DIARY FOR DECEMBER.

1. Wed. New Trial Day C. P. Clerk of every Municipality except County to return number of Resident rate-payers to Receiver General.
2. Thur. Re-hearing Term in Chancery commence.
3. Fri.. New Trial Day, Queen's Bench.
5. SUN. *2nd Sunday in Advent.*
6. Mon. Last day for notice of trial for County Courts.
12. SUN *3rd Sunday in Advent.*
14. Tues. General Sessions and County Court sittings in each County. Grammar and Common school Assessments payable. Collectors roll to be returned, unless time extended.
19. SUN. *4th Sunday in Advent.*
20. Mon. Nominations of Mayors in towns, Aldermen, Reeves and Councillors, and Police Trustees.
24. Fri.. Christmas Vacation in Chancery commence.
25. Sat.. *Christmas Day.*
26. SUN. *1st Sunday after Christmas. St. Stephen.*
27. Mon. *St. John Evangelist.*
27. Tues. *Innocents Day.*
19. Fri.. School returns to be made. Last day on which remaining half G. S. fund payable. Deputy Registrar in Chancery to make returns and pay over fees.

The Local Courts'
AND
MUNICIPAL GAZETTE.

DECEMBER, 1869.

DEATH OF THE CHANCELLOR.

We again refer to this melancholy event which has deprived the country of such an able judge, and his friends and relatives of such a kind amiable companion. At the time when Mr. Van Koughnet was appointed to the Chancellorship of Upper Canada, in March, 1862, we took occasion (8 U. C. L. J., 85) to give a short sketch of his career up to that time, it is therefore unnecessary to repeat what may there be found.

Whilst at the Bar, Mr. Van Koughnet was remarkable for the quickness and keenness of his perceptive faculties, enabling him to ascertain the strong points of his own, and the weak ones of his adversary's case, with wonderful rapidity. In examining a witness he is said not to have had an equal. On the Bench, though very ingenuous and open to conviction, his mind was rapidly made up, and he much more generally than the other judges decided cases on the spot, not feeling in his own mind the necessity of further consideration of evidence of which his quickness enabled him at once to comprehend the full bearing. It was a pleasure to conduct cases before one so fair, courteous and considerate; and here we may remark, that the courtesy and patience of the Chancellor was not confined to himself, but is a pleasing attribute of both of his learned brethren on the Equity Bench.

Upon his impartiality and uprightness as a judge we deem it unnecessary to dilate; the character of the Bench of Upper Canada in this respect has always stood so high, that it is sufficient to say, that he was the fitting chief of a court of "equity and good conscience."

He lent a helping to many reforms in the administration of the Court of Chancery, simplifying the procedure, and facilitating business, and was the author of the system of having the arguments of counsel immediately after the examination of the witnesses.

But, when speaking of him in his judicial capacity, we cannot do better than quote the words of Mr. Vice-Chancellor Mowat, who was holding circuit at Cobourg, when the news of of the Chancellor's death arrived there:—

"As a judge, he was most conscientious; he had a profound love of justice, and an exalted sense of judicial duty. In the discharge of his office, he acted without fear, favor, or affection, if any judge ever did. He was from the first prompt in deciding, and that he was generally accurate as well as prompt is shown by the fact that his decrees were generally (I believe), as seldom appealed from successfully as those of any judge we ever had. He had long been suffering from ill-health, but he was never willing to allow us to relieve him from any of his work, and he often insisted on doing his full share when he was ill able to endure the fatigue which it occasioned him. He had completed his last circuit without assistance, but a few days before his sad death. A Conservative by birth, education, and party connections, in his court he was a Reformer. He did not a little to complete those ameliorations in the practice of the Court of Chancery, which were commenced under the auspices of his distinguished predecessor, Chancellor Blake,—of whose able services, ill health so soon deprived the country, but who, though ever since unable to take part in public duty, still lives, and will, I hope, long live to be a comfort to his family and friends. Chancellor Van Koughnet originated valuable reforms himself, and always listened with interest to those suggested by others. I believe that he was the author of the present practice of hearing the arguments at these Circuit Courts, and of disposing of the cases at once, wherever practicable, a practice by which business has been greatly expedited, the expense of suits much diminished, and a knowledge of the doctrines of equity diffused amongst the people—all objects, I need not say, of great public moment."

Personally, the late Chancellor was very generally liked; more so, perhaps, than any other man of his day. Without seeking popularity, he was essentially popular, for none could resist his unaffected good humour, charm of manner, and evident warmth of heart. Mr. Vice-Chancellor Spragge at the opening of Court after the event, spoke in the most feeling manner of his death; and we are sorry we can only give the substance of his remarks:—

"Since I last met you, gentlemen of the Bar, an event has occurred, a most sad and unexpected one, which we all, the Bench and the Bar alike, most deeply deplore. The learned and able man, who for the past seven years has presided as its chief Judge, has passed away from amongst us, in the very prime of life, when, according to the ordinary course of nature, many years of honourable usefulness lay before him.

"The late Chancellor, let me add our late friend, for he was the warm and sincere friend of all of us, possessed many admirable qualities. With talents of a very high order, he combined one of the kindliest natures that it has ever been my lot to meet with; and he discharged, with rare ability and the purest integrity, the duties of his high office. We have lost an able and upright Judge, and a man as beloved as he was respected. The country and the Judiciary, and in an especial manner this Court have much to deplore in the loss of such a man.

"He is dead, and we shall see his face no more, but his memory will long be held by all of us in affectionate remembrance."

And Mr. Mowat, on the occasion already alluded to, further said:—

"He was, indeed, one of the most amiable of men; he had a warm and tender heart, and his friendship was deep and never failing. I never knew any one who had in him more to attract and less to repel. He probably never had a personal enemy. * * * During the period that he was engaged in politics, he was not only successful in obtaining and keeping the confidence of his political supporters, but he soon secured and he ever afterwards retained the personal friendship of, I believe, every one of his opponents in the House. Whatever those opposed to him, politically, may have thought of the measures or proceedings of the government of which he formed part, nobody doubted the purity of his motives or the soundness of his patriotism. He loved this Canada of ours, which was the land of his birth, and he earnestly desired to promote its interests. * * * Few men will die leaving more friends to mourn his loss. Speaking for myself and for you, gentlemen of the Bar, I am sure that I may say, that we loved him very dearly, and that we mourn him very deeply, sorrowing greatly to remember that we are never again to press his hand, or hear his kindly voice."

The day before the funeral, a meeting of the Bar was called, in the Library of Osgoode Hall, to express the feelings of the profession on the melancholy occasion, and their sympathy with the members of his family in their bereavement. The Attorney-General of Ontario, having introduced the subject in a few appropriate remarks, the following resolutions were passed:—

"*Resolved.*—1. That the Bar of Ontario desire to express their unfeigned grief at, and deep sense of the loss sustained by the Profession in the death of the late lamented the Hon. P. M. M. S. Van Koughnet, Chancellor of this Province.

"2. That the Bar attend the funeral of the late Chancellor in their robes, as a mark of respect to the deceased.

"3. That a copy of the foregoing resolutions be furnished to the Treasurer of the Law Society [absent from Toronto at the time], with a request that they may be entered on the books of the Society, and, that he be requested to call a meeting of the Bar for to-morrow, at two o'clock, at Osgoode Hall, to attend in a body the funeral of our late Chancellor."

The funeral was largely attended by all classes, and amongst them might be seen many of the clerks who were under him when Commissioner of Crown Lands, by all of whom he is held in affectionate remembrance. The Pall-bearers were Hon. W. H. Draper, C. B., Chief Justice of the Court of Appeal, the Chief Justice of Ontario, Chief Justice Hagarty, Vice-Chancellors Spragge and Mowat, Judges Morrison, Wilson, Gwynne, and Galt, and Judge Duggan. The body was interred in St. James' Cemetery.

His name will be remembered in the history of Canada as that of a man endowed with a very high order of intellect, as an eloquent and effective speaker; both at the Bar and in Parliament; as an able administrator, shown as well in the management of the Crown Lands Department, as in the reforms in the Court of Chancery; and, to crown all, a man with as kindly a heart as ever made a friend or disarmed an enemy.

Mr. Spragge has been offered and has accepted the Chancellorship, and Mr. Strong has been appointed one of the Vice-Chancellors.

CLERKS ACTING AS AGENTS FOR SUITORS.

Our attention has been directed to Rule 100. We do not understand it as prohibiting clerks for acting as agents for suitors, except in the actual conduct of a cause in Court, when the the officer has full employment otherwise, and when he should be "all eyes and all ears," to keep track of the orders made by the judge, to minute such orders, swear witnesses, cancel stamps, and perform other duties required by him in open Court. Indeed it could not be possible to carry on the business of the Division Courts unless clerks received instructions from parties at a distance, and acts for them. Ingnorant persons too are seldom capable of making out their own accounts, or giving notices required by law, and would be compelled to go to some competent persons for assistance, if clerks were unable to give them aid. Lawyers are not entitled to fees, are not recognized in the Division Courts, and nearly the whole operative part of the system is and must ever be worked out by the officers of the Courts. To prevent officers acting within reasonable limits as the agents for parties, would impair the value of the Courts to a very considerable extent, and certainly the rule we have referred to has not that effect.

USE OF STAMPS IN PAYMENT OF FEES.

We hear a good deal on the subject of the use of stamps in the Division Courts, and complaints are made, we think, without good cause, of "the great delay in seeing to the cancellation of stamps during the sittings of the Courts." Now in the first place, the stamps need not be presented to the judge for inspection till the close of the Court (Rule 167, *c.*), so that at least it is only the judge and clerk who would be delayed; but from enquiries we have made from several able and efficient officers we are satisfied that the delay in affixing and cancelling stamps, would not necessarily occupy, on an average, half a minute to each case, or, half an hour to a list of sixty. If the judge could inspect the stamps on summonses and judgments entered by the clerk before the Court opens, even this brief delay would be considerably reduced. No doubt if the government furnished clerks with "obliterators" it would be a great convenience, yet after all, the clerk may by writing his names beforehand on stamps to be used, reduce the actual duty in Court to insertion of date merely, and we make no doubt that if the saving of time at a Court was necessary, the judge would hold that the brief mode by figures, viz., "2 | 1 | 70, | " for "2nd Jan., 1870," would be a sufficient dating for the purpose of cancellation. We are quite disposed to sympathise with officers when they have any reasonable ground of complaint. Rule 167, as we stated in a former issue, is little more than a declaration of what the law is, and requires nothing unreasonable. We trust that all concerned will cheerfully comply with its provisions.

ADMINISTERING OATHS IN OPEN COURT.

As forms are now given in the new Rules for oaths to be administered in open Courts, they ought to be strictly followed.

The clerk anxious to acquit himself well will commit those forms to memory; if not spoken from memory, the officer should administer them reading from the book. This seems a small matter, but as the public are apt to form their impression of an officer of what they see of him in open Court (and officers naturally and properly desire to appear to advantage in the discharge of their duties), it seems well worth the trifling labour of committing a few forms to memory, that the important duty of administering oaths may be done reverentially, and without bungling or hesitation.

TRANSMITTING MONIES TO SUITORS BY MAIL.

The 159th general Rule, makes it the duty of parties entitled to monies collected to direct how they are to be transmitted; and if no such direction is given the monies are payable at the clerk's office. We recommend clerks to take written instructions from suitors as to the transmission of monies, as it is necessary for their own protection to do so. If directed to be sent by Post Office order, or in Bank bills, it will be necessary to have some entry in the cash book, and various suggestions are made as to the best practice in such cases. Perhaps the direction of the suitor to transmit, might also contain an authority to some one to sign the receipt in the cash book, or the person who mails the letter and sees, the enclosure might sign. We would be glad to hear suggestions from experienced officers on this point.

SELECTIONS.

SHALL WE PUNISH MURDER?

The crime of murder is an atrocious one. For one human being, deliberately, with studied purpose and malice afore-thought, to take the life of another, is an act at the bare thought of which even many a hardened wretch shudders. That there should be circumstances, under whose cover a murderer may not only be excused, but also justified; not only justified, but even glorified, is at first thought almost inconceivable; nevertheless, such circumstances exist.

Woman in America occupies an anomalous condition. Treated in some respects as if far superior to the masculine sex, in others denied all participation in rights and privileges accorded to its lowest specimens, her outward conduct is a fit and faithful representation of the inconsistencies of her position. This is the only country in the world in which a woman who has murdered her seducer, is honorably acquitted by a jury, and in which a husband can with impunity take the life of his wife's paramour. Why the perpetration of an act, to which the woman alleged to be injured thereby has given her full consent, should exempt her from being punished according to law for any crime she may commit, it is impossible to understand; unless she commit the crime in self-defence, or be regarded and treated as an irresponsible being, possessing and exercising no will or discretion of her own, and a completely passive instrument in the hands of others. Both of these suppositions are untenable. In watching for a man and shooting him unawares, she, far from acting on the defensive, is acting very offensively, and no one will for a moment maintain the latter supposition, and assert, that women have no wills of their own.

What are the arguments commonly adduced in support of the barbarous practices above named? Great stress is always laid upon the unsuspecting innocence of the deceived, the base designs of the deceiver, and the social stigma which his villainy casts upon her. That in this case, as in every other, it takes two to make a bargain, is a fact perpetually lost sight of. To say that every seducer is an unprincipled villian, whose arts it is impossible for weak women to resist, is to say something of which every one of us knows to be absurd. Taking the strongest possible case, that of a young woman seduced under promise of marriage, what are the facts? Overcome by her passions, trusting in his promises, although conscious that by yielding to his premature solicitations she cannot but compromise herself in his eyes, she falls from her high estate. The man deserts her, and the usual consequences follow. Who is to blame? The man only? Is she to be in no wise responsible for her rash and inconsiderate conduct?

But the plea most frequently urged in behalf of the murderess is the enormity of the punishment with which society visits her transgression against chastity, and the slight censure it passes upon him in concert with whom she transgresses. To state this plea is to refute it. If in leaving the path of virtue a young woman has committed an offence, in the estimation of society, for which she deserves to be excluded from its precincts, then society can not, if it desire to remain consistent, sanction the murder by her of a man whom it regards in no very reprehensible light. On the contrary, a man known to be successful with the opposite sex, is generally regarded by his fellows as a lucky dog; his success, far from rendering him odious in their eyes, is envied by them; and the women themselves, in many cases, feel much more flattered than repelled by the attentions of a man, whom they know to have achieved success with so many of them. If we really regarded a seducer as a scoundrel we would treat him as one. This, however, we do not. In considering his capacities for an office, it does not occur to us to inquire whether these are effected by his fancied rascality; in introducing him into society, and in generally treating him as we do other men, we also contrive to overlook it. And yet after his violent death we say "served him right," and acquit and applaud the murderess. The question here is not whether he ought to be treated as a scoundrel, but whether he is. If he is not, then, without being so grossly inconsistent as to make our judgment go for nought, we cannot consider his conduct after his death differently from what we did before it.

It may, however, be asked what a woman accomplishes by murdering her seducer. It is difficult to understand what motive impels her to the deed, unless it be the ignoble passion of revenge. She can obtain civil redress from every tribunal in the land; there is not a jury which would not award her heavy damages. But with these she is not satisfied; they do not appease her thirst for revenge. She wants that which public opinion and therefore the law does not give her, the death of her seducer. Not that it does her any good to kill him. She does not thereby restore her shattered reputation; the doors of society remain closed against her. Enraged at beholding what different results the same indiscretion brings about to her and to him, she concludes that the best mode of wreaking her revenge is to take his life. She, whose offence against society consisted in illegally giving birth to one being, now atones for it by illegally destroying another.

A fugitive allusion has been made to the case of the husband killing his wife's paramour. All that has hitherto been said applies with double force to him. That a husband, who, as has repeatedly happened, in cold blood, has shot down the supposed destroyer of his peace, should, as has also repeatedly happened, be allowed to go unpunished for his crime, is a spectacle at which we may well stand aghast. We venture to assert that no instance of conjugal infidelity on the part of the wife has ever

happened in this country, in which she was not fully as culpable as he with whom she sinned. No married woman can ever be approached by one harboring evil designs against her honor without her becoming aware of them before it is too late; no man can ever cause her to prove faithless to her husband, unless it be with her full consent. What grounds of justification, then, has the husband who deliberately shoots her paramour? The honor of his family, it is said, has been invaded; does he by his bloody deed restore it? The purity of his wife has been defiled; does he wash the stain away? Indeed, no injury has been done him; he simply ascertains that he has been mistaken in his wife; she, whom he thought virtuous, is shown to be otherwise. Is he to be justified in killing a man, because of a mistake which he himself has made,

To take the life of any human being, except in self-defence or when the law commands it, is illegal. That the laws of any country conform in the main to its public opinion is a threadbare truth. We have no law punishing seduction with death, simply because we dont want it. To the passage of any such law, public opinion would be overwhelmingly opposed. But we have a law punishing murder. Then why not apply it to a case falling within it? Why not teach our young women to be on their guard against designing men, and discourage them from committing that awful crime, murder? One of the most pernicious consequences of the acquittal of this class of murderesses is the direct encouragement it gives to others to commit murder under similar circumstances. Recently, in Maryland, a woman was made a heroine of for having twice in succession shot her lover, who did not marry her because, being the only support of a mother and several sisters, he could not. A premium is thus set on deliberate, cowardly homicide. But this is not all. The murdered person may have had good and substantial reasons for refusing to keep his promise of marriage. All these, however, are buried with him; every opportunity to present them, to explain his conduct, to show that the murderess, in her double role as judge and executioner, acted unjustifiably, inexcusably, is gone; for at her trial the public prosecutor is confined to proving the naked fact of the murder, and is not allowed to invalidate or weaken what is called the defence by submitting to the jury any evidence in explanation or extenuation of the murdered man's conduct. The vale of human life, already so frightfully low in this country, is in this way lowered still more.

The inconsistencies of public opinion have already been pointed out. Although a man, known to be a seducer, is treated none the worse for this, and has the same access to society as anybody else, yet his violent death elicits applause, or at least no condemnation. Although a proposition to make seduction legally punishable with death would not have the least prospect of being adopted by any legislature, yet when a woman in violation of the law kills her seducer, thus doing that illegally which no one is willing to make legal, no voice is heard in reprobation of the outrage. Such a remarkable phenomenon calls for an explanation, for which, in the case of the husband killing his wife's paramour, we need not be at a loss. The only supposition, upon which his act could possibly be excused, is the very one upon which, in matters relating to husband and wife, the common law has always proceeded, viz.: that the wife has no will or mind of her own, and that, therefore, the paramour is the only person to whom any blame or guilt attaches. That husband and wife are but one person, has always been a maxim of the common law, by which, however, is practically meant that the husband is the one person. The wife, being supposed to be always acting under the coercion of her husband, has no power to contract; her agreements are of no effect whatever; she can not even commit a crime in his presence, save in a few excepted cases. In fact so much is she regarded as under his control that he has the right, solemnly confirmed by an English court of justice a few years ago, to chastise her corporally whenever he thinks it necessary. There can be no doubt that the above quoted maxim took its rise in the same modes of thought and action which, prevailing universally seven or eight hundred years ago, gave birth to the system of law denominated the common. At that period, and indeed long thereafter, this maxim was living law, in perfect consonance with the semi-civilization to which the English had attained. Although in the course of time opinions have greatly changed, so that in this country, at least, the husband can no longer enjoy the privilege of whipping his wife, without having to pay dearly therefor, yet in other respects there has been but little advance; venerable traditions fetters the minds of men, and, unbeknown to them, warp their judgments; and the husband is still looked upon as, to some extent, the owner of his family whose honor he is required to guard. The absurd notion of duelists, that the infliction of a bodily wound cures a mental one, is among sensible people happily exploded, but the parallel notion of husbands, similarly dating back to, and transmitted from the middle ages, that by killing their wives' paramours they repair their lacerated honour, is received with applause. It is only when juries will cease regarding the husband as the owner of his family, and will cease divesting the wife of those qualities of free will and responsible action with which she is naturally endowed, that they will also cease acquitting the man, who, after having deliberately satisfied himself of his wife's guilt, deliberately kills her accomplice.

In the case also of the murder of the seducer by the seduced, the woman is either habitually regarded as having no will, or else it is considered as overcome by the insidious wiles of the seducer. That he also has strong, frequently ungovernable passions, is a considera-

tion always overlooked; he is constantly represented as the smooth, calm, scheming villain, who effects her ruin with undisturbed placidity. An additional element, however, enters into this case, viz.; the dim, vague consciousness under which juries, and indeed all of us, labor, that the relations between the sexes are not what they should be, that the one is oppresed and occupies a subordinate position to the other. We do not here refer to the political disabilities of woman, but only to the social inequalities and prejudices from which she suffers. Though our confidence may be strong that the time is near at hand when no one will any longer presume to dictate to woman her supposed peculiar sphere, yet at the present moment that time has not come, and it is in consequence of perceiving this that our sympathies are always so copiously excited in her favor. We are passing through a transition period in which some women, bolder than the rest, defy and shatter old prejudices by following occupations for merely aspiring to which they in byegone times would have been ostracised. Hence the social oppression of the entire sex is forced upon the attention of the public mind, which, by a beautiful provision of nature, immediately seeks to re-establish an equilibrium by causing an increased gallantry, sympathy and devotion to be shown them as a temporary substitute for that freedom of action of which they have always been deprived. In other countries, where this transition period has not yet set in, a woman killing her seducer is punished like any other murderess, because she is looked upon as a responsible being, and because the public mind, not having become aware of the disadvantages of position incident to her sex, has not yet begun to sympathize with her on account of them. A removal of these disadvantages will operate in the same way as a failure to perceive them. Thus with us, as soon as woman will be at full liberty, both socially and politically, to follow whatever occupation she chooses, as soon as the prejudices are disipated which now debar her from devoting her energies to many a field of action, as soon as she is placed on a footing of perfect equality in every respect with man, who will then of himself demand that, having the same rights with him, she should be held equally responsible for their use or absue, then, but not before, all motives for bestowing any extra amount of sympathy upon her, will vanish; her crimes will be judged as severely and impartially as those of man, and juries will no longer deliver verdicts which, unconsciously prompted by a general appretiation of her depressed condition, work injustice in each particular case.—*Bench and Bar.*

REPAYMENT OF MORTGAGE MONEY. TRANSFER WITHOUT NOTICE.

Whitington v. *Tate*, L.C., 17 W. R. 559.

It is well settled that when a mortgagee assigns the mortgage and notice is not given to the mortgagor, the assignee is subject to all the equities between the mortgagor and the original mortgagee. Thus, if the mortgagor were to pay off the debt to his original mortgagee that would be a good payment as against the assignee. The principle has been carried to the length of affecting the transferee by the balance of a general account between the mortgagor and original mortgagee: *vide Norrish* v. *Marshall* (5 Madd. 481), where the mortgagor claiming that he had extinguished the mortgage-debt by wines and money supplied to the plaintiff, the Vice-Chancellor of England decreed an account, observing that, "as against an assignee without notice the mortgagor has the same right as he has against the mortgagee, and whatever he can claim in the way of mutual credit as against the mortgagee he can claim equally against the assignee. In *Ex parte Monro, Re Fraser* (Buck, 300), a bond having been assigned without notice to the obligor, the debt was held to be still in the order and disposition of the obligee within 21 Jac. 1, c. 19. *Williams* v. *Sorrell* (4 Ves. 390) affords an example o the simple case. There the mortgage having been assigned without notice to the mortgagor, a payment afterwards made by the mortgagor to the original mortgagee was held a valid payment as against the assignee, and on a foreclosure bill filed by the assignee, the mortgagor tendering the balance, which tender was refused, the mortgagor was required to pay costs to the time of tender only. *Matthews* v. *Wallwyn* (4 Ves. 118) is another case in which this principle is clearly ruled and explained.

Upon the consideration—what is notice? it is worthy of observation that in *Lloyd* v. *Banks* (16 W. R. 988) Lord Cairns held that any actual knowledge on the part of the person to be affected is notice, provided the knowledge were such as would operate on the mind of a reasonable man of business. In *Dearle* v. *Hall* (3 Russ. 1) and *Foster* v. *Cockerell* (3 Cl. & F. 456), and the cases above that date, the question of notice seems to have been regarded as being not so much whether or no there had been actual knowledge as a question of the conduct of the incumbrancer. But the decision in *Lloyd* v. *Banks*, by treating actual knowledge, by whomsoever or howsoever conveyed, as the thing to be looked for, puts the matter upon rather a different footing.

In the principal case, without at all controverting the principle of *Matthews* v. *Wallwyn*, *Williams* v. *Sorrell*, &c., a payment made by the mortgagor, after an assignment of the mortgage without notice to himself, was held to have been made in his own wrong. The case, which was a very unfortunate one, arose out of the defalcations of a Liverpool solicitor named Stockley, who absconded in the latter end of 1867. The defaulter was the solicitor both of the original mortgagor and of the transferee. He gave no notice to the mortgagor. The transferee left the deeds in his custody. As between himself and the mortgagor, the solicitor had authority to receive the interest

on behalf of the mortgagee, but had no authority to receive the principal. The mortgagor wishing to pay off the mortgage, the solicitor got the transferee to execute a reconveyance under the impression that he was merely joining in an appointment of new trustees (the mortgaged property being trust property); he handed this deed to the mortgagor with all the other deeds (except the transfer), but he kept the money himself, merely paying the transferee from time to time the interest on the original mortgage-money. Three years afterwards the transferee filed a foreclosure bill against the astonished mortgagors, and Lord Hatherley, affirming the Master of the Rolls, held that the mortgagee must pay his principal a second time or be foreclosed. The first payment was held to have been in his own wrong, because he made it to a person who was not authorised to receive it; if he had gone with his money to his original mortgagee, the original mortgagee would have said, "The mortgage is transferred," and passed him on to the transferee, and so the payment would have got into the right hands. But if the original mortgagee had played the knave and pocketed the money, the fault would have been the transferee's, for not giving to the mortgagor notice of his having taken the transfer.

The case was a particularly hard one upon the mortgagor, because, receiving back his deeds, his mortgage, with a re conveyance, he had everything to assure him that the mortgage was extinguished. Yet the decision is unimpeachable. If, when the mortgage was created, the mortgagor had from the mortgagee been given to understand that the solicitor had authority to receive principal as well as interest, here, we imagine, the transferee, not having given notice, would have been bound by this arrangement, and the payment made would have been good as against him. The moral of the case is—that mortgagors should, unless they have a special authority, take care, in paying off their mortgages, to pay direct to the mortgagor, and not to the solicitor through whom the advance was effected.—*Solicitors' Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Division Courts Jurisdiction.—Prohibition.—County Courts have jurisdiction of actions of ejectment where the yearly value of the premises does not exceed 20*l.* A county court decided on conflicting evidence that the yearly value of the premises did not exceed 20*l.* *Held* (*per* Cockburn, C. J., and Lush, J.; Hannen, J., *dubitante*), that the Court of Queen's Bench could not review this decision by prohibition. —*Brown* v. *Cocking*, Law Rep. 3 Q. B. 672.

Criminal Law.—1. The cashier of a bank has a general authority to conduct its business, and to part with its property on the presentation of a genuine order; and if, being deceived by a forged order, he parts with the bank's money, he parts, intending so to do, with the property in the money, and the person knowingly presenting the forged order is not guilty of larceny, but of obtaining money on false pretences.—*The Queen* v. *Prince.* Law Rep. 1 C. C. 150.

2. Partridges, hatched and reared by a common hen, so long as they remain with her, and, from their inability to escape, are practically in the power and dominion of her owner, may be the subject of larceny, though the hen is not confined in a coop, but at liberty.—*The Queen* v. *Shickle*, Law Rep. 1 C. C 158.

3. A. stole gas for the use of a manufactory, by drawing it off from the main through a pipe, which was never closed at its junction with the main. The gas from this pipe was burnt every day, and turned off at night. *Held*, (1) that as the pipe always remained full, there was a continuous taking of the gas, and not a series of separate takings; and (2) that even if the pipe had not been kept full, the taking would have been continuous, as it was substantially one transaction.—*The Queen* v. *Firth*, Law Rep. 1 C. C. 172.

4. A woman permitted the prisoner to have connection with her, under the impression that it was her husband. *Held*, that in the absence of evidence that she was unconscious at the time the act of connection commenced, it must be taken that her consent was obtained, though by fraud, and that therefore the prisoner was not guilty of rape.—*The Queen* v. *Burrow*, Law Rep. 1 C. C. 156.

Municipal Law.—A statute provided that no licensed victualler should sell wine or ale on Sunday, except "as refreshment for travellers." A. walked on Sunday to a spa, two and a half half miles from his house, for the purpose of drinking the mineral water there for the sake of his health, and was supplied with ale at an hotel at the spa. *Held*, that A. was a traveller within the exception.—*Peplow* v. *Richardson*, Law Rep. 4 C. P. 168.

2. Commissioners were incorporated with powers to construct a bridge, and to borrow from the treasury £120,000 on an assignment of the tolls: they were authorised to take tolls, to be applied to pay the expenses of the bridge, and then in repayment of the sum borrowed. *Held*, that they were not liable to the poor-rate, as they were in occupation of the bridge, as servants of the crown, deriving no

benefit from the tolls, and were therefore exempt from the operation of 43 Eliz. c. 2, s. 1. (Exch. Ch.)—*The Queen* v. *McCann*, Law Rep. 3 Q. B. 677.

8. At the election of town councillors there were four vacancies and five candidates. B. one of the four who had a majority of votes, was returning officer, and therefore ineligible. *Held*, that mere knowledge by the electors who voted for B. that he was returning officer, did not amount to knowledge that he was disqualified in law as a candidate, and that therefore the votes were not thrown away, so as to make the election fall on the fifth candidate.—*The Queen* v. *Mayor of Tewkesbury*, Law Rep. 3 Q. B. 629.

2. A man cannot be convicted of personating "a person entitled to vote," if the person personated be dead at the time.—*Whitely* v. *Chappell*, Law Rep. 4 Q. B. 147.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Landlord and Tenant.—1. A tenant is estopped from denying that his landlord has a legal reversion, though it appear from the instrument of demise that the landlord has only an equity of redemption.—*Morton* v. *Woods*, Law Rep. 3 Q. B. 658.

2. The lessee of an inner close has, by necessity, a right of way over an outer close which belongs to his lessor, but he cannot, by user, acquire an easement to deposit packages on a close which belongs to his lessor.—*Gayford* v. *Moffat*, Law Rep. 4 Ch. 133.

Libel.—An accurate report in a newspaper of a debate in parliament, containing matter disparaging an individual, is not actionable; the publication is privileged on the ground that the advantage of publicity to the community outweighs any private injury; and comments in the newspaper on the debate are so far privileged, that they are not actionable so long as they are honest, fair, and justified by the circumstances disclosed in the debate.—*Wason* v. *Walter*, Law Rep. 4 Q. B. 73.

Master and Servant.—To an action for breach of an indenture of apprenticeship, the defendant, the apprentice's father, pleaded that the apprentice "was and is prevented by act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all said term." *Held*, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action.—*Boast* v. *Firth*, Law Rep. 4 C P. 1.

Railway.—1. A company were empowered by a statute, passed in 1832, to make and use a railway for the passage of waggons, engines, and other carriages. The company ran passenger trains drawn by locomotive steam-engines, having taken all reasonable precautions to prevent the emission of sparks. The plaintiff's haystack having been fired by sparks from an engine, *held*, that, as the company had not express powers by statute to use locomotive steam-engines, they were liable at common law for the damage.—*Jones* v. *Festiniog Railway Co.*, Law Rep. 3 Q. B. 733.

Undue Influence.—A., a widow, aged seventy-five, within a few days after first seeing B., who claimed to be a "spiritual medium," was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of B, to adopt him as her son, and transfer £24,000 to him; to make her will in his favor; to give him a further sum of £6,000; and also to settle on him, subject to her life-interest, £30,000 (these gifts being without consideration, and without power of revocation). *Held*, that the relation existing between them implied the exercise of dominion and influence by B. over A.'s mind; and that as B. had not proved that these gifts were the pure voluntary acts of A.'s mind, they must be set aside.—*Lyon* v. *Home*, Law Rep. 6 Eq. 655.

Reforming Deed—Specific Performance—Fraud—Conflicting Equities.—The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed to the plaintiffs in these suits for valuable consideration. After the lapse of more than fifteen years the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings in this Court to reform the deed executed by the defendant, or, treating it as a contract only, for a specific performance thereof. *Held*, (1st) That though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing; and that his equity being the elder, and having the legal title in his

favor, the court could not interfere to give the plaintiff relief; and (2nd) That though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief were he in court as a plaintiff, still they did not constitute a ground for granting the plaintiffs the relief sought, and under the circumstances, the court dismissed the bill with costs.—*Livingstone* v. *Acre*—*Wallace* v. *Acre*, 15 C. R. 610.

ONTARIO REPORTS.

IN THE COURT OF ERROR AND APPEAL.

SCRAGG v. THE CORPORATION OF THE CITY OF LONDON.

Assessment—Property belonging to corporation.

Held, affirming the judgment of the Queen's Bench, that land owned by a city, but leased by them to a tenant, for his own private purposes, was liable to taxation, and that the corporation might distrain for such taxes.

Morrison, J., dissented, on the ground that the land was not liable; Van Koughnet, C., and Spragge, V.C., on the ground that, though the corporation might sue on the covenant to pay, they could not distrain.

[28 U. C. Q. B. 457.]

Error from the judgment on demurrer in this case in favor of the plaintiff, reported in 26 U. C. R. 263, where the pleadings are set out at length.

The question in substance was, whether land belonging to a municipal corporation, and leased by them to a tenant for his own private use, was liable to taxation under the Assessment Act, Consol. Stat. U. C. ch. 55, and whether the corporation could distrain, the tenant having by the lease covenanted to pay taxes. The court below held that the land was liable, and that the corporation might distrain, Morrison, J., dissenting.

Crombie, for the plaintiff in error, the plaintiff also in the court below.* All land, the statute declares, shall be liable to taxation: Consol. Stat. U. C. ch. 55, sec 9. Before any individual therefore can be liable for taxes on the land, the land itself must be liable to sale; but here the corporation would be selling their own property. The clause of the statute in question—sec. 9 subsec. 7—exempts "the property belonging to any county, city, town, township, or village, whether occupied for the purpose thereof or unoccupied." It is argued for defendants that if the section had stopped at the word "village," this property clearly would have been exempt, but that the subsequent words restrict such exemption to the two kinds of property specified. These words do not, however, restrict, but amplify or illustrate the previous part of the section, or certainly do not limit it. Many instances might be put of sentences framed in the same manner, where the word "whether," following words intended to be general, is clearly intended not to be restrictive. In the first epistle to the Corinthians, ch. xii. v. 13, it is said, "For by one spirit are we all baptized unto one body, whether we be Jews or Gentiles, whether we be bond or free," &c. In the same epistle, ch. iii. v. 21-22, "All things are yours; whether Paul, or Apollos, or Cephas, or life, or death, or things present, or things so come: all are your's." In the epistle to the Ephesians, ch. vi. v. 8, "Knowing that whatsoever good thing any man doeth, the same shall he receive of the Lord, whether he be bond or free"—all these are illustrations.

If the Legislature had intended to assess the occupant in respect of the land, without the land itself being made liable, it would have been specially provided for, as in the case of lands vested in her Majesty: sec. 9, sub sec. 2. The provisions and machinery of the act are inconsistent with the idea of subjecting such land to taxation. Under sec. 22, it should be assessed against both the owner and the occupant, and sec. 24, provides, that in such case the taxes may be recovered from either. This cannot apply where the owner in the party to receive the taxes and the body by whom their payment is to be enforced. Sec. 26 provides, that any occupant may deduct from his rent any taxes paid by him if they could have been recovered from the owner. Suppose the city should rent without taking any covenant to pay taxes, they would have then to impose, collect, and repay them; a useless form, which could never have been intended. Moreover, the corporation have had no power to lease. Sec. 243, sub-sec. 1, of the Municipal Act, Consol. Stat. U. C., ch. 54, enables them to obtain property and dispose of it, which means only to sell; and they have no other power.

Harrison, Q. C., for defendant in error. This property is assessable. In England the occupant of Crown property for his own benefit has always been held liable in respect of his occupation, and it is just that it should be: *Lord Bute* v. *Grindall*, 1 T. R. 338; *Mersea Docks* v. *Cameron*, 11 H. L Cas. 443; *Regina* v. *St. Martin's Leicester*, L. R., 2 Q. B. 493. The corporation had power to lease, and the plaintiff, their tenant, is not in a position to dispute it. A corporation may hold land subject to the interference of the Crown: *Becher* v. *Woods*, 16 C. P. 29-32; *Municipality of Oxford* v. *Bailey*, 12 Grant, 276.

As to the meaning of the word "whether," when used as in this clause, no general rule can be laid down. It may be used either to amplify or to restrain previous words, according to the context, and its effect in each case must be determined by the context and the consideration of the whole statutes. If what precedes it includes every thing, as here, it cannot amplify; it must restrain therefore, or mean nothing; and many cases may he put in which it would clearly have a restrictive effect—"All judges, whether Chief Justices or Puisne Judges," would not include County Court Judges. "All courts, whether the Common Pleas, Queen's Bench, or Exchequer," would not necessarily include the courts of Oyer and Terminer; it would depend on the whole scope and object of the act. The rule is to give a men to all words used in a statute, if possible, and there are obvious reasons why the legislature may have intended to limit the exemption as the defendants contended for.

[It was contended also that the decision of the Court of Revision was final, as determined by the court below, but the argument on this point

*Argued 27th August, 1868, before Draper, C. J. of Appeal, Van Koughnet, C., Richards, C. J., Spragge, V. C., Morrison, J., Adam Wilson, J., Mowat, V. C.

is omitted, as the judgment proceeds upon the other ground only.]

DRAPER, C. J., of Appeal.—The rule prescribed by the statute, Consol. Stat. U. C. ch. 55, in relation to the question raised, is contained in the 9th section; all land and personal property is liable to taxation.

The exception applicable in this case is contained in the 7th sub-section of the 9th section, the property to any county, city, town, township or village "whether occupied for the purpose thereof or unoccupied."

The word "property" includes both real and personal estate.

A philological discussion has been raised upon the word "whether."

This word is used as a pronoun, and also as a "particle expressing one part of a disjunctive question in opposition to the others" (*Johnson's* Dictionary). The Imperial Dictionary defines it as a pronoun or substitute.

As a pronoun, both the authorities explain it to mean, which of two; but the latter, after referring to the example taken from the 21st chapter of St. Matthew's Gospel, v. 31—"whether of them twain did the will of his father"—asserts that "in this sense it is obsolete," and adds, as an additional sense, "Which of two alternatives expressed by a sentence or the clause of a sentence, and followed by *or*," and gives this example: "Resolve *whether* you will go or not: *i. e.*, you will go *or* not go; resolve *which*.'

Speaking with an attempt at strict accuracy, the word *whether* is not used in this section of the act in either of the senses.

As a pronoun, it is not used to signify which of the two kinds of property—*i. e.*, property occupied for the purpose of the municipality, or property not occupied at all—is to be exempt; and in the former case an actual occurrence is referred to, not a mere possession incident to title. Obviously it was intended to exempt, not one, but both—the property occupied for the purpose, &c., and unoccupied property.

As a "particle or substitute" it is not used to denote one or other of two alternatives contained in the sentence, for their is no selection of the one or exclusion of the other intended; both are equally exempted.

This the plaintiff agrees, or indeed insists on. He relies on the word "all" in the beginning of the exemption, and argues that the later words, "whether," &c., do not restrict this general word so as to limit the exemption to land occupied for the purpose of the corporation or unoccupied. He, in effect, treats these words as redundant, or intended as a mere illustration of the meaning of "all," neither confining or expressive of its whole meaning. He adverts to and urges on our consideration the previous sub-section 4, of the exempting clause in relation to real estate of universities, or other educational institutions where the exemption is declared to exist only so long as such real estate is actually used and occupied by such institution, but not if otherwise occupied, or unoccupied, arguing that the judgment gives as wide an effect to the language of sub-sec. 7, now under consideration, as could be given to the more express and particular terms of sub-sec. 4. A suggestion was certainly thrown out, that land for which a tenant paid rent to the corporation was occupied, "for the purposes thereof," but I did not understand that the plaintiff's counsel placed much reliance on this suggestion, nor do I think it requires an answer; it could not be seriously contended that this was an occupation for the "purposes"—*i. e.*, the end and object of creating municipal corporations.

Lord Chief Justice Holt is reported to have said: "I think we should be very bold men, when we are entrusted with the adminstration of the law and the interpretation of acts of parliament, to reject any words that are sensible in an act." I shall not endeavor to gain a reputation for courage by treating as nugatory the lost words of this section.

I should be sorry to infringe upon the modern rules adopted in construing statutes—namely, to construe those "according to the plain and popular meaning of the words," and not to adopt a construction unwarranted by such words, in order to give effect to what I might suppose to be the intention of the legislature; but I should certainly not be deterred by philological cobwebs from an exposition of a statute which, in my judgment, is in accordance with the intent to be deduced from a comparison and consideration of its whole language.

I cannot read this 7th sub-section by itself without a conviction that, however easy it would have been to have used a clearer form of expression, the sole object of the latter part was to explain and limit the general expression "the property belonging to any county," &c., and to give to the whole sub-section the meaning it would certainly bear if "and" were substituted for "whether."

When the principal member of section nine is referred to in connection with the seventh subsection, this opinion is strengthened. The legislature may reasonably be assumed to have known that municipal corporations in this Province had, or might hereafter have property, neither occupied for the purpose therefor nor occupied—for example, buildings at one time both necessary and adequate for their convenience, but which under changed circumstances were no longer wanted, and which it might not be desireable to sell. Such buildings if leased, would most probably not be occupied for any corporate purpose, and still would not be unoccupied.

It would make sub-section seven repugnant to the expressed object of the section of which it forms part so to construe it, and thereby to exempt property so circumstanced from liability to taxation, and yet this repugnancy will arise, and arise from what I think a perversion of the latter part of the sub-section, if the plaintiff's contention should prevail. It would in my humble judgment afford a very strong illustration of the maxim, *Qui hæret in literâ hæret in cortice.*

I think the appeal should be dismissed with costs.

VAN KOUGHNET, C.—Setting aside any question as to exemption, it seems to me that the defendants still could not levy by distress. When a corporation leases their property, they are the parties to collect both rent and taxes, and when they lease for a certain sum, they can take no more; they cannot under the contract superadd taxes. The stipulation that they shall pay taxes gives, I think, only an action on the covenant, and, the mistake they have made here is in dis-

training. It seems to me, therefore, that the judgment below should be reversed.

RICHARDS, C. J., ADAM WILSON, J., and MOWAT, V. C., concurred with DRAPER, C. J., of Appeal.

SPRAGGE, V.C., concurred with the Chancellor.

MORRISON, J., adhered to the judgment delivered by him in the court below.

Appeal dismissed.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, E.q., *Barrister-at-Law.)*

BARBER v. ARMSTRONG.

Replevin—Pleading.

Held, 1. That section 18, Con. Stat. U. C. cap. 29, applies only to cases of a wrongful taking and detention within the latter part of section 1 of the act.

2. That the second count of the declaration set out below was in case and not in replevin, and could not therefore be joined with an ordinary count in replevin; but even if intended to be a count in replevin under the provisions in the latter part of section 1 it is improper, the facts being, that the action was against a pound-keeper for detaining certain horses distrained *damage fer cas*, and therefore a case "in which by the law of England replevin might be made," and in either case the count must be struck out.

[Chambers, November 1, 1869.]

This was an action of replevin. The declaration contained two counts; the first an ordinary count in replevin, but omitting to state the locality in which the taking took place. The second count in its introductory part stated that the defendant was a pound-keeper, and as such received and took into his custody certain goods and chattels of the plaintiff, to wit, certain horses, &c., and that whilst the said goods and chattels were in the defendant's custody as such pound-keeper as aforesaid, and previous to the sale thereof, he, the plaintiff, considering and contending that the said goods and chattels had been and were illegally impounded in pursuance of and as required by the fourth sub-section of section 355 of 29 & 30 Vic. ch. 51, offered to give to the defendant and tendered to him good and sufficient and satisfactory security for all costs, damages and expenses that might be established against him, and did thereupon, as the owner of the said goods and chattels, demand from the said defendant the delivery up of the said goods and chattels to him, the plaintiff, as he lawfully might. Yet the defendant wrongfully refused to accept the said security or any security whatsoever, and wrongfully refused to deliver up to the said plaintiff the said goods and chattels, and unjustly detained the same from the said plaintiff against sureties and pledges, until, &c.

Upon being served with this declaration the defendant obtained a summons calling upon the plaintiff to show cause why the second count of the declaration should not be struck out, on the ground that the same is calculated to prejudice, embarrass and delay the fair trial of this action, and that the said count cannot, if in case, properly be joined with the first count of the said declaration, and if in replevin is separable; or why the defendant should not be at liberty to plead and demur to the declaration, on the ground that there is a misjoinder of counts, or why the first count should not be amended at plaintiff's expense, by stating the particulars of the place whence the chattels, &c., therein mentioned, were taken.

D. McMichael shewed cause, contending that although the first count was in replevin yet that supposing the second count to be in case, it might be joined under the provisions of the first section of Con. Stat. U. C. ch. 29, entitled, "An Act relating to Replevin," otherwise it would not be possible for the plaintiff to avail himself of the provisions therein contained for "the recovery of the damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses." And if even nominal damages are given, and such would be the result without such a count as this, such recovery could be pleaded in bar of any subsequent action for substantial damages.

Osler, for the defendant, contended that the count was in case, in which event it was a misjoinder of action, under the provisions of the Common Law Procedure Act, section 73 or if it should be held to be in replevin then it was unnecessary and should be struck out, and that the provisions of the act relating to replevin respecting damages did not refer to cases like the present, but to cases where the plaintiff brought replevin in place of trespass or trover. He also contended that in this case it was necessary to state the place where the wrongful taking and detention took place, as this case did not fall within the provisions of section 18 of the replevin act.

GALT, J.—It is very difficult to say whether the second count is in replevin or in case for wrongfully refusing to accept the security mentioned in the declaration, although it concludes in the ordinary form of a count in replevin. I incline to think that it is in case, and, as such, is in contravention of the 73rd section of the Common Law Procedure Act, and must be struck out, but it is of very little consequence whether I am correct in this view, because if it is intended to be in replevin, it ought to be struck out as superfluous for the following reasons—From the affidavits filed it appears that this is an action against a pound keeper for detaining certain horses distrained damage feasant and placed in the pound, it is therefore a case "in which by the Law of England replevin might be made," and does not fall within the latter part of the 1st section of the replevin act, which was the portion relied upon by Dr. McMichael. The part referred to is as follows, "or in case any such goods, &c., have been otherwise wrongfully taken or detained, the owner or other person capable at the time this act takes effect of maintaining an action of trespass or trover for personal property may bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained," &c., as before mentioned. If, therefore the second count is intended to be in replevin under the foregoing provisions, it is wrong, because being a case in which by the law of England replevin might be made, the said provisions do not apply. It also appears to me that the 18th section applies only to cases of a wrongful taking and detention within the latter portion of the first section, and not to cases of unlawful distresses for damage feasant, and therefore that local description is necessary.

The summons is therefore made absolute to strike out the second count, and to amend the first with costs, and the defendant to have eight days time to plead to the amended declaration.

Order accordingly.

ENGLISH REPORTS.

CHANCERY.

MARSHALL v. ROSS.

Trade mark—Word "patent"—Definition of.

The word "patent" may be used, in certain cases, although the party using it has not, in fact, obtained a patent for the manufacture of the article so said to be patented.

[21 L. T. Rep. 260.]

This was a motion in the terms of the prayer of the plaintiff's bill, to restrain the defendant, James Ross, a shipping agent, from removing or parting with certain packages of thread, in wrappers, bearing labels in imitation of the plaintiff's labels. The thread had been manufactured in Belgium, and had been consigned by the manufacturers, Messrs. Dietz and Company, to the defendant Ross in this country, for the purpose of being shipped by him to Australia. The label which the plaintiff had adopted contained the words "Marshall and Co., Shrewsbury." "Patent Thread."

The labels of the defendants were worded, "Marshal; Schrewsbury." "Patent Thread." It appeared that the thread manufactured by the plaintiff was not, in fact, patented: but it was alleged and proved that the word "patent" was so used to designate a certain class of thread well known in the trade; that that term had for many years past been used by manufacturers to distinguish it from thread of a general class.

E. E. Kay, Q.C., and *A. G. Marten*, in support of the motion, contended that it was an evident infringement of the plaintiff's trade mark, which the word "patent" implied; was deceptive in its character, and caused injury to the plaintiffs.

Davey, contra, urged that the defendant was in the present case only a simple consignee, and could not be presumed to know anything of the label in question as an imitation of the plaintiffs' label. The plaintiffs, in fact, had no right to make use of the word "patent" in reference to the character of their thread, when no patent had ever been granted in respect of it, and they therefore could not have the relief by injunction as prayed.

The VICE-CHANCELLOR said, that the word "patent" might be used in such a way as not to deceive anyone, or cause a belief that the goods so called were protected by a patent He instanced the case of "patent leather boots." In the present case the term "patent thread" had been so long used in this particular trade that it might be said to have become a word of "art." He did not consider that there had been any such misrepresentation by the plaintiffs in using the term to prevent them from having it protected by the injunction prayed for. There must therefore be an order for the injunction as prayed.

Order accordingly.

UNITED STATES REPORTS.

SUPREME COURT, UNITED STATES.

[*From the Pittsburgh Legal Journal.*]

THORINGTON v. SMITH & HARTLEY

The rights and obligations of a belligerent were conceded to the government of the Confederate States in its military character from motives of humanity and expediency by the United States. To the extent of actual supremacy, in all matters of government within its military lines the power of the insurgent government is unquestioned.

Such supremacy made civil obedience to its authority not only a necessity, but a duty.

Confederate notes issued by such authority and used in nearly all business transactions by many millions of people, while as contracts in themselves in the event of unsuccessful revolution they were nullities, must be regarded as a currency imposed on the community by irresistible force.

Contracts stipulating for payment in that currency cannot be regarded as made in aid of the insurrection; they are transactions in the ordinary course of civil society, and are without blame except when proved to have been entered into with actual intent to further the invasion.

Such contracts should be enforced in the courts of the United States after the restoration of peace, to the extent of their first obligation.

The party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States.

CHASE, C. J—This is a bill in equity for the enforcement of a vendor's lien.

It is not denied that Smith & Hartley purchased Thorington's land, or that they executed to him their promissory note for part of the purchase money, as set forth in his bill; or that, if there was nothing more in the case, he would be entitled to a decree for the amount of the note and interest, and for the sale of the land to satisfy the debt. But it is insisted, by the way of defence, that the negotiation for the purchase of the land took place, and that the note in controversy, payable one day after date, was made at Montgomery, in the state of Alabama, where all the parties resided in November, 1864, at which time the authority of the United States was excluded from that portion of the State, and the only currency in use consisted of Confederate Treasury notes, issued and put in circulation by persons exercising the ruling power of the States in rebellion, known as the Confederate government.

It was also insisted that the land purchased was worth no more than three thousand dollars in lawful money; that the contract price was forty-five thousand dollars; that this price, by the agreement of the parties, was to be paid in Confederate notes; that thirty-five thousand dollars were actually paid in these notes, and that the note given for the remaining ten thousand dollars was to be discharged in the same manner; and it is claimed on this state of facts, that the vendor is entitled to no relief in a court of the United States; and this claim was sustained in the court below, and the bill was dismissed. The questions before us on appeal are these: First, can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so called Confederate States, be enforced at all in the courts of the United States? Second, can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, for the payment of any other than lawful money of the United States? Does the evidence in the record

establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the Government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contract made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But was the contract of the parties to this suit a contract of that character—can it be fairly described as a contract in aid of the rebellion? In examining this question, the state of that part of the country in which it was made must be considered. It is familiar history that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment within its boundaries of a separate and independent confederation. A governmental organization representing these States was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was by the central authority thus organized, and under its direction, that the civil war was carried on upon a vast scale against the Government of the United States. For more than four years its power was recognized as supreme in nearly the whole of the territory of the States confederated. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the national government. What was the precise character of this government in contemplation of law? It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate. There are several degrees of what is called *de facto* government. Such a government, in its highest degrees, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their places, and so becomes the actual government of a country. The distinguishing characteristic of such a government is that adherents to it in war against the government *de jure* do not incur the penalties of treason; and, under certain limitations, obligations assumed by it in behalf of the country or otherwise will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11, Henry VII, C. I. (Brit. Stat. at large), relieves from penalties for treason all persons who, in defence of the King for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch (4 Bl. Comm. 77).

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in such possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the absolute sense. It made laws, treaties, and conquests, which remain the laws, treaties and conquests of England after the restoration. The better opinion is that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (6 State Trials, 119) in the year following the restoration, but such a judgment in such a time has little authority.

It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* government in this sense, nor was it acknowledged as such by other powers. No treaties were made by it. No obligations of a national character were created by it binding after its dissolution, on the States which it represented on the national government. From a very early period of the war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government called by publicists a government *de facto*, but which might perhaps be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories and against the rightful authority for established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens, who by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for these acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions; they are usually administered directly by military authority but they may be administered also by civil authority, supported more or less by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to a British possession (the War of 1812). From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of the court in the *United States* v. *Rice* (4 Wheat., 253), "the British government exercised all civil and military authority over the place." The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced then or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws and

such only, as it chose to recognize and impose. It is not to be inferred from this that the obligations of the people of Castine, as citizens of the United States, were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming* v. *Page* (9 How., 614), that although Tampico did not become a part of the United States in consequence of that occupation, still having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part. The central government established for the insurgent states differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war; but it was not on that account less active or less supreme, and we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it in its military character, very soon after the war began, from motives of humanity and expediency, by the United States. The whole territory controlled by it was thereafter held to be the enemy's territory, and the inhabitants of that territory were held in most respects for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent govarnment connot be questioned. That supremacy would not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made civil obedience to its authority not only a necessity but a duty. Without such obedience civil order was impossible. It was by this government exercising its power through an immense territory that the Confederate notes were issued early in the war, and these notes in a short time, became almost exclusively the currency of the insurgent States. As contracts in themselves, in the contingency of successful revolution, these notes were nullities, for except in that event there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after a ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force. It seems to follow as a necessary consequence from the actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and the necessity of civil obedience on the part of all who remained in it, that this currency must be regarded in the courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in that currency cannot be regarded as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further the invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their first obligation. The first question, therefore, must receive an affirmative answer.

The second question, whether evidence can be received to prove that a promise made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was, in fact, made for the payment of any other than lawful dollars of the United States, is next to be considered. It is quite clear that a contract to pay dollars made between citizens of any State of the Union maintaining its constitutional relations with the national government is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars was intended; and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States.

Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence may be removed by parol evidence. We have already seen that the people of the insurgent States, under this Confederate Government, were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply to the former case would apply to the latter, and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the laws imposed by the conqueror, so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerents, actually established as the government of the country; and contracts made with them must be interpreted and inferred with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word dollars had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract.

But it must be remembered that the whole condition of things in the insurgent States was matter of fact, rather than matter of law; and as matter of fact these notes, payable at a future

and contingent day, which has not arrived, and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly, and quite as effectively, by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as value by irresistible force; they were the only measure of value which this people had, and their use was a matter of almost absolute necessity, and this gave them a sort of a value, insignificant and precarious enough, it is true, but always having a sufficient definite relation to gold and silver, the universal measures of value, so that it was easy to ascertain how much gold and silver was the real equivalent of a sum expressed in the currency. In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects, and it seems to us that no rule of evidence, properly understood, requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar was actually used in the contract before us.

Our answer to the second question is, therefore, also in the affirmative. We are clearly of the opinion that such evidence must be received in respect to such contracts in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States. We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for $10,000, to enforce payment of which suit was brought in the Circuit Court, was to be paid by agreement in Confederate notes. It follows that the judgment of the Circuit Court must be reversed and the cause remanded for a new trial, in conformity with the opinion.

CORRESPONDENCE.

The Entry of Judgments given in Division Courts.

To the Editors of the Local Courts' Gazette.

Gentlemen,—It has been the general custom in Canada West for many years, among the Judges presiding in Division Courts, on the cause being called, to examine the nature of the action and proceedings on the summons in each cause laid before them by the respective clerks of the courts. On the back of each summons is printed a form with blanks for amounts and dates, in somewhat this style,

"Judgment for the ——, (*either plaintiff or defendant*) for $, payable in fifteen days."

J. B., *Judge.*

or if a nonsuit is entered, the word "nonsuit" is inserted. If an order to commit for not paying is to be made, the judge has generally written the order himself, thus: "I order that the defendant be committed for 20 days, for non-payment of money ordered to be paid." Until recently this custom has been, I believe, almost universally followed by the Judges. The clerks then entered in the Procedure Book, what they saw signed by the Judge, and no mistake could occur in doing so. If any mistake were made by the Judge, the suitor could resort to him only, and get him to rectify it.

The Judges, also usually swore the witnesses. But recently, since the new rules came into force, the clerks are required in these courts, to listen to what the Judges say, amid all the din that often takes place in such courts, and record their judgments verbatim, as to amount and costs. Now in a court where there are only a dozen or twenty suits, and no great interest manifested in them, and everything goes on in order, it is possible for a skillful clerk to record judgments correctly. But the clerks in such places as Toronto, Hamilton, London, Ottawa, or when large courts occur now in the country, such as used to occur in 1857, and may again at times occur, find it very difficult to hear what is said by the Bench, when perhaps two agents or two lawyers, and their clients are all talking in court to the Judge. If he were to put down in figures and words his judgments, all would be plain.

Suppose a wrong judgment is put down by the clerk—say he puts down $20 for $10, or, puts down "judgment without costs" and deprive a suitor of $10 costs—what would be the remedy? The suitor says "that is a wrong judgment, I must have costs." But the clerk thinks he heard the Judge say so, and the Judge being appealed to, cannot "precisely remember." The suitor can prove the clerk wrong. Now I know of several instances of this kind, yes, a dozen, having arisen within a few months past, of erroneous judgments in the City of Toronto. I dare say many more may have occurred here and elsewhere. It appears to me that it is a great pity (and it will result often in gross mistakes), that the old time-honoured custom first mentioned should have been dropped. For what reason I cannot see.

Even the Superior Court Judges always endorse the judgments or findings of the jury

on th records. The clerks do the same in the Books of Entry. The same thing is done on indictments. But by this new custom a man may be committed for 20 days to prison by a mere slip of the pen of a clerk, who thinks he heard the Judge say "committed for 20 days," when perhaps no such order was made; or only a conditional one. A clerk must put down and remember all the particulars of the judgments in trial cases and in cases of interpleader and contempt. The judgments in some of the cases require to be in particular words, especially in replevin and interpleader cases.

Particular care is required in committal cases. Is a man to be deprived of his liberty by a mistake? The Division Court law says, the "Judge is to give his decision openly in court," which is all well, so that all may hear it, but it does not say that he is not to record it. It makes his judgment doubly certain by being marked short in writing. There are many complaints in the City of Toronto against this custom, where numerous suits are tried at courts, which set twice a month.

There will be perhaps 2500 cases in the Toronto Division Court this year (1869), and out of them many are intricate, involving large amounts of money, costs and special judgments.

In Hamilton there will be over 2000 cases. Where the judgment is printed on the back of the summons it is very little trouble for the Judge to fill it up, or add any special condition. I do not know that it is obligatory on the Judges to adopt the course taken since the new rules came into force, and it was never obligatory I think, on the Judges, to enter their judgments on the back of the summons, but it was a wise, and necessary custom and precaution to do so. It makes certain what is left very uncertain, and possibly, injurious to suitors. I sincerely hope the old custom will be adhered to in all crowded courts, especially in Toronto and Hamilton.

"Lex."

Toronto, 16th Dec., 1869.

[The above letter brings up several points which we shall speak of on a future occasion. —Eds. L. C. G.]

REVIEWS.

Law Magazine and Law Review. November, 1869. London: Butterworths.

The articles for this quarter are the Penal Code of New York; on Primogeniture; Foreign Debtors in England; Imprisonment for Debt; Suggestions for the Irish Law Bill; on the Turnpike System; on Reform in the Law of Patents; Naturalization and Allegiance; Rights of Colonial Legislatures; State Appropriations of Railways, &c.

American Law Review. October, 1869. Boston: Little, Brown & Co.

This number contains articles on Government Contracts; The Senatorial Term; the Alabama Claims (which we shall reprint). The leading case in England as to the extent of the Liability of Common Carriers of Passengers, is reprinted from the Law Times Reports with a note by the editors, referring to some American decisions on the same subject. Then follows the Digest of the English Law Reports, Selected Digest of State Reports, &c. This publication is a mine of wealth to the American lawyer, and much that it contains is almost of equal interest to us. With the October number was published an index to Vols. I. II. and III. of the Review, with a Table of Cases. This will largely increase the value of the work.

APPOINTMENTS TO OFFICE.

DEPUTY CLERK OF THE CROWN.

JAMES CANFIELD, of the Town of Ingersoll, Esquire, to be Deputy Clerk of the Crown and Pleas, and Clerk of the County Court of the County of Oxford, in the room and stead of William A. Campbell (temporarily acting) resigned. (Gazetted October 16, 1869.)

CORONERS.

FREDERICK WILLIAM STRANGE, of the Village of Aurora, Esquire, M.D., to be Associate Coroner within and for the County of York. (Gazetted November 20, 1869.)

DANIEL JOSEPH KING, of the Village of Canonbrook, Esquire, to be an Associate Coroner within and for the County of Perth. (Gazetted November 27, 1869.)

GEORGE ROILTON, of the Village of Bothwell, Esquire, to be an Associate Coroner within and for the County of Kent. (Gazetted December 4th, 1869.)

CHARLES SAMUEL HAMILTON, of the Village of Roslin, Esquire, M.D., to be an Associate Coroner within and for the County of Hastings. (Gazetted December 18th, 1869.)

HENRY ADAMS, of the Village of Embro, Esquire, M.D., to be an Associate Coroner within and for the County of Oxford. (Gazetted December 18th, 1869.)

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