents of the same stamp, we would not despair of curing in one year most of the evils of administration which this writer laments.

Doubtless, points may remain on which it is impossible to reconcile conflicting views without an adjudication, of some rule laid down by authority. Yet the number of these can be but few, and numerous debatable points dwindle down with marvellous rapidity under the process of a full and free discussion.

In the administration of the Division Courts, the judge, very seldom have the benefit of legal assistance in examining the intricate points constantly engendering by complications in the thousands of cases coming before them, and it can be no matter of surprise if they occasionally fall into error. So do the judges of the Superior Courts. Neither the one nor the other can lay any claim to infallibility, and neither, we must suppose, would be above hearing "the *pros* and *cons*" of a subject. A judge ca. have no desire but to know what the law is in any case coming before him; and, to quote a somewhat hackneyed truism, any man may err in judgment, but none but a knave or a fool will persevere when convinced of error.

We are obliged to postpone notice of the details given in the communication referred to, till next number. Many subjects are dwelt upon; each would almost require an article to itself. Certainly one or two of the judges, according to our correspondent's report, seem to have strange notions of the law and to take strange liberties with the statutes.

This great truth, applicable in matters of small concern as well as great, can never be too often repeated, namely, that while extensive discretion ought to be given to those who administer the laws, it should not depend upon accident or the temper or private opinions of judges what character the law should assume.

UPPER CANADA REPORTS.

IN APPEAL.

[Before The Hon. Sir J. B. Robinson, Bart., President; The Hon. Archibald McLean, Chief Justice of Upper Canada; The Hon. William H. Draper, C.B., Chief Justice of the Court of Common Pleas; The Hon. Vice-Chancellor Esten; The Hon. Mr. Justice Burns; The Hon. Vice-Chancellor Spragge; The Hon. Mr. Justice Hagarty; and The Hon. Mr. Justice Morrison.]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

(*Reported by* Alexander Grant, Esq., *Barrister-at-Law.*)

Evans v. Evans.

Specific performance—Laches.

In the year 1850, the owner of 100 acres of land, with the view as was admitted of retaining his son upon the property and settling him in life, agreed to convey to him in fee simple 50 acres of this land, worth at least £150, upon payment of £50, payable in six years without interest, and executed a bond for that purpose. After obtaining this bond, the son went to work about the country, and resided for some years at a distant part of the province, sometimes returning when out of employment and residing with the other members of his father's family, and during such residence was in the habit of assisting in doing the usual work of the farm. Nothing was ever paid on account of the purchase money, although it was alleged the son was entitled to a credit on account thereof for services rendered. After a lapse of a period of about ten years, a bill was filed by the son to enforce a specific performance of the contract evidenced by the bond, and a decree was pronounced in favour of the plaintiff. Upon an appeal to this court this decree was reversed, and the bill in the court below dismissed with costs, unless the plaintiff should within one month deliver up the bond to be cancelled, in that event the dismissal to be without costs. [Draper, C. J., and Esten, V. C., dissenting.]

The bill in this cause was filed by Thomas Evans against George Evans, setting forth, that in April, 1850, defendant had agreed to sell and convey to plaintiff 50 acres, part of lot number 24, in the first concession of Albion, for the price of £50, payable according to the terms contained in the recital to a bond executed by the defendant to the plaintiff on the occasion of such sale, and which bond was set forth at length in the bill; that after the execution and delivery of this bond, the plaintiff, at defendant's request, agreed to serve defendant as a labourer on his farm, the remuneration for which was to be applied upon and form part of the payment of the purchase money of the land; that under the agreement, plaintiff had so worked for twelve months—such services being worth £30; that it was also arranged that plaintiff should pay the taxes on the land, he first being let into possession and enjoyment thereof; that accordingly, about twelve months after the execution of the bond, plaintiff applied to defendant to let him into possession, which was refused, and defendant continued to retain the possession thereof. The bill also charged that plaintiff had another claim against defendant, on a promissory note for £30, with interest thereon, such sums in all amounting to much more than was due to defendant in respect of the purchase money agreed to be paid; and prayed specific performance of the contract, and an account of what was due.

The defendant answered the bill, admitting the contract alleged, but stated that, at the time of entering into it, the property was of much greater value, and that his sole reason and inducement for agreeing to sell it for so small a sum was, as the plaintiff well knew, to endeavour by that means to keep the plaintiff on the farm, instead of suffering him to go to the United States or some other part of the country; but denied that plaintiff had served him as alleged, but, on the contrary, that immediately after the contract left and went elsewhere, and had never remained on the farm as had been intended; that plaintiff had never complied with the terms and conditions of the bond by payment of the consideration money or taxes, and that therefore he (plaintiff) was not entitled to any relief. The answer further stated that, about the year 1856, and after the time limited for payment had elapsed, defendant set up the plaintiff and his sister in a tavern belonging to defendant, where he remained for about a year, when he left, when he made a claim against defendant for boarding some of his workmen, and that, in consequence, defendant gave plaintiff the note for £30, at which time plaintiff did not assert any claim to the property, or to have the note credited on the bond, and which

defendant submitted was evidence of plaintiff having abandoned the contract; that the claim of plaintiff was a stale demand, and that by reason of plaintiff's laches the same could not be enforced.

The answer further stated, that on the 26th January, 1859, the defendant being in want of money, and supposing that plaintiff had abandoned all claim to the property, had mortgaged the same with other lands to one Stephen S. Lee and Alan Cameron, for $900, of all which the plaintiff was aware, as defendant verily believed.

Evidence was gone into; that on the part of the plaintiff, being chiefly with a view of showing that he had complied with the stipulation agreed upon between the parties of working for the defendant, one Evans, a relation of the parties, swore that about the 6th of February, 1861, he went with plaintiff to defendant in order to make an arrangement of the differences before suit, when defendant refused to give the deed, and said if plaintiff waited till defendant's death he would give plaintiff his share; that the witness tendered defendant $55, which was the balance due on the land, after deducting six months' labour ($66) and a note of $83, with interest on it ($19); that on this occasion defendant stated he had offered plaintiff $1000 and some farming utensils in lieu of the 50 acres; that he would like to keep the land, for which reason he had made the offer. This witness said the place was worth $1,600, some time being given; that he did not know where plaintiff lived after getting the bond. John Lyndsay, a witness for plaintiff, proved that, in the fall after the bond was given, plaintiff was working for defendant; that he had heard defendant offer the $1000 and farming implements to plaintiff; that at the time of the bond the land was worth $1000, and that he had heard defendant say in presence of plaintiff that he was selling him the land to keep him at work. Ellen Matthews (sister of plaintiff and called by him) swore that she had heard plaintiff and defendant converse about the land; plaintiff had been working off and on for defendant before the bond was given; she had heard her father speak about the bargain; he always allowed he would give the land to the plaintiff; about a year after the bond, the defendant said that if plaintiff would settle and marry he might go upon the land; that she had seen plaintiff working for defendant since the bond was given, could not say how long; that plaintiff had been back and left defendant frequently; that he was more frequently away than at home during the last four or five years, and that about six years ago she had heard plaintiff complain of not getting possession of the land. Other witnesses called by the plaintiff proved that defendant had always desired to keep the land in his family; that he had stated he would rather pay the money ($1C00) than break the farm, as thereby he might get a bad neighbour; that plaintiff had been in the habit of working for other people; that he staid at his fr ier's house when out of work, but worked while there.

The plaintiff was examined by the defendant On his examination he swore that the bond had been given for work done before 1850, after that he was to have wages, which were to be applied to the land, which he was to get possession of after a year. One witness (Hessy) called by the defendant stated that plaintiff had been living at the Grand River for about four years, and while there witness had a conversation with him, in which he stated that he thought he would never return home; that he had some claim against his father, but did not like to put it in force, because he did not think it was his right, and his father was not able to pay it or suffer the loss; he did not say what the claim was, and witness did not ask him.

The cause came on to be heard before his Honour V. C. Esten, on the 25th day of January, 1862, when a decree was made, by which it was declared "that the plaintiff is entitled to a specific performance of the contract in the bill of complaint of the said plaintiff in this cause set forth upon payment of what shall be found due by the plaintiff to the defendant in respect of the purchase money agreed to be paid therefor, subject, however, to the mortgage security in favour of Stephen S. Lee and Allan Cameron in the said bill mentioned, and doth order and decree the same accordingly, and it is ordered that it be referred to the master of this court to take an account of what is due by the plaintiff to the defendant for the purchase money of the said land and premises, and in taking such account he is to set off and allow against such purchase money whatever he may find to have been the value of the services (if any) rendered by the plaintiff for the defendant at any time subsequent to the date of the contract, and also to set off and allow against such purchase money any sum or sums of money he may find due from the defendant to the plaintiff upon any other contract or consideration, and also in like manner to set off and allow against such purchase money and interest the costs of plaintiff to be taxed by the master, and upon payment by the plaintiff to the defendant of any balance which shall be found due to him upon taking such account, it is ordered that the defendant do execute a good and sufficient deed of conveyance in fee simple of the parcel of land in the said bill mentioned, being, &c.; such conveyance to be settled by the master of this court in case the parties differ about the same, and the said defendant undertaking to satisfy and discharge the said mortgage in favour of Stephen S. Lee and Allan Cameron according to the requirements thereof. This court doth order and decree that the defendant do satisfy and discharge said mortgage, and in the event of the master finding that the amount due in respect of the purchase money and interest shall be insufficient to balance the amount which shall be found due to plaintiff, including the costs aforesaid, it is ordered that the defendant do pay to the plaintiff the amount of the deficiency, such deficiency not exceeding however the costs which shall have been so taxed and allowed to the plaintiff. And this court doth reserve the consideration of further directions and of subsequent costs."

From this decree the defendant appealed, for the following reasons:

1st. Because the court should have declared that the contract in the pleadings mentioned had been abandoned by the parties, and should have therefore refused specific performance.

2nd. Because from the laches of the respondent the court should have refused him any relief.

The respondent, in support of the decree, assigned the following reasons:

That the decree made by the court cannot be appealed from, inasmuch as it orders the payment of money, an account whereof has not been taken, and to secure the payment whereof the appellant has not made the requisite provisions. That as the decreeing or refusing specific performance of a contract is discretionary, this court would not interfere with the judicious exercise of that discretion by the court below, to whom the same peculiarly belongs, and that, therefore, there is no error in the said decree.

That there was no abandonment by the respondent of the contract whereof specific performance was decreed by the said decree in the court below, and no evidence of any such abandonment was furnished or offered in the court below.

That there were no laches to disentitle the respondent to the relief granted to him by the said decree.

That if there were any error in the said decree the appellant ought to have caused the same to be reheared before the full court below.

The appeal coming on to be heard—

Blake and *G. D. Boulton* for the appellant.

Although the lowness of the price agreed to be paid for the land may not of itself be sufficient as a ground of defence, it is certainly material when taken in connection with the other considerations which arise in the case—such as settlement by the plaintiff on the property, for it is perfectly clear from all the evidence that this object was the main if not the sole moving cause for the father agreeing to convey to the son. On this understanding the bond was executed, and this may be shown by parol as a defence to a bill seeking specific perfor- ance—*Beaumont* v. *Dukes* (Jac. 422), *Meyers* v. *Watson* (1 Sim. N.S. 123).

The application for and refusal of possession occurred as stated by the bill, in 1851, was a sufficient repudiation of the contract, and yet no proceeding is taken to enforce the contract for ten years afterwards. This was such laches as should disentitle the plaintiff to any relief in a Court of Equity.—*Hook* v. *McQueen* (3

Grant). The execution of the mortgage to Leo & Cameron with the knowledge of plaintiff, was strong evidence of abandonment.

Blevins, for the respondent, referred to *Norway* v. *Moore* (5 Grant, 611), as to the effect of a statement in the bill being contradicted by evidence. *Carolan* v. *Brabazon* (3 J. & Lat. 444) shews that to prove a defence on the ground of abandonment, the fact of abandonment must be proved as clearly as the original agreement. He cited *Clark* v. *Hart*, 5 Jur. N.S. 447; Fry on Spec. Per. 306; Sug. V. & P. Ss. 211-212.

Sir J. B. ROBINSON, Bart.—I think there is nothing in this case which stands in the way of a determination by this court of the question whether it is or is not consistent with equity that the plaintiff should have a decree for specific performance. As to the reference to the master which the decree contemplates, that would not be upon any point material to our forming a judgment upon the main question. The necessity for such reference is dependent on the decree for specific performance being upheld.

Then as to the ground of objection to the appeal, that it was discretionary with the court to decree performance or not, and that there can be no appeal from the exercise of mere discretion. That is true in a limited sense, but not universally, or there could scarcely be an appeal in any suit of this description; whereas we have had many, and shall not improbably have to dispose of more. It is no doubt within the authority of an appellate jurisdiction to determine in this case, as in others, whether the judgment of the Court of Equity in a matter which may be admitted to be in some measure discretionary has been given in accordance with the general principles which in such cases govern courts of equity. It need hardly be said that a judgment decreeing specific performance may in many more instances be found the subject of an appeal than a judgment refusing it. This is an order of the former kind.

This case should not, in my opinion, be looked upon as if the transaction were enirely one of business—in which the motive of each party is, for all that appears, to get an equivalent for what he gives. This is a bill filed by a son against his father, to compel him to carry into effect an agreement, positive enough no doubt on the part of the father, but in which the son has lost all remedy at law by most unreasonable negligence and delay.

It does not appear that the defendant exacted any undertaking from the son to pay the sum of money mentioned in the defendant's bond as the consideration for the land which he was to convey, nor any undertaking to pay the taxes.

All that we see, or hear of, is a bond from the defendant to the plaintiff, that he will make him a deed of the land in question, 50 acres in the township of Albion, provided the plaintiff should pay him £50 in six years from the 1st September, 1850, that is to say, £10 on 1st September, 1852, and the remaining £40 in four equal annual payments on 1st September in each of the four years following; so that the whole price should be paid by 1st September, 1856; and the plaintiff was in the mean time to pay all taxes on the 50 acres. No interest was to be paid, according to the terms recited in the defendant's bond to convey. The agreement therefore properly speaking was all on one side, and that is a material feature in the case.

At the time that the defendant thus bound himself to convey to his son these 50 acres for £50, to be paid in six years, the land it appears by the evidence was well worth £150, and is now worth from £300 to £400.

It is quite plain that there must have been some particular purpose to be answered to the father by selling to his son 50 acres of the same lot on which he lived for a third of its value. I have no doubt that the object was that which is indicated in the evidence, and is in some measure admitted by the plaintiff, namely, to keep the son from wandering about, laboring for strangers, or wasting his time perhaps more unprofitably.

Or it may have been that the motive also entered into his father's mind of making in this manner a provision for this son, in proportion perhaps to what he might be able to give to his other children, for the land given to him upon these easy terms would be in a great measure a gift.

These considerations apply strongly against treating this as an agreement to be enforced against the defendant by any active interference of a court of equity, where the son is chargeable with great laches in omitting to do what he was bound to do in order to bring himself within the terms of his father's bond.

On considering the whole evidence, I find it not easy to satisfy myself what labor the son had done for the father after the execution of the bond, which the father afterwards agreed to allow for as part payment of the £50. It is very imperfectly proved, and the evidence that is given is contradicted.

The cases which are referred to in Mr. Fry's work on Specific Performance, chapter 24, are very strong to shew that the court should not lend its aid to the plaintiff to enforce special performance against the father, after a delay of so many years, where the plaintiff has not in the mean time been in possession and has made no improvements, and has neglected so long to enforce the agreement after he had, as he admits, full notice that his father, in consequence of his negligent conduct, intended not to consider the agreement still in force which had been so long disregarded, that is, I mean, the specific agreement to convey the land, though he had offered no alternative.

I think the decree should be reversed and the bill dismissed with costs, though, if my brothers concur, I should have no objection to follow the course taken in *Spurrier* v. *Hancock*, 4 Ves. jr. 694, by adding, "unless within one month the plaintiff should deliver up the agreement;" and in that case without costs.

DRAPER, C. J.—I can see nothing in this case to take it out of the general rule, that the specific performance of an agreement for the sale of lands should be decreed. I think, for the reasons assigned by the learned Vice Chancellor, the decree should be affirmed and the appeal dismissed with costs.

ESTEN, V. C.—I think the decree pronounced by me in favour of the plaintiff should be affirmed. The estate was sold at an undervalue by a father to a son, who had acted towards him in a praiseworthy manner, but for a substantial consideration, and this circumstance can therefore form no bar to a specific performance. The bond is proved and constitutes a valid contract within the Statute of Frauds. The only defence then which can be raised to the suit is abandonment or laches on the part of the plaintiff. The defendant was anxious to keep his son in the neighbourhood, and see him married and settled. I am satisfied that he never intended to rescind the contract. The plaintiff paid a substantial part of the consideration, and at the end of the year asked for possession; when the defendant said that if he would marry and settle he would admit him into possession. The plaintiff was not prepared at that time to marry, and time passed, the plaintiff and defendant having dealings with each other. The defendant never notified the plaintiff that if the contract were not performed he would rescind it. He brought the land into cultivation, intending probably the plaintiff to have the benefit of it when he should settle. During this time the plaintiff left the bond in the hands of George Evans, with instructions to press it, but he did not, and Mrs. Matthews took it away. On the plaintiff's return from the Grand River he pressed his claim, and the defendant, not insisting that the contract was at an end, made a very advantageous offer of compromise to the plaintiff. Upon the whole, considering the circumstances of the case and the relation existing between the parties, I think no abandonment and no sufficient laches exist in the present case to debar the plaintiff from the relief he seeks. I do not attach any weight to the declaration of the plaintiff as mentioned in the evidence of Hessy, although I think he was speaking the truth to the best of his recollection. Mrs. Hessy exhibited a good deal of feeling in delivering her testimony. She was only ten years old at the time of the transactien which she relates. The defendant should have acquiesced in the demand of the plaintiff, and accepted the money which he tendered to him.

I think the appeal should be dismissed, and with costs.

HAGARTY and MORRISON, J. J., concurring in the views expressed by the president, the appeal was allowed and the bill in the court below ordered to be dismissed.

QUEEN'S BENCH.

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

THE CORPORATION OF THE COUNTY OF MIDDLESEX v. THE CORPORATION OF THE CITY OF LONDON.

Jury expenses—Consol. Stats U. C., ch. 31, secs. 155, 156—Mode of computation.

In computing the proportion of jury expenses payable by a city and county under the Jury Act, secs. 155, 156, the assessed value of the ratable property of the city, on which their proportion is calculated, is to be taken not as the assessed annual value, but as a sum of which that forms ten per cent.: *e. g.* if the annual value in any year be £6,000, the share of the city is to be calculated upon £60,000.

[Mich. Term, 26 Vic.]

This was an action brought by the plaintiffs against the defendants to recover the sum of $3,409 24, for the use of the gaol and court-house by the defendants, and for the proportion of the expenses incurred by the plaintiffs for the payment of jurors for the years 1855 to 1861, inclusive, and interest.

The cause came on to be tried before McLean, C. J., at London, when a verdict was taken for the plaintiffs for $3,409 24, subject to the opinion of the court upon the following case:

The only matter in dispute between the parties in this suit is with respect to the amount which the city ought to contribute to the jury expenses, the parties differing as to the mode by which that amount should be computed.

Accordingly, referring to the statutes 22 Victoria, chap. 31, of the Consolidated Statutes of Upper Canada, entitled, "An act respecting jurors and juries," sections 155 and 156, the plaintiffs affirm that the proportion payable by the city should be regulated as follows:

Assuming the assessed annual value of the ratable property in the city of London, for any year, to be £6,000, the plaintiffs affirm that this sum of £6,000 must be taken as ten per cent. of the actual value of that property, which actual value would consequently be £60,000, and that therefore this sum of £60,000 should be taken as a basis upon which the amount payable by the city for the jury expenses of that year ought to be computed.

On the other hand, the defendants deny that the above mode is the correct mode of computation, and affirm, that assuming the assessed annual value of the ratable property of the city, for any year, to be £6,000, this sum of £6,000 must be taken as the basis upon which the amount payable by the city for the jury expenses of that year ought to be computed.

If the court shall be of opinion in the affirmative—that is to say, that the mode of computation which the plaintiffs contend for, as mentioned above, is in accordance with the law—then the verdict is to be entered for the plaintiffs as aforesaid, for the sum of $3,499 24.

But if the court shall be of opinion in the negative—that is to say, that the mode of computation which the plaintiffs contend for, as mentioned above, is not in accordance with the law, but that the mode of computation contended for by the defendants, as above mentioned, is correct—then the verdict is to be entered up for the plaintiffs for the sum of $984 51.

A schedule, which it is considered unnecessary to give here, was attached to the case, showing the actual value of the ratable property of the county of Middlesex, and the annual value of the ratable property of the city of London for the years 1855 to 1861, inclusive, respectively, and the population of the city and county in different years, in order to assist in illustrating to the court the two modes of computation above mentioned, and their effect, if required.

Connor, Q. C., for the plaintiffs. *McMichael* for defendants.

MCLEAN, C. J.—The assessment in cities and towns being upon the annual value, and in counties upon the actual value, the third sub-section of section 155 declares that the annual value shall be held to be ten per cent. of the actual value. The whole object of that enactment is to equalize as nearly as can be done the proportions to be paid by each, for if some such standard were not established it is evident that persons assessed yearly on the actual value of property would pay an amount far greater than those in cities assessed only on the annual value. I think the plaintiffs are right in their mode of computation, and that they are entitled to recover according to that mode.

HAGARTY, J.—We may safely assume that such a construction as the city contends for could hardly have been intended by the legislature, as it would apparently defeat all idea of any rational proportion between the respective ratable property of each municipality as the measure of liability.

The defendants insist that the words are, on the assessed value, and that in their city the only assessed value is the annual value, and that it is only this annual value that is the assessed value.

It may be literally true that in the city rolls the only value appearing is an annual value, except perhaps, that if the roll, strictly conforms to the 19th section of the Assessment Act (Con. Stats. U. C., chap. 55), one column would shew the total value of personal property, and another column the yearly value of the same.

We also know judicially that in the city assessment roll, in the case of real estate, the assessed value is an annual value; and the legislature expressly meet a case like the present by qualifying sub-section 2 by the succeeding sub-section 3, that in comparing the value of ratable property in any city or town and county for the purposes of the act, the assessed annual value shall be ten per cent. of the actual value, and, in the next section, that the actual or annual value shall be that shewn by the assessment rolls.

I therefore think the plaintiffs' construction is the true one, and that the *postea* should be delivered to them for the sum claimed.

Postea to the plaintiffs.

COMMON PLEAS.

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

IRESON v. MASON.

Contract—Common counts, construction of—Duty of Court—Misdirection.

One L. advertised for tenders for an addition to a store, intending to furnish the brick for the work himself. Having changed his mind, he notified the architect that the contractor was to furnish the brick; and the architect notified the persons tendering by leaving a written notice on his desk, where the specifications were put for the inspection of those tendering. The plaintiff, it was shown, tendered for the work, but the defendant's tender was accepted, and the plaintiff sub-contracted under him. Upon an action brought by the sub-contractor against the contractor for the price of the brick, the learned judge left the question on the contract to the jury, who found for the plaintiff.

Upon a notice of a new trial, on the ground of misdirection,

Held, that it was the duty of the judge to have construed the contract, it being the province of the jury to decide upon surrounding facts and circumstances, if there were any, to vary it; and that it not being shown that the defendant was aware the plaintiff had tendered on the understanding that the bricks were to be furnished by the defendant.—A new trial was ordered, without costs.

Common counts, for work and labour. Money and account stated.

Pleas.—1st, never indebted; 2nd, payment; 3rd, set-off.

The case was tried in March last, at the assizes for the city of Toronto, before Hagarty, J.

It appeared that Rice Lewis desired to have alterations and additions made to his store, and employed an architect to prepare plans, &c., for that purpose. The architect prepared a specification, and invited tenders. The specification, as originally drawn, provided that the proprietor should furnish the necessary brick; for at that time Mr. Lewis had determined to find brick. Afterwards he changed his mind, and desired that contractors should tender, they finding the brick; and the architect swore this was before the tenders were sent in, and that he had communicated this to those who sent in tenders; that he told all to include materials in their tenders; he wrote a notice, and left it on his table; that the plaintiff tendered for the work, and his tender was produced to Lewis; he would not swear that he told the plaintiff. The defendant got the contract, and then the plaintiff made a tender as follows to him:

"Toronto, August 20, 1861.—Mr. Mason: Sir,—My estimate of the works as follows at the alteration of Mr. Rice Lewis' store is, for the excavation, rubble masonry, brick work, cut stone, and plastering. $263 00
Plastering under shingles partition 20 00

$283 00

(Signed) WM. IRESON."

The architect was pressed as to his communicating the change in the specifications to the plaintiff. He said he did not remember, as a fact, that plaintiff saw his memorandum (the written memorandum left on the architect's table) as to materials; but he tried to make all understand this—all who called. However, another party, who tendered for the work, swore that he never heard of any change as to the bricks, and that he tendered on the specification excluding bricks, and that plaintiff tendered under him to the architect; that plaintiff's tender was $263, exclusive of bricks.

Five architects (besides the one who prepared the specification), on reading the plaintiff's tender to defendant, said they should consider it to include materials, unless it were made (*i e.*, founded) on a specification which excluded bricks from the contractor's tender, which should be according to the specification.

The defendant's counsel contended that the tender, as it stood, must govern. The learned judge left the jury to say what work the tender applied to, saying it was admitted the tender must have reference to some work specified or described, as it is to do the work for a sum specified in bulk.

The jury found for the plaintiff.

In Easter term, *R. A. Harrison* obtained a rule *nisi* for a new trial, for misdirection and on the law and evidence, contending that the learned judge should have put a construction on the tender, and not have left it to the jury; and that the proper construction of the tender was, that it included the bricks as well as putting them up.

In Trinity term, *M. C. Cameron* showed cause, citing *Bambridge* v. *Wade*, 16 Q. B. 59.

Harrison, contra, referred to *Charlton* v. *Gibson*, 1 C. & K 541; *Besant* v. *Crop*, 10 C. B. 895; *Boldero* v. *E. I. Company*, 26 Beav. 316; 4 Jur. N. S. 1124, and 6 Jur. N. S. 5; *Shore* v. *Wilson*, 9 Cl. Fin. 355.

DRAPER, C. J.—The case of *Bambridge* v. *Wade*, though a strong authority to show that the circumstances attending the entering into a contract may be inquired into or received in evidence to explain the meaning of the language used, does not reach the point raised—that it is for the court to construe the contract, and not for the jury.

In *Hutchinson* v. *Bowker*, 5 M. & W. 542, Parke, B., lays down the rule, that it is the duty of the court to construe all written instruments; that if there are particular expressions used, which have in particular places and trades a known meaning attached to them, it is for the jury to say what the meaning of the expression is, but for the court to decide upon the meaning of the contract.

Although evidence of all the circumstances which surround the author of a written instrument will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the language of the instrument as explained by the extrinsic evidence. The duty of the court is to *interpret*, that is, to find out the true sense of the written words as the parties used them; and to *construe*, that is, when the true sense of the words is ascertained, to subject the instruments to the established rules of law (Tayl. Ev. sec. 1087). In all cases alike the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous both with reference to the context and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention (*ib.* sec. 1088). And again, in *Neilson* v. *Harford* (8 M. & W. 823), Parke, B., says: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court either *absolutely*, if there be no words to be construed—as words of art, or phrases used in commerce—and no surrounding circumstances to be ascertained, or *conditionally* when these words and circumstances are necessarily referred to them."

It appears to me that the plain import of plaintiff's tender to the defendant, as regards the matter in dispute, is, that he was to furnish bricks for the brickwork. It seems to have been conceded by the plaintiff himself, by what he did in performance of his tender when accepted, that "rubble masonry" included stone and mortar, and "cut stone" included mortar and labor in putting it into the place it was required for; and the inevitable inference is, that if we do not look out of the contract, "brickwork" must include bricks.

The plaintiff is, it appears, a sub-contractor, the defendant having taken the contract from the employer, whose architect had at first prepared a specification, in which the employer was to furnish bricks; but the architect swore this was changed before the tenders for doing the work were received; that he left a written notice, for persons who came to examine the specification, of that change. The defendant, as it would seem, tendered with notice that he was to furnish bricks, but it was not proved that the plaintiff knew or did not know how the matter was when he made his tender to the defendant. He made a tender for the original contract on the specification excluding the bricks.

If the plaintiff could establish that the defendant was aware that the plaintiff tendered on the understanding that the bricks were to be furnished by the defendant, it would probably have a material effect on the decision of the case.

The copy of the specification produced at the trial has not been brought before us.

We think, looking at all the circumstances, there should be a trial without costs.

Per Cur.—Rule absolute.

THE QUEEN v. MCLELLAN.

Felony—Right of reply.

Held, that a counsel for the Crown in Upper Canada (not being himself the Attorney or Solicitor General) has no right to reply in an ordinary prosecution for crime where no witnesses are called for the defence.

RICHARDS, J., *dubitante.*

The defendant was tried at the last assizes for the united counties of Huron and Bruce, on a charge of burglary.

The indictment averred that defendant, on 26th September, 1862, about the hour of 2 o'clock in the morning of the same day, the dwelling-house of one Joseph J. Wright, situate in the town of Goderich, in the county of Huron, did feloniously and burglariously break and enter, with intent the goods and chattels of the said Joseph J. Wright, in the said dwelling-house being, feloniously and burglariously to steal, take and carry away.

The first witness for the Crown stated that there had been a large dinner party at his house (the Huron Hotel) on 25th September last; that the party broke up about 12 o'clock, and witness went to bed about 1 o'clock. He did not close the windows before going to bed, but left it to be done by a young man who was in charge of the dining room. That young man swore he closed the windows before he went to bed; and that it was about 4 o'clock in the morning when he went to bed. He could not say whether or not the windows were open up to 4 o'clock. He could not state the precise time when he closed the windows; but was positive that it was after 2 o'clock when he went to bed. He had himself put up the windows in order to air the room. He said there were no fastenings to the windows.

Another witness swore that, on the night in question, he drove up to the Huron Hotel between 12 and 2 o'clock, saw a boy of the name of John Ramsay jump out of the dining room window, and in consequence of what Ramsay said, witness got in at the window, and found prisoner crouching under a table. He asked prisoner what he was doing there. Prisoner said he had got in to get something to eat. This witness said he was quite satisfied it was between 12 and 2 o'clock, and not later, when he found prisoner in the dining room.

No witnesses were called for the prisoner, and his counsel accordingly addressed the jury.

The counsel for the crown then claimed a right of reply, and insisted that, as representing the Attorney General, he was entitled to reply, though no witnesses were called for the defence.

The counsel for the prisoner objected, but the learned judge, (McLean, C. J.,) allowed the counsel for the crown to address the jury, for the purpose of summing up the evidence brought forward on the part of the Crown.

The counsel for the prisoner objected that the only right to sum up was under the Common Law Procedure Act; and that the Common Law Procedure Act was inapplicable in a criminal case; and that at all events it was too late to sum up after he had addressed the jury on behalf of the prisoner.

The counsel for the Crown was, however, allowed to proceed, and did accordingly address the jury.

The jury found prisoner guilty, and he was afterwards sentenced to two years imprisonment in the Reformatory Prison of Upper Canada.

During Michaelmas Term last, *R. A. Harrison* obtained a rule calling upon the Attorney General or his agent to shew cause why the verdict of guilty, and all proceedings subsequent thereto, should not be set aside, and a new trial had, upon the grounds:

1. That the counsel for the Crown, not being the Attorney or Solicitor General, claimed a right of reply, was allowed to reply, and did reply, though no witnesses were called for the defendant.

2. That the verdict was contrary to law and evidence, in this, that there was no proof of the breaking and entering charged in the indictment.

3. That at the time of entering the window, through which defendant entered, was open, so that defendant was not guilty of the offence of burglary.

During last term *Richards, Q.C*, shewed cause.

He contended that the counsel for the Crown, as representing the Attorney General, had the right of reply, though no witnesses were called for the prisoner; and also contended that, whether he had or not, the exercise of the supposed right was not a ground for a new trial.

Harrison supported the rule.

He contended that the right of reply in a criminal case, where no witnesses are called for the defence, is the personal right of the Attorney General, if it exists at all; and that being so it cannot be exercised by those whom he deputes to conduct criminal prosecutions.

Mr. Harrison admitted that an error of the judge in allowing the right of reply, in a case where it does not exist, is not *per se* a ground of application for a new trial; and submitted that in this case it had worked injustice, inasmuch as the evidence was wholly insufficient to sustain the conviction.

The following authorities were cited by counsel during the argument:—7 C. & P. 676, 677; *Rex* v. *Marsden*, M. & M. 439; *Rex* v. *Bell*, M. & M. 440; *Reg.* v. *Gardner*, 1 C & K. 628; *Reg.* v. *Blackburn*, 3 C. & K. 330; *Reg.* v. *Christie*, 1 F. & F. 75; S. C. 7 Co. 506; *Reg.* v. *Taylor*, 1 F. & F. 75; *Reg.* v. *O'Connell*, 11 C. & F. 155; Har. C. L. P. A. 303 note.

DRAPER, C. J.—I think there is no such right as that claimed by the learned counsel for the crown. I do not think any such right exists in England. In England the right may be said to exist in cases where the Crown is directly concerned, as in a state prosecution, or in a prosecution for an assault on a customs or other public officer. In ordinary prosecutions for crime I do not think it exists, except where the Attorney General himself prosecutes. I have always been of this opinion, and have always so ruled in cases before me. The erroneous exercise of that right is not, however, itself a ground for a new trial; but in this case I have no hesitation in saying that the evidence was not sufficient to sustain the verdict, and, therefore, think there ought to be a new trial.

RICHARDS, J.—I also think there ought to be a new trial; but I cannot say I am free from doubt on the first point to which the learned Chief Justice has referred. The learned judges (Talfourd, Bayley and Martin) who in England have decided against the right of a crown officer, not being attorney or solicitor general, to reply where no evidence is adduced for the defence, never held the office of attorney or solicitor general, and had not the same opportunity of forming a correct opinion on the question as Chief Baron Pollock who, in *Reg.* v. *Gardiner*, 1 C. & K. 628, ruled in favor of the right. There is nothing to show that any one of the learned judges who, in England, ruled against the right were aware of the rules published in 7 C. & P. 676. On the ground that the evidence in this case was wholly insufficient to support the verdict I concur with the Chief Justice in deciding that the rule ought to be made absolute.

MORRISON, J.—I concur with the Chief Justice in thinking not only that the evidence was insufficient to support the verdict, but that the counsel for the Crown had not the right which he claimed and exercised at the trial.

Per cur.—Rule absolute.

CHANCERY.

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

HILL v. RUTHERFORD.

Composition deed—Effect of debtor failing strictly to fulfil terms of compromise.

The rule that the terms of composition deeds must be strictly complied with, considered and acted upon.

The creditors of an insolvent debtor, by deed, absolutely and unconditionally released their claim against him, but it appeared by a memorandum on the instrument, that such release was intended to be in consideration of the debtor delivering to them certain endorsed notes, which, however, he stated he was unable to procure, and in fact they were not delivered as had been agreed upon. *Held*, that the creditors were entitled in this court to enforce payment of their orignal claim, notwithstanding that the debtor offered to pay the sum, for which it was stipulated by the deed of composition that the notes should be given, or to give the notes agreed upon; although the court of common law had held the right of the creditors to recover was gone. SPRAGGE, V. C., dissenting.

The bill in this cause was filed by Daniel Hill, Jesse W. Benedict and William Vann; Benedict & Vann being merchants residing in New York, setting forth that on the 16th of September, 1859, defendant having become indebted to Benedict & Vann, (for goods sold to him), in the sum of $979 76, stated the account between them by signing the following;—

"$979 76 Guelph, September 16, 1857.

"Six months after date I promise to pay to the order of Benedict & Vann, nine hundred and seventy-nine dollars, seventy-six cents, at the Bank of Montreal, with current rate of exchange on New York."

Rutherford subsequently, and on the 9th of January, 1860, made an assignment to trustees for the benefit of his creditors, which contained a general release, unless the parties signing wrote "without release" after their signitures; that the deed was only executed by a few of defendant's creditors, and all without release; and the deed was afterwards abandoned, and a deed dated the 7th of August, 1860, was subsequently made; that in the interval, and in the month of June, defendant induced many of his creditors and amongst them Benedict & Vann, to believe that he was unable to pay his liabilities in full, when it was agreed between him and his said creditors, that he should pay them five shillings in the pound, payable in two equal instalments, in six and twelve months, from the first of July, 1860; and that he should give his promissory notes, satisfactorily endorsed, to secure such payments. That for the purpose of carrying this arrangement out, a document was prepared by the defendant, purporting to be between his creditors of the one part, and the defendant of the other part, which instruments defendant took to his several creditors, requesting them to sign it, on the agreement and understanding that he would deliver such promissory notes, as before mentioned; upon which understanding many did sign, amongst others, the plaintiffs Benedict & Vann; that afterwards defendants discovered he could not procure the notes to be endorsed by any one who would be satisfactory to his creditors, and thus to carry into effect in good faith the agreement for composition, and that he therefore abandoned it, and entered into a new arrangement with his creditors, which was carried into effect by an indenture dated 7th of August, 1860, purporting to be made between defendant, of the first part, Ross, Mitchell & Fisken, of the second part, the Bank of Montreal, the City Bank, and the Bank of Toronto, of the third part, and all his other creditors therein named (and among them, Benedict & Vann,) of the fourth part, which deed was transmitted by defendant to Benedict & Vann at New York, in a letter of the 28th of August, 1860, wherein he stated, in effect, "that he was unabled to get such sa-

tisfactory endorsers as aforesaid, and had had therefore abandoned the arrangement and composition in the said paper-writing of June 1860, referred to, and had resorted to the new arrangement contained in the said indenture of the 7th of August, 1860, and requesting the said Benedict & Vann to execute the said indenture and procure other creditors of defendant, resident at New York, to execute the same."

The bill further alleged, that after the abandonment of the arrangement of June, 1860, and before receipt of the deed of the 7th of August, Benedict & Vann, considering the paper of the 7th of September, 1859, a promissory note, sold and delivered the same to the plaintiff Hill, for the sum of twenty-five per cent. on the amount thereof paid by Hill to them, and therefore they declined to execute the deed of the 7th of August, and returned the same to defendant, at the same time informing him of the sale and transfer of the claim; that Hill being afterwards advised that this writing did not constitute in law a promissory note, and therefore could not be sued in his name, Benedict & Vann, authorised him to bring an action at law in their names, in which action the defendant in bad faith pleaded the release of the debt by the paper of June, 1860, and put the same in evidence, when, by consent of parties, a verdict was entered for defendant, with liberty to move to enter a verdict for the plaintiff, if the court should be of opinion, that, upon the facts stated, they were entitled to recover: but the court afterwards, upon argument of a rule obtained for that purpose, refused to disturb the verdict so entered for defendant. The case at law is reported in 11 U. C. C. P. 218.

The prayer was for an injunction to restrain defendant setting up the writing of June, 1860, as a valid document; its delivery up to be cancelled, so far as plaintiff was concerned; an account and payment of amount found due.

The defendant answered the bill at length, setting up, amongst other things, that by the deed of August, 1860, he was allowed two years to pay the compromise therein stated; but that such deed was not intended, neither did it, replace or in any manner do away with the release of June, 1860, except as to creditors who should be willing to give him the additional time and advantage allowed by the deed of August, and who should become parties thereto; that subsequently, and about the 18th of October, 1860, a letter was written to Hill, offering the security stipulated and agreed to be given, and submitted that plaintiffs by suing at law had precluded themselves from resorting to this court for relief, and that under all the circumstances, this court had no jurisdiction in the premises. The cause having been put at issue, the defendant and one of the trustees under the deed, were examined on behalf of the plaintiffs, but the evidence did not materially vary the statements in the pleadings.

The cause was originally heard before his Honour V. C. Esten.

McDonald, for plaintiffs.

Fitzgerald, for defendant.

Esten, V. C.—The evidence shews that the plaintiffs were assenting parties to the deed of January, which operated against them as a release in equity. Then the plaintiffs join in and execute the deed of June, which cannot stand with the deed of January, but supersedes it, with regard to such of the creditors as execute it.

The plaintiffs are therefore bound by the deed of June. This deed cannot be considered as abandoned, by the making of the deed of August, or otherwise, as to creditors not executing the deed of August.

Prima facie, therefore, the plaintiffs must claim under the deed of June, but they retained the note until the security should be given, or composition paid. It must be intended that the note was so retained, in order that if the security was not given or composition with punctuality paid, the original debt might be enforced. The plaintiffs are, therefore, remitted to the deed of January, but Rutherford having put an end to that deed, by the one of August, they are remitted to their personal remedy for their whole debt against Rutherford. This, however, is the operation only in a court of equity, and a bill is, therefore, the proper course.

The decree will, therefore, be, that Rutherford must pay the amount of the note, and costs. Rutherford never was in a position to pay, having stripped himself of all his property. It would now be a breach of trust in Moore to pay.

Rutherford renounced the deed of January by the deed of August, and the plaintiffs choose to adopt such renunciation. In this view their action was premature, but this did not dispense with the payment or tender of composition.

What was done was not equivalent to either, for Rutherford never was ready with money, and the action under such circumstances was no refusal to accept payment of the composition.

(The defendant feeling himself aggrieved by the decree thus pronounced, petitioned for a re-hearing of the cause before the full court: on the re-hearing,)

Proudfoot, for the plaintiffs, contended that the decision of the Court of Common Pleas in the case of *Benedict* v. *Rutherford* did not affect in any degree the questions raised in this suit. From the statements in the pleadings and evidence it is evident that Benedict and Vann never contemplated abandoning any rights they were entitled to under their original claim, unless and until the stipulations in reference to the agreement of June, 1860, were entirely fulfilled. By the deed of June no property whatever was conveyed, and there is nothing contained in it which should prevent it subsisting with the one of January previous; while on the other hand the deed of August cannot be taken to agree with that of June, but must be considered to have superseded it; and Benedict and Vann never having executed or agreed to execute the deed of August, and default having been made in payment of the amount agreed upon by the terms of the compromise, they are remitted to their original rights under the note signed by defendant.

The release being in the hands of the defendants and pleadable at law, this court has clearly jurisdiction to restrain him such use of it being against good faith.

Simpson v. *Lord Howden*, 3 M. & C. 97; *Flower* v. *Marten*, 2 M. & C. 459; *Gudgeon* v. *Bessett*, 8 E. & B. 986; *Hudson* v. *Revett*, 5 Bing. 368.

McMichael and *Fitzgerald* for the defendant.

The general rule in equity is that the court will relieve against a forfeiture which is caused by non-payment of money. Here the defendant is ready to pay the full amount agreed to be paid as a composition, and it is established that before suit commenced he offered either to pay or deliver the notes endorsed as agreed upon. Here, then, the court will be lending its aid to work a forfeiture, for the defendant is not seeking its protection against the effects of his default in payment, as at law he has been declared not liable. This court no doubt would restrain the defendant from setting up the release unless he pays the 5s. in the pound, but, under the circumstances of the case, that is unnecessary, as the defendant is willing and always has been to pay that. The original debt was absolutely released by the instrument of June, and the fact that the original note was allowed to remain in their hands was only to enable Benedict and Vann to enforce payment in the event of the composition not being paid. If the fact of failure to pay the composition had the effect of reviving the debt which had been released, such must be the effect at law as well as in this court, and in that view the plaintiff had no right to complain of the defendant setting up the release.

The fact that the defendant had executed the deed of August cannot possibly affect the rights of the original creditors; they might have chosen to come in under it, or they might have elected, as they did, not to come in under it, and remain under the instrument of June.

Hill, by his proceeding at law, declared his determination not to accept the notes or the stipulated composition, a tender was therefore unnecessary, and the fact that no tender was made cannot now give the plaintiff any additional right to relief. They referred to *Hockster* v. *De Latour*, 17 Jur. 972; *The Danube and B. Sea Co.* v. *Enos*, 8 Jur. N. S. 434; *Black* v. *Smith*, Peake's Rep. 88; *Harding* v. *Davis*, 2 C. & P. 77; *Wallis* v. *Glynn*, 19 Ves. 383; *Davis* v. *Thomas*, 1 R. & M. 506; *Leake* v. *Young*, 5 E. & B. 955.

Vankoughnet, C.—In this case the plaintiff Hill sues as assignee of his co-plaintiffs of an agreement by the defendant with them to pay them the sum of $979·76, on the 16th of March, 1860. The facts of the case appear in the judgment of V. C. Esten, which comes before us on this re-hearing.

I think the deed of the 18th January, 1869, may be left out of consideration, and that the right of the plaintiffs to recover depends upon the deeds of June and August, and the circumstances con-

nected with them. By the deed of June the defendant agreed to secure the payments in composition by his own promissory notes satisfactorily endorsed. This was executed by the plaintiffs Benedict and Vann. The defendant did not, as he subsequently explained, could not procure his notes to be endorsed. Now it cannot be doubted that the stipulation for endorsed notes was a material one; and though it only appears in the recital to the deed, and is not the covenanting or legally operative part of the deed, and could therefore form no defence at law, yet this court would not take so restricted a view of the deed, but would hold the stipulation as part of the agreement of the parties necessary to be observed. This being so, and the defendant finding he could not comply with it, abandons, as far as he can, the deed altogether, and proposes and procures to be executed by most of the parties to the deed of June, the deed of August already referred to. This deed differs in many respects from the other deed; and of course no creditor was obliged to execute it unless he chose. The plaintiffs did not execute it. In the interval between the execution by Benedict and Vann of the deed of June and the execution by the defendant of the deed of August, the assignment to the plaintiff Hill of the debt now in suit was made. Hill then and thereafter stood in no better or worse position in regard to it than his co-plaintiffs, and the question is, were or are they bound by the deed of June after what had occurred? In my opinion clearly not. The defendant did not, and admits he could not, comply with the stipulation for endorsation; he makes an entirely different arrangement for his creditors by the deed of August as a substitution for the deed of June, which he abandons both by his acts and his declarations, and yet he says the plaintiffs must be bound by it.

I think the effect of what has occurred is to leave the plaintiffs in possession of the original right to recover the full amount of the debt. It is of the essence of a composition of an existing debt that every term of the agreement for composition should be strictly observed and performed. Here not only was the stipulation in the deed of June not observed, but the defendant declares he does not intend to observe it. I do not think that the judgment of the Court of Common Pleas on the rights at law of these parties in the case presented to them raises any difficulty to the plaintiffs' right here.

The doubt I have felt is, whether the plaintiffs might not now recover at law; and whether, therefore, this court should in its discretion exercise its jurisdiction in favour of Hill, as the assignee of a chose in action That this court has the jurisdiction, will, I suppose, not be questioned; its exercise is a matter of discretion. In the case for instance of a bond debt and an assignment simply, the court will leave the assignee to sue at law in the name of the assignor, (there being no obstacle to its use,) as in *Hammond* v. *Messenger*, 9 Sim. 327. Here, however, I think we may properly interpose. There is a complication of transactions affecting the debt, arising out of the acts of the defendant himself. The stipulation for endorsation could not be set up at law, and it is doubtful whether the abandonment by the parties of the deed of June, after it had gone into formal operation, would be an answer to it. There is no such difficulty in equity even when the deed may affect, or is intended to affect, the rights of a third party, a stranger to the deed. See the observations of the Master of the Rolls in *Hill* v. *Gomme*, 1 Beav. 544; and of the Lord Chancellor, on appeal, 5 M. & C. 254.

ESTEN, V. C., remained of the same opinion as expressed on the original hearing.

SPRAGGE, V. C.—The same thing was sought in the action at law as is sought in this suit, that is, the recovery of the original debt from Rutherford to Benedict and Vann, which debt it was the object of the several deeds of January, June and August to settle by a composition.

It is *res judicata* by the judgment of the Court of Common Pleas in *Benedict* v. *Rutherford*, 11 U. C. C. P. 213; that the legal right to recover for the original cause of action is gone; that Rutherford's covenant to pay the composition was future; that the release operated as a present discharge of the old debt, and that the giving of the notes was not a condition precedent: none of these points are now open.

The plaintiffs must come into this court upon some equity independent of those points, and I understand their equity to be, that although the release is in terms absolute, unconditional, and immediate, still it was intended to be conditional upon the giving by Rutherford of endorsed notes for the amount of the composition; and that the endorsed notes not having been given, the plaintiffs have an equity to be remitted to their original cause of action, and that the composition deed of June was abandoned. The question is not whether if Benedict and Vann had a legal right to recover the amount of the original debt, this court would have interposed to restrict the creditor to the amount of the composition; but whether this court will interfere actively to give the creditor more than the amount of his composition. This court will ordinarily interfere to relieve from forfeiture, where it occurs from non-payment of money: but the case of composition deeds is in England an admitted exception; still I think there is no instance, certainly no case has been cited, of a court of equity enforcing a forfeiture even upon a composition deed.

It is certainly to enforce a forfeiture that the plaintiffs come to this court. Assuming that they are right in treating the release as conditional under the composition deed of June, Rutherford's right under that deed was to have a composition of twenty-five per cent. accepted by the creditors, parties to it, upon his giving the notes; and the plaintiffs case is, that they forfeited the right to have the composition accepted by not giving the notes; and they come into equity asking for the whole debt by reason of that forfeiture. It is true that the assumed condition was not the payment of money, but the giving of notes.

I find two English cases where notes were to be given upon a composition deed. They are both cases at law, the first, *Boothby* v. *Sowden*, 3 Camp. 75; was a *nisi prius* decision before Lord Ellenborough: the action was upon the original debt; the defence was, that the creditor had agreed to give time, and to take the debtor's notes, payable in London, for the amount. For the plaintiff, it was contended, that the giving of the notes was a condition precedent, but Lord Ellenborough said: "If the plaintiff could shew that the defendant had refused to give the notes according to the terms of the agreement, they might be remitted to their original remedy, but I think that remedy is suspended by the agreement, unless an infraction of the agreement is proved by the plaintiff;" and the plaintiff was nonsuited.

Doubt is thrown upon this ruling by the case of *Crawley* v. *Hilary*, 2 M. & S. 120. In that case also promissory notes were to be given; and the question was, whether it was the business of the creditor to apply for them, or for the debtor to give them. It was proved that the plaintiff might have had them if he had applied for them, but there was no evidence that the defendant had given or tendered them to the plaintiff. The action was not brought until after the time at which the composition notes were to be payable; so that there was default in payment of the composition money, as well as in the giving of the notes. The court evidently leaned to the opinion that the debtor was bound to give or tender the notes. But even in that case Lord Ellenborough observed: "If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." Mr. Justice Bayley only observed upon the composition notes being past due. This case shews the reluctance with which the court, Lord Ellenborough especially, gave effect to the forfeiture, intimating the probability of the court exercising equitable jurisdiction if the notes had been tendered even after the time at which they ought to have been given, if not after they were due.

Again, supposing that a court of equity would interfere actively in behalf of the creditor under similar circumstances to those in which it would refuse to interfere with the legal right at the instance of the debtor, which I by no means concede, I doubt whether this is not a case in which the court would properly interfere with the enforcement of the legal right. In the English cases where the court has refused to interpose, there has been an express stipulation that upon default the original debt would revive; or at least a very plain and distinct agreement that payment should be made by a day specified. Now here there is no day specified for the giving of the notes; indeed the giving of notes at all was an after-thought; the whole composition deed is framed without reference to any notes being given, the only reference to notes being written in the margin in these words: "And for which said payments to give his promissory notes, satisfactorily endorsed,

and dated on the first day of July next, and at six and twelve months respectively.'

No day being named for the giving of the notes, the cases in which the court has refused to interfere for the debtor do not in terms apply. But assuming that this court would regard an absolute refusal to pay composition money, or to give composition notes as equivalent to a default on a day named, has there been such refusal here? Rutherford was disappointed in getting his notes endorsed in the quarter that he expected, and thereupon proposed the composition deed of August as a substitute; and on the 28th of that month wrote to Benedict and Vann, asking them to become parties to it. In that letter all that he says about the endorsed notes is this: "I could not get the security wanted—the party that promised to become a partner drew back, so I went at once to the Bank of Montreal, they being the largest creditors, and told them; they said it was more than I could expect to get any party about here to go security, as the farmers about here are terribly afraid of being security"

Before the receipt of this letter, and I think before the deed of the 7th of August, Benedict and Vann had endorsed Rutherford's note to the plaintiff Hill. The plaintiffs put it in their bill, that Rutherford abandoned the composition of June, and refer to the letter of the 28th of August as evidence of it, yet say that the original note was endorsed to Hill, before the 28th of August, after the abandonment. It is to be noted that Hill purchased the note at twenty-five per cent., and that twenty-five per cent. was the amount to be paid under the composition deed of June. Benedict and Vann say that in endorsing the note to Hill they supposed it to be a negotiable instrument. Unless there was an abandonment of the deed of June, before the endorsement to Hill, of which there is no evidence, it was bad faith in Benedict and Vann to make that endorsement. It is agreed, I believe, that this original note was not a negotiable instrument; and if so, Hill took it subject to the equities that attached to it in the hands of Benedict and Vann.

If the note had been in the hands of Benedict and Vann at the time of the receipt from Rutherford of his letter of August, as Rutherford evidently expected it would be, their proper course was clear. The letter said not a word about abandoning the deed of June, but proposed another as a substitute; indeed, abandoning the deed of June without the consent of the parties to it, was out of the question. Benedict and Vann's proper course then would have been, if they declined the proposed substitute, to say so; and to say that they insisted upon the endorsed notes in accordance with the deed of June, and so have given Rutherford the opportunity of making another effort to procure them; rather than pay the original debt in full, it would have been to the interest of his other creditors to assist him in doing so. Benedict and Vann having parted with the note cannot place them in a better position; nor can Hill's position be better than theirs. I think the plaintiffs position may fairly be put thus: suppose Benedict and Vann, immediately upon the receipt of the letter of August, to have written to Rutherford to say that they would hold him to have abandoned the deed of June, surely Rutherford might with reason answer that he had merely made a proposal to them, which if they refused would leave it still open to him to comply with the terms of the deed of June. They should hardly be countenanced in snapping at that as an abandonment which was never intended to be such.

Rutherford's action was not very prompt with Hill. He probably thought, with Benedict and Vann, that the note was negotiable, and that Hill as the holder was entitled in law to the full amount in any event, and that he was without remedy. However, on the 18th of October following his solicitor addressed a letter to Hill offering to give the required security under the deed of June. This offer does not seem to have been accepted, and Hill, in the name of Benedict and Vann, sued upon the original note, before either of the notes to be given under the deed of June would have been payable. This seems material in reference to the language of Lord Ellenborough in *Crawley* v. *Hilary*

I do not think that Benedict and Vann's letter of the 8th of June can make any difference in the case, so as to bring it within the rule (taking it to be the rule) that a court of equity will only decline to interfere with the legal right, when in the composition deed it is expressly stipulated that upon default the original debt shall revive. That letter was written, as its contents shew, *before* the writers had seen the composition deed, and in ignorance as to whether the amount of the composition was to be secured or not; and the event in which they said they should want to hold the original note, was only in case of the deed, not providing that security should be given. The words are, "In reply to your proposition of 5s. in the pound, would say that you do not state whether it is to be secured or not. If not, we should want to hold the original note until the compromise paper was paid." As a fact the original note was retained by Benedict and Vann, but it was not in pursuance of any stipulation in the composition deed or the letter.

There is then, as it seems to me, nothing in the case but the original debt, and the composition deed, and the omission to give the endorsed notes; the same case that was before the Court of Common Pleas. The deed has been construed by that court, and there cannot of course be one construction by a court of law, and another by a court of equity Neither, I apprehend, will a court of equity give a different effect to the various provisions of an instrument than is proper according to their legal construction: will not, for instance, make one a condition precedent to another, unless they are so upon a proper construction of the instrument, or treat covenants, as dependent, when upon a proper construction they are independent covenants. A case illustrative of this was decided by the Lords Justices. *Gibson* v. *Goldsmid*, 5 D. M. & G. 757.

Supposing it open to the plaintiffs to shew in this court that the giving of endorsed notes was intended to be a condition precedent to the release, or to the deed of June coming into operation, they have not shewn it. What evidence there is, that of Laurie, called by the plaintiff, a trustee under the deed of January, is the other way. He says: "I know no other arrangement or terms, with respect to the deed of June, than what appears on the face of the deed. I am not aware of any understanding that this deed was not to operate until the notes were given"

As to the alleged abandonment of the deed of June, I have already observed upon it; but I may add, that it was, I apprehend, equally open to the plaintiffs to urge it at law, as in this court, and as a piece of evidence, that it was not abandoned except as to those who accepted the deed of August in lieu of it, is the fact, that Gates, a party to the former, but not the latter, received payments of his composition according to the deed of June; he asked, indeed, for his debt in full, but this was refused, and he received his composition.

I think the plaintiffs' case fails, and that so far from having any equity to come into this court, their conduct throughout has been harsh and inequitable. I doubt, if the legal right had been with them, whether it would not have been a proper case for relieving the debtor from the forfeiture, for this reason, in addition to the case being outside the cases decided in England, that a decree for the plaintiffs would affect others besides the defendant, namely, his creditors; a reason which weighed with Lord Eldon in *McKenzie* v. *McKenzie*, 16 Ves. 372. I may observe too, what has probably had some weight with the court in refusing relief in England, that composition deeds are not favourably regarded there, it being considered that proceedings in bankruptcy are better for both debtor and creditor. But here, in the absence of a bankrupt law, they should be regarded favourably, and as far as possible carried out, as perhaps the only mode of making a final and equitable disposition of the effects of an embarrassed trader.

If Lord Ellenborough's view be correct, the defendant was in time in offering the notes in October, being two months and a half before the first would have been payable. I do not quote his lordship as an *authority* in a court of equity, but the view of so eminent a judge, as to what would have been just between the parties, is entitled to respect; and it is to be observed, that notes given in October would have placed the creditor (if he had not parted with the original note) in as good a position as if given contemporaneously with the execution of the deed. After refusing them, I cannot see his equity to recover the original debt in full.

But apart from these considerations, growing out of the particular facts of this case, I think that by sustaining this bill the court would make a precedent in discordance with the principles upon which courts of equity proceed. It is in substance and in

effect a bill to enforce a forfeiture for default in the payment of money. My own conclusion, therefore, is, with great respect to the opinions of the other members of the court, with which I have the misfortune to differ, that the bill should be dismissed. I have felt it to be due to his Lordship the Chancellor, and my brother Esten, to explain my views at large.

COMMON LAW CHAMBERS.

(Reported by ROBERT A. HARRISON, Esq., *Barrister-at-Law.)*

IRVIN v. HAM.

Cognovit—Filing copy—Copy filed not true copy—Dispute as to amount due on judgment—Remedy—Con. Stat. U. C, cap. 22 sec. 237.

It is enacted by sec. 237 of Con. Stat. U. C. cap. 22, that no confession of judgment or cognovit actionem shall be valid or effectual to support any judgment or writ of execution, unless, within one month after the same has been given, the same or a sworn copy thereof be filed on record in the proper office of the court in the county in which the person giving such confession of judgment or cognovit actionem resides.

Held, 1. That immaterial discrepancies between the sworn copy filed and the original cognovit, constitute no ground for setting aside the judgment entered on such cognovit, and subsequent proceedings.

2. That that a defendant seeking to set aside a judgment on a cognovit, as not being filed in the county where he resided at the time of giving the cognovit, must show that he was not so resident.

3. That where parties dispute as to the balance justly due on a judgment, a reference may be made to the master, and costs be directed to abide the event.

(8th January, 1863.)

This was a summons, obtained by defendant, calling upon the plaintiff to show cause why the judgment in this cause, and all subsequent proceedings should not be set aside, on the ground that neither the cognovit given by the defendant nor a sworn copy thereof was filed in the office of the deputy clerk of the court in which the defendant resided at the time of giving the cognovit; or why the plaintiff should not be compelled to enter up satisfaction of the said judgment, and to withdraw the writ of execution in the hands of the sheriff, upon being paid the sum of $64 54, or to reduce the endorsement on the writ of *fieri facias* to the said sum of $64.54, on grounds disclosed in affidavits and papers filed.

The cognovit was given by defendant to plaintiff on 6th August, 1858. It was for the sum of £110, to secure to plaintiff payment of £99 15s. 1d., with interest from date. A copy of it was filed within one month after the cognovit was given in the office of the deputy clerk of the crown in the county of Perth.

The copy filed was not in all respects a true copy of the original. The original commenced, "I confess this action, and *that the plaintiff has sustained damages* to the amount of £110, besides costs and charges in this behalf to be taxed." The copy commenced, "I confess this action, and that the plaintiff *is entitled to recover in it* the sum of £110, besides costs and charges in this behalf to be taxed." The original proceeded, "And I do hereby agree that judgment for the same *may* be forthwith entered up of record against me." The word "may" was omitted in the copy filed." The copy filed concluded, "And that it shall not at any time or in any event be necessary previous to issuing the said execution to revive the said judgment or to sue out or execute any writ of *scire facias*." There was no such concluding clause in the original cognovit.

It did not appear on what day judgment was entered on the cognovit. Execution was issued on 29th September, 1858, and payments were made on the judgment, as well before as after issue of execution.

The balance due upon the judgment was not agreed upon between the parties. Defendant claimed that he owed at the time of the application only $64 54; while plaintiff claimed a much larger sum to be due him. Defendant, before making the application, tendered $64 54 to plaintiff in full of judgment, but the amount was refused.

Carroll shewed cause, referring to *Commercial Bank* v. *Fletcher*, 8 U. C. C. P. 181.

Moss supported the summons, referring to Con. Stat. U. C. cap. 22 sec. 237, and contending that it was no where shewn among the papers filed that defendant, at the time of giving the cognovit, was a resident of the county of Perth.

DRAPER, C. J.—Independently of any other consideration I should not set aside this judgment and execution at the instance of the defendant, when a paper intended to be, and sworn to be, a true copy of the cognovit was filed within one month, on the ground that it appears to have been in some particulars—not the most material, however—an incorrect copy.

As to the objection that it does not appear defendant was resident in the county of Perth at the time the cognovit was given, I think it rests upon him to shew he was not.

I refer to the case of *The Commercial Bank* v. *Fletcher*, 8 U. C. C. P. 181 for my views as to the construction of sec. 237 of Con. Stat U. C. cap. 22.

I do not think the plaintiff's attorney, or any one else, can enforce, under this cognovit, payment of more than what is stated to be the true debt and interest, and the costs of the cause, execution, poundage and sheriff's fees.

I refer the matter to the master to determine, on hearing the parties (on affidavit, if necessary), what has been paid, and what is the balance justly due, and, on payment of that balance, order all further proceedings on the execution to be stayed, and satisfaction to be entered on the roll. If the master find no more to be due than has been tendered and refused, the plaintiff must pay the costs of this application, and of the master's office; but if too little was tendered, defendant must pay these costs.

Order accordingly.

ALLMAN AND WIFE v. KENSEL.

Arrest—Omission of the court in affidavit—Slander—Right to review decision of County Court Judge.

The name of the court must be inserted in an affidavit to hold to bail at the time of suing out the process, and where it was not inserted until long after defendant had been arrested the arrest was set aside.

In this case the action was by husband and wife for a verbal slander of the latter not actionable without proof of special damage, and the affidavit stated only that persons *not named* had in consequence withdrawn their custom from the husband, who was a tailor. The learned judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only, expressing no opinion as to his right to review the decision of the county court judge.

(December, 1862.)

This was an application to set aside the order for the defendant's arrest made by the county judge of Essex, with the writ and arrest, &c., on various ground—insufficiency of statement of any good cause of action, and the absence of any facts indicative of an immediate departure from Canada, the absence of any heading to the affidavit shewing what court it was in, and other minor grounds.

The defendant filed no affidavits except shewing his arrest on the 11th of December instant.

The only ground for the arrest was an affidavit of the plaintiff, Peter Allman, setting out that over three months before the application the defendant had verbally slandered his wife by calling her a whore in presence of several persons; that in consequence of such words various persons (not named) who formerly employed the plaintiff as a tailor had declined so to do, and his wife who worked with him also lost employment, and that he and his wife had also lost the society, &c., of persons, (not named,) and that he and his wife had suffered damage, and that they had a cause of action against the defendant for $100 and upwards: that the defendant kept a saloon in Windsor, had no ties to bind him to Canada, and could leave without inconvenience: that the plaintiff had been informed the defendant had offered his license for sale, intimating his intention "to leave the said town;" that there was good and probable cause for believing, and the plaintiff did believe that the defendant was about to quit, and unless forthwith apprehended that he would quit Canada with intent, &c., to defraud the plaintiff and his wife, and without satisfying him and her for the damage so occasioned.

This was sworn on the 8th of December, 1862, and on the 10th instant the learned judge gave a fiat to arrest for $100.

On the 11th December the defendant was arrested, and served with a copy of writ in the Queen's Bench, tested the 10th of December. On the 15th his attorney swore to the paper now produced being a true copy of the affidavit on which the order to hold to bail was issued; but that such affidavit was not filed in the de-

puty clerk's office when process issued, nor up to the time of his (the attorney's) affidavit. No name of any court appeared at the head of the affidavit.

On the 18th of December the summons for discharge was granted by Morrison, J. In shewing cause the plaintiff filed an affidavit dated 24th of December, annexing a copy of the judge's fiat, and stating that the fiat was filed in the deputy clerk's office when the writ was issued: that the affidavit was delivered to the judge, who retained the same till the 23rd of December, when he delivered it to the deputy clerk, and that in Essex it was customary in obtaining summonses and orders from the judge to file and leave the papers with him, and he delivered them to the clerk of the proper court; and that when the defendant was arrested he deposited $100 with the sheriff as bail, and the sheriff then let him go.

Spencer, for the plaintiff.

Blevins, contra.

HAGARTY, J.—I must, in the first place, express my great surprise and regret that any person should have been held to bail on such statements as were sworn to in this matter. It is the first time I have ever heard of an arrest being ordered for verbal slander. It is notorious that in such cases (however gross) the damages rarely exceed a few dollars, and that in all human probability the limit of £25 fixed as the lowest sum for which arrest is allowed, would never be reached. But here the words of themselves are not even actionable, and the plaintiffs could not recover except on proof of special damage clearly proved, and an allegation that persons unnamed had withdrawn their custom in consequence would hardly satisfy most minds. Such an allegation would not support a declaration, and where no cause of action exists without proof of the damage, it would seem only reasonable to expect to find the affidavit more explicit.

Again, no facts whatever are stated to raise the belief that the defendant was about to leave the province. His offering his license for sale, and talking of leaving the town of Windsor, cannot amount to anything unless connected with some other circumstance. If the belief of the plaintiff, unsupported by any reasonable ground therefor, is to be held sufficient, the statute is rendered of little avail.

I repeat therefore, my inability to understand how any man's liberty should be infringed on such statements.

When process was issued on the judge's fiat an affidavit was not filed in the clerk's office till nearly two weeks, nor was the name of any court put at the head of the affidavit for many days after the issuing of the process and the arrest, nor apparently up to the issuing of the summons. The act, ch 24, Consol. Stats. U. C., sec. 6, declares that it shall not be necessary that it should be entitled in any court at the time of making it, but that the title of the court may be added at the time of making it, but that the title of the court may be added at the time of suing out the process; "and such style and title, when so added, shall be for all purposes, and in all proceedings, whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*."

I quite agree with the views expressed on this point by Mr. Justice Richards in *Swift* v. *Jones* (6 U. C. L. J. 63,) and that our statute clearly points out the course to be adopted as to entitling affidavits. I think it was the plaintiffs' duty to see it properly entitled when suing out the process; then and then only, as it seems to me, can he avail himself of the privilege allowed by our statute. On this ground I think the arrest must be set aside.

There seems to be a difficulty in dealing with orders made by judges for arrest, after exercising their discretion on the materials before them. In this case I have no affidavits from defendant negativing the intention to leave, and am therefore asked to review the discretion so exercised.

Draper, C. J., in *Terry* v. *Comstock*, (6 U. C. L. J. 235,) says, "It was not pressed upon me to review the decision of the learned judge who made the order for the arrest upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. If this had been done I should have referred the matter to the full court."

I had occasion to notice the law on this point in *McInnes* v. *Macklin*, (6 U. C. L. J. 14.)

As I can see my way to disposing of the case on the other ground, I do not feel called upon, in the absence of any affidavits from defendant, to discuss this point any further than has been done in the cases cited. If the defendant desires to rescind the order, I must refer him to the full court.

I direct that the writ and arrest of defendant, and all proceedings had thereon, be set aside, with costs to be paid by the plaintiffs, and that the sheriff do return to defendant the money deposited with him in lieu of bail, or if any bail-bond be given, that it be delivered up to be cancelled

I desire to be understood as expressing no opinion as to my right to review the county court judge's decision in a case like the present.

IN RE IRA LEWIS, ONE, &c.

Reference of attorney's bill—Liberty to dispute retainer.

Where an application is made to have an attorney's bill referred to the master for taxation, and the affidavits in support of the application in no manner question the retainer, leave to dispute the retainer will be refused.

(January 24, 1863.)

W. F. Macdonald, on behalf of the Buffalo and Lake Huron Railway Company, made application to have an attorney's bill referred to taxation.

The affidavit was the ordinary one, shewing service of the bill, but in no manner disputing the retainer.

Mr. Macdonald desired to have leave reserved in the order to dispute the retainer. He referred to *Re Payne* 5 C. B., 407.

M. B. Jackson shewed cause, objecting that no leave to deny the retainer should be reserved, the same being in no manner questioned in the affidavits filed.

DRAPER, C. J., having taken time to consider the application, refused, under the circumstances, to reserve leave to the client to dispute the retainer; but gave permission to Mr. Macdonald on further affidavits to apply to a judge in Chambers to have his order varied.

IN RE IRA LEWIS, ONE, &c.

Reference of attorney's bill—Denial of retainer—Conflicting affidavits.

On an application made to a judge in Chambers for an order referring an attorney's bill to taxation, it is in the discretion of the judge to reserve leave to the applicant to dispute the retainer or not. In order to the proper exercise of that discretion, the judge may look to the affidavits before him, though conflicting.

(Chambers, Feb. 5, 1863.)

Mr. Macdonald afterwards, pursuant to notice, applied to have the order of Draper, C. J. so far varied as to reserve liberty to the client to dispute the retainer.

He filed affidavits in which it was, in effect, sworn on the part of the Buffalo and Lake Huron Railway Company, that Mr. Wood, of Brantford, was the only attorney of the Company, and that Mr. Lewis was never employed by the Company.

M. B. Jackson shewed cause, producing an affidavit of Mr. Lewis, to which was annexed several letters from officers of the Company authorizing him to act in several matters for and on behalf of the Company, and in which it was positively sworn that he was retained to perform the services in respect of which his bill was rendered.

Macdonald contended that the question of retainer could not be tried on affidavit, and submitted that he had shown enough to entitle him to the order referring the bill to tavation, and reserving leave to dispute the retainer.

MORRISON, J., held that it was in his discretion to reserve leave to deny the retainer or not, and that in order to the proper exercise of that discretion he could look to the affidavits before him, though conflicting Under the circumstances of this application he refused to vary the terms of the order of Draper, C. J. He said the Railway Company must either dispute the retainer without a reference to the bill or taxation, or accept a reference and so admit the retainer. The Company accepted the latter alternative.

CHANCERY CHAMBERS.

Reported by G. SAMUEL G. W. WOOD, Esquire.)

BESSEY v. GRAHAM.

(2nd February, 1863.)

Error in Master's Report—Amendment—New upset price—Postponement of sale.

Wood, on behalf of plaintiff, made an *ex parte* application, under the following circumstances:

The bill had been taken *pro confesso* against defendant. Decree for sale. No subsequent incumbrancers. After the final order had been made and the advertisement of sale for 14th February published, it was discovered that the Master's clerk in making up the report had omitted to include two items of interest, amounting together to £141 14s. 5d., as set forth in plaintiff's affidavit of claim. The error appeared on the face of the papers filed, containing the clerk's calculation in pencil below the account as sworn to by plaintiff.

Upon an affidavit stating the facts, and production of the papers from the master's office, his honor V. C. Esten held there was no necessity for appointing a new day for payment, and granted an order referring it to the master to take a fresh account of plaintiff's claim, and to amend his report; and leave was given to fix a new upset price and to postpone the sale if necessary.

S. G. Wood for plaintiff.

DIVISION COURTS.

(In the Third Division Court, County of Elgin, before His Honor JUDGE HUGHES.)

DAVID STEWARD, Plaintiff v. ISAAC MOORE AND JESSE KIPP, Executors of the last Will and Testament of JAMES W. BOWLBY, Defendants.

Action on promissory note of the testator, who made his will, appointing the defendants and one David Harvey executors. All the executors took probate and administered, but Harvey alone managed the estate. The suit was brought, however, against Moore and Kipp (without noticing the name of Harvey in any way.) They were served with summons from this court to appear at the sittings on the 6th January, 1863. The plaintiff appeared on that day, but the defendants made default; judgment was, therefore given for the plaintiff for the amount of his claim.

On the 21st January (15 days after the trial) the defendant Kipp applied to the judge, upon affidavits, for a summons calling upon plaintiff to show cause why the proceedings should not be set aside for irregularity—

1st. Because the executor, David Harvey, had not been sued.

2nd. Because Harvey had had the management of the estate, and transacted all the business connected with it, and knew nothing of the proceedings.

3rd. That the defendant (Kipp) did not appear at the trial, because he was returning officer at the municipal election.

4th. That the executors were prepared to shew what assets had come to their hands, and how the same had been administered.

The other executor, Harvey, also made an affidavit substantiating these facts, and that he had no knowledge of the suit until after judgment was obtained, otherwise he would have been present at the trial, and would have been prepared to shew what assets had come to the hands of the executors, and how the same had been disposed of; and also setting forth what sums the executors had expended in proving the will and for legal advice, and other expenses in reference to the estate; and that there was not sufficient property in the hands of the executors to pay the judgment and costs, and the amount expended. Neither of the affidavits stated the actual sum received; nor the value of the estate; nor the sum actually expended in detail. The defendant, Moore, made no affidavit shewing what reason he had for not appearing to the summons; nor was it shown why the defendants did not inform the other executor (Harvey) that they had been served with process.

Paul, for the defendants, cited Addison on Con., 1063; Chit. Arch. Prac., 1170, Action against Exr.; Williams on Exrs., 1760, 1824, 851; *Elwell* v. *Quash*, Stra. 20.

White, for the plaintiff, cited the 57th sec. of the D. C. Act, the 69th sec., the 107th sec.; and the rules of the Div. Courts, Nos. 40, 41 and 42.

HUGHES, Co. J., delivered the following judgment:—

1st. It is quite true that if there be several executors they should all be sued, in case they have all administered and have assets, or the defendant sued may plead the non-joinder of the others in abatement; but if one hath not proved nor administered, he may be omitted. 1 Chit. on Pl. (Greening's) 51; Toller, 367; 1 Moo. and P., 663; 4 T. R., 565. This is the rule of the superior courts.

2nd. Setting up the non-joinder, however, of a co-executor as a defence must, in the superior courts, be taken advantage of by a plea in abatement, and, in ordinary cases, such a plea must be put in within four days of the service of the declaration. In inferior courts it is no doubt necessary that such a plea must be made as soon as conveniently possible (as at the next court), and at all events before any next step is taken.

3rd. I think, therefore, that the non-appearance of the defendants at the trial, and no defence being made for them, ought to preclude my interfering to disturb the judgment given.

4th. The 57th section of the Division Court Act enacts — that any executor or administrator may sue or be sued in the division court, and the judgment and execution shall be such as in like cases would be given or issued in the superior courts. The 69th section enacts that any case not expressly provided for by that act, or by existing rules made under that act, the county judges may, in their discretion, adopt and apply the general principles of practice in the superior courts of common law to actions and proceedings in the division courts.

5th. The general rules of the court do not provide for an amendment in a case where it appears at the hearing that a *less* number of persons have been made *defendants* than by law is required. The 39th rule provides for a case where a *greater* number of persons have been made *plaintiffs* than by law required. The 40th rule, for a case where a *less number* of persons have been made *plaintiffs* than by law required. The 41st rule, for a case where *more* persons have been made *defendants* than by law required; and the 42nd rule for a case where *all who have been made defendants* have not been served with the summons, so that I must be guided by the general practice of the superior courts, and discharge this application because it was not taken advantage of at or before the trial, and because in the superior courts it would be too late to make such an application after verdict.

6th. The 85th section of the Division Court Act enacts that if on the day named in the summons the defendant does not appear or sufficiently excuse his absence, or if he neglects to answer, the judge, on due proof of service of the summons, &c., may proceed to the hearing on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be *final and absolute*, and as valid as if both parties had attended.

7th. The 107th section permits the judge, upon the application of either party, within fourteen days after the trial, upon good grounds being shewn, to grant a new trial upon such terms as he thinks reasonable, and in the meantime to stay proceedings. I think under the ruling of the Court of Queen's Bench in *Smith* v. *Rooney*, 12 U. C. Q. B. 661, it is beyond my authority to disturb a verdict after the fourteen days, expressly limited by the Division Court Act, have expired. It has been ruled that the judge of an inferior court may grant a new trial for matters of irregularity, as where the proceedings have been contrary to the practice and rules of the court: (*Bayley* v. *Boone*, 1 Str. 392; *Jewell* v. *Hill*, 1 Str. 499.) A verdict may be set aside by motion for misconduct of the jury, as where they toss up, or draw lots, or otherwise determine by chance which way the verdict shall be, without further conference after such determination: (*Lord Fitzwalter's case*, 1 Freem. 415; *Foster* v. *Hawden*, 3 Lev. 205.) There is, however, no complaint of anything of that kind here, nor of anything which the superior courts would treat as an irregularity.

8th. Had the application been made within fourteen days after the trial, I should have ordered a new trial upon the merits upon payment of costs: as it is I think I have no authority to do so.

The summons must, therefore, be discharged.

GENERAL CORRESPONDENCE.

Unpatented lands—Liability to assessment and sale.

To the Editors of the Law Journal.

Gentlemen,—If it would not be against the rules which govern your published answers to correspondents, I would like to know, if *unpatented* lands—on which some instalments are due the Crown by the purchaser, and on which no one resides—can be assessed, or sold for taxes? Sec. 138, cap. 55, C. S. U. C. says, the *interest* of the defaulter may be sold, while Judge Draper, in *Street* v. *The Corporation of Co. Kent*, 11 U. C. C. P., says exactly the contrary. What is your opinion? Assessors and Municipal Councils through the country have no doubt at all on the subject, for they assess *all* lands on which an instalment may be paid. Your answer will confer a favor on many of your readers.

I am, your obedient Servant,

A Law Student.

Ottawa, Feb. 23, 1863.

[We do not understand Draper, C. J., in *Street* v. *County of Kent*, 11 U.C.C.P. 255, to say that no unpatented lands can be sold for taxes. All he does say is, that Street, the plaintiff in that case, was not either "the grantee or lessee of the lands in question, nor was there any license of occupation granted to him in respect thereof" (p. 258).

The section of the Assessment Act to which our correspondent refers was neither cited in the argument nor adverted to by the court. It provides that "if the sheriff sells any land of which the fee is in the crown, he shall only sell the interest therein of the *lessee* or *locatee*," and that "the conveyance shall give the purchaser the same rights in respect of the land as *the original locatee* or *lessee* enjoyed, &c."

Now, if the fee be in the crown, and the land though sold be neither *granted*, *leased*, nor *located*, it is not liable to be either taxed or sold for taxes. This is what we understand Draper, C. J., to have decided, and nothing more. Had Street been either *grantee*, *lessee* or *locatee*, we apprehend the decision would have been very different.

True it is many people suppose that Draper, C. J., has decided that no unpatented lands can either be taxed or sold for taxes. But there is nothing in the language of that learned judge to warrant such a conclusion. The general rule is, that lands vested in Her Majesty cannot either be taxed or sold for taxes. The exception is where the land is leased or located, in which case the interest of the lessee or locatee in the land may not only be assessed but sold for nonpayment of assessment, and the sale "be valid without requiring the assent of the Commissioner of Crown Lands."

Such is the express language of the legislature in the section to which our correspondent refers. Its meaning is clear and unmistakable. The decision to which our correspondent refers, so far from being in conflict with it, in our opinion supports it.—Eds. L. J.

MONTHLY REPERTORY.

COMMON LAW.

Q. B. Stallard v. Great Western Railway Co.

Bailment—Luggage—Railway Station—Cloak Room—Hours of Attendance—Reasonable—Question for the Jury.

A passenger arrived at the up terminus of a railway station on Saturday, and deposited his luggage in the cloak-room. On Sunday he proceeded to the cloak-room for his luggage but found no one in attendance, and in consequence of delay in obtaining his luggage, he missed the train by which he intended to leave the station.

Held, that the luggage was not deposited with the company as ordinary warehousemen, but that the contract on the part of the company was to deliver the luggage at a reasonable time, on a reasonable request.

C. C. R. Reg. v. John Jennison.

False pretences—Money obtained by a false representation of an essential fact with false promises.

A false representation by a married man—whereby a single woman is induced to part with her money to him—that he is a single man; that he will furnish a house with the money, and marry the woman, is sufficient to support a conviction for obtaining money under false pretence; for although the two latter statements are mere false promises to do something in future, and, as such, are insufficient, the pretence of being a single man is a pretence of an essential fact.

C. P. Phene v. Popplewell and another.

Landlord and Tenant—Surrender by operation of law.

A was B's tenant of a house from year to year. A, being in insolvent circumstances during a current quarter, sold his effects, and sent the keys to B's office, who refused to accept them, but they were left at his office. In the next quarter B put up a board on the house, giving notice that it was to let, and used the keys for the purpose of shewing it to persons with a view to letting it. In the quarter after that B painted out A's name, which had before been painted on the premises, and had some cleaning and repairing done to the house, and the day after the last mentioned quarter expired demanded possession.

Held, that what took place before the last quarter might be coupled with the acts done in the last quarter, and the act demanding the premises, which referred back to the first quarter; that the whole constituted an acceptance by the landlord of the tenant's offers that it amounted to a surrender by operation of law, and A was consequently not liable for rent for the two last quarters.

Ex. Holme v. Clark and another.

Practice—New Trial—Surprise.

A party to a cause, who has not been called as a witness, cannot have a new trial on the ground of surprise in regard to the effect of any conversation with himself; at all events, if he admits some conversation to have occurred, and the effect of it is not necessarily decisive of the case.

Webber v. Shaw.

Practice—Costs—County Court—Bill of Exchange—Indorsement.

In an action by a party as endorsee of a bill of exchange, after judgment by default for a sum less than £20, it is no answer to an application for costs, on the ground of the parties not residing within twenty miles of each other, that the bill was endorsed to the plaintiff to sue upon, as residing beyond that distance from the defendant, for the purpose of obtaining costs on that ground.

Q. B. EX PARTE WALLIS.

Attorney—Service of Clerk under articles—Death of Master—Assignment.

A clerk, duly articled to an attorney, served a portion of his time with his master. Upon his master's dying negotiations were entered into for the transfer of the business, and assignment of the clerk; but the assignment was not executed till about a month afterwards. During that time the clerk continued to serve in the office of his late master.

Held, that the interval between the death of the master and the execution of the assignment could not be allowed to count.

EX. GIBSON v. ORICK.

Contract—Agency—Right of Broker to commission.

Although the broker who introduces the customer is entitled to his commission, and it may be a question for the jury (partly upon custom) which of two brokers has in fact introduced the customer (*Cunard* v. *Von Oppen*, Fost. & Fin. 716), yet where the broker introduces a party who introduces another broker, through whom (by the intervention of another party) a charter is effected by the negotiations between him and the agent of the owner, the first broker is not entitled to recover commission, and witnesses cannot be asked as to the effect of a supposed custom in such a case to entitle him to claim commission, as his agency is too remote, so that the custom would not be legal or reasonable.

CHANCERY.

L. J. WILDE v. WILDE.

Practice—Staying proceedings—Costs.

Where a defendant satisfies the claim of the plaintiff before the hearing, the plaintiff cannot, on a motion to stay proceedings, make the defendant pay all the costs of the suit.

M. R. WEBSTER v. WEBSTER.

Foreign attachment—Lord Mayor's court—Assignment of moneys in hands of garnishees—Notice of attachment

A foreign attachment in the Lord Mayor's court only operates upon those moneys in the hands of the garnishees, in respect of which the debtor could have brought an action at the time of the attachment, or at any time between the issuing thereof and the entry of the pleas of the garnishees.

Where, therefore, before the attachment, the debtor had assigned all his interest in the property sought to be attached, and notice thereof was given to the garnishees, it was held that the attachment had no operation as against the assignee.

V. C. S. SAUNDERS v. ROTHERSON.

Will—Sale of business—Residuary legatee—Employment of manager.

A testatrix, after giving certain legacies, bequeathed her estate and effects to R upon trust to sell the same except a certain leasehold house, in which she directed him to continue her business under the management of W. Then, after directing R. on the expiration of the lease, to sell the goodwill, &c, or, at his discretion, to defer such sale until payment of legacies, she gave the residue of the estate to S.

Held, that S. was not entitled to have an immediate sale.

V. C. K. FAULKNER v. LLEWELLYN.

Practice—Common order to elect.

Upon a bill filed for specific performance of a contract to take a lease, a motion is made for payment of a year's rent into court, and such motion is refused on the ground of possession not having been taken under the contract. The plaintiff then sues the defendant at law, and the defendant gets the common order to elect. On motion to discharge such order for irregularity—

Held, that the common order was the proper course, and on the undertaking of the plaintiff to abandon all relief in respect of rent prior to the contract, and to amend by striking out such relief, all proceedings under the order to elect stayed, the plaintiff paying the costs of the motion, and the defendant having the option of paying in the rent within a fixed time, the action being stayed.

V. C. K. FOX v. CHARLTON,—CHARLTON v. HALL, HALL v. FOX.

Will—Construction—Power—Election.

C. having made an feoffment of property at B., accompanied by livery of seizin, in favour of his daughter M., absolutely, she, by a declaration of trust of even date, agrees to hold such property in trust for herself and her two brothers and sister, in such shares as C. should by deed or will appoint, and in default of appointment, in trust for them, their heirs and assigns equally. C. continues in possession during his life, and by his will and codicil not referring to the power, leaves his property at B. to trustees, his son being one, upon certain trusts in favour of his daughter and his two sons and their children, with gifts of other property to his sons and to his grand-daughters. Suits being instituted to administer the trusts of the will and feoffment, it is found that the trusts of the latter were binding at the testator's death and he having very small property at B., besides that mentioned in the feoffment and declaration of trust, questions are raised as to whether the will is an exercise of power, and whether the two sons are not put to their election as between the feoffment and will.

Held, that the testator intended by his will to give the whole of his property at B., there being a good exercise of the power *prota nto*, and that the two sons, but not the daughter, were put to their election.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

SKEFFINGTON CONNOR, LL D. and Q C., of Osgoode Hall, Esquire, Barrister-at-Law, to be a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of The Honorable Robert Easton Burns, deceased.—(Gazetted, January 31, 1863.)

CORONERS.

GEORGE BELLINGTON, Esquire, M.D., to be an Associate Coroner for the County of Middlesex.—(Gazetted, February 7, 1863.)

Kennon L. Cook, Esquire, M D., to be an Associate Coroner for the United Counties of Northumberland and Durham.—(Gazetted, February 14, 1863)

JOHN GUN, Esquire, M D, to be an Associate Coroner for the County of Grey.—(Gazetted, February 14, 1863.)

ALFRED E. ECKROYD, Esquire, M.D., to be an Associate Coroner for the County of Wellington.—(Gazetted, February 21, 1863.)

ALFRED E ECKROYD, Esquire, M.D., to be an Associate Coroner for the County of Grey.—(Gazetted, February 21, 1863.)

JOHN N. REID, Esquire, M D, to be an Associate Coroner for the United Counties of York and Peel.—(Gazetted, February 21, 1863.)

NOTARIES PUBLIC.

ALEXANDER G MACDONELL, of Morrisburgh, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 7, 1863.)

JOHN C STIKEMAN, of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, February 7, 1863)

EDMUND JOHN SENKLER, the younger, of Brockville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 7, 1863.)

WILLIAM H. BEATTY, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 14, 1863.)

GEORGE GREER, of Brampton, Esquire, Barrister at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 21, 1863.)

BRITTON BATTE OSLER, of Dundas, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 21, 1863)

TO CORRESPONDENTS.

A LAW STUDENT.—Under "General Correspondence."

CLERK 6TH DIVISION COURT, CO. NORFOLK.—ENQUIRER.—Under "Division Court Correspondence."