DIARY FOR SEPTEMBER.

1. SUN... 11*th Sunday after Trinity.*
2. Mon.. Last day for notice of trial for County Court Recorder's Court sits.
4. Wed... Notices for Chancery re-hearing Term to be served.
8. SUN... 12*th Sunday after Trinity.*
10. Tues... Quarter Sessions and County Court sittings in each County.
12. Thurs. Chancery re-hearing Term begins.
15. SUN... 13*th Sunday after Trinity.*
21. Sat. ... *St. Matthew.*
29. SUN... 14*th Sunday after Trinity.*
25. Wed... Appeals from Chancery Chambers.
29. Sat. ... 15*th Sunday after Trinity. St. Michael.*

The Local Courts'
AND
MUNICIPAL GAZETTE.

SEPTEMBER, 1867.

THE MARRIAGE LAWS.

There is a case now standing for judgment in the Court of Chancery, which discloses the necessity for a thorough revision and amendment of our Marriage Laws.

An action for alimony was brought by the wife against the husband, on the ground of desertion, and the defence set up was that the alleged marriage of the parties was celebrated by the Roman Catholic Bishop of Toronto, without the publication of banns or the procurement of a license from the Governor, under the statute, and that such marriage was celebrated privately in the Bishop's house, without any witness being present, and after canonical hours. The aid of the English statute, known as Lord Hardwicke's Act, was also invoked, whereby it is provided that marriages celebrated without banns or license, shall be deemed clandestine, and shall be *null and void to all intents and purposes whatsoever.*

The plaintiff sought to avoid this defence by setting up that these acts did not apply to Roman Catholics (both parties being such in this case, and resident within the diocese of the Bishop who officiated at the marriage ceremony); that marriage was accounted a sacrament by the Roman Church, and as such, being a part of their religion, it was preserved to them intact by the stipulations made upon the capitulation of Canada, and that it was open to that church to regulate the celebration of marriage by their own ecclesiastical rules — and at all events, if the aforesaid statutes did apply, then the marriage was at most only irregular, but not null and void.

It is evident that here are very important questions as to the privileges of our Roman Catholic fellow subjects, and as to the status of many of those who are not Roman Catholics, upon which no shadow of doubt should be allowed any longer to rest. It should be one of the first objects of the Confederate Parliament, to declare the law authoritatively upon these points. On the one hand, privileges are claimed for the Roman Catholics which exceed those granted to any other religious body; on the other hand, if they are on the same footing as other churches, it would appear that a deviation from the requirements of Lord Hardwicke's Act, operating as a total annulment of the marriage tie, would produce consequences, especially as to the issue of such marriages, frightful to contemplate.

As regards the marriage in question, the matters presented for adjudication are, as the Chancellor remarked, whether the marriage of Roman Catholics by their own Bishop is regulated by our statute, or by the French law applicable to the subject which obtained at the time of the cession of Canada, or whether, exempt from both, the Roman Catholics are in this respect a law unto themselves.

It is our object, in a few papers, to discuss some of the points which present themselves in this case, in order that the necessity for legislative interference may be the more manifest, and that the best mode of applying a remedy may be elicited.

And, first, there would seem to be but little doubt that Lord Hardwicke's Act is in force in Upper Canada. Under English law, marriage is a civil contract, involving civil rights and liabilities, and the very first act of the Local Legislature of Upper Canada, when called into existence, was to pass an act adopting English law in regard to "all matters of controversy relative to property and *civil rights.*" P. S. 32 Geo. III. cap. 1, sec. 3. See Con. Stats. U. C. cap. 9, sec. 1. The marriage law, then in force in England, and by such act introduced into Upper Canada, was 26 Geo. II. cap. 33 (Lord Hardwicke's Act). This position appears to have been at first doubted by the late Chief Justice Robinson, in *Reg.* v. *Secker*, 14 U. C. Q. B. 604, and *Reg.* v. *Bell*, 15 U. C. Q. B. 290; but subsequently he announces the deliberate opinion of the court in *Reg.* v. *Roblin*, 21 U. C. Q. B. 352, in the following language:—

"We consider that our adoption of 32 Geo. III. cap. 1, of the law of England * * * included

the law generally which related to marriage. The statute 26 Geo. II. cap. 33, being in force in England when our statute 32 Geo. III. cap. 1 was passed, was adopted as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time *relating to civil rights:* that is, to the civil rights which an inhabitant of Upper Canada may claim as a husband or wife, or as lawful issue of a marriage alleged to have been solemnized in Upper Canada.

"The Legislature of Upper Canada have so regarded this matter, as appears by the statute 33 Geo. III. cap. 5, secs. 1, 3 and 6; 38 Geo. III. cap. 4, sec. 4; and 11 Geo. IV. cap. 36, in which they have recognized the English Marriage Act, in effect though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnized.

"We find nothing in the ordinances of the Governor and Council of the province of Quebec, nor anything in the British Statutes, 14 Geo. III. cap. 83, or 31 Geo. III. cap. 31, or in any other British Statute passed between the 26 Geo. II. cap. 33, and the time of our adopting the law of England, which can affect us in this matter, nor anything in any British or Imperial act passed since, which either extends to the Colonies generally or to Canada in particular."

Besides the Provincial Statutes above cited by the Chief Justice, reference may also be made to 2 Geo. IV. cap. 11, sec. 1, which contains *express* mention and recognition of the English Marriage Act as in force in Upper Canada. The only case reported subsequent to *Reg.* v. *Roblin*, in which the marriage laws were considered, is that of *Hodgins* v. *McNeill*, 9 Grant, 305, wherein Esten, V. C., takes the same view of the law and substantially follows the previous case.

Both courts agree in this, that while Lord Hardwicke's Act is generally in force, yet the 11th section is not to be considered as part of the law of this Province. That section avoids the marriages of minors without the consent of their parents and guardians first had, and the 12th section provides that if the parents and guardians are of unsound mind, or beyond the seas, or shall unreasonably withhold consent, an application may be made to the Lord Chancellor who has power to order such marriage without such consent. And our courts hold that as it would work great hardship to have the 11th clause in force without the 12th or any other provision as a substitute for it, therefore it is to be taken that in this Province the marriages of minors without the consent of their parents or guardians, are not to be accounted invalid, but simply irregular, illegal, and in breach of the usual bond-condition that no impediment exists.

SELECTIONS.

TESTIMONY OF PERSONS ACCUSED OF CRIME.

On the 26th day of May, 1866, the Legislature of Massachusetts enacted, that, "in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant." In these few words, with very little discussion and with no great amount of inquiry, the Commonwealth of Massachusetts enters upon what to some appears merely an experiment, and to others a thorough revolution, in the administration of criminal law. Whether it should be designated as an experiment or a revolution, it cannot be said to have been called for by any generally acknowledged necessity, or to be intended for the purpose of reforming any practical abuse or defect that had been a matter of general complaint. On the contrary, if there had been any one thing in which the old rules of the common law were successful in their practical working it was in the protection of persons accused of crimes against the danger of being unjustly convicted. Here, if anywhere, was to be found a justification of the cry of the old barons, "*Nolumus leges Angliæ mutare*," It is a just and well-founded boast of the common law, that under its humane provisions, the risk of convicting a man of a crime of which he is not guilty is reduced to its very lowest expression.

Under the law of Massachusetts, as it stood until May 26, 1866, the great practical defence of every person accused of a crime was, first, the presumption of his innocence; and, secondly, the certainty that he could not be compelled to furnish evidence against himself. The law not only presumed him to be innocent but allowed him to keep his own secrets. He was not called upon to explain anything, or to account for anything. He was not to be subject to cross-examination. He had nothing to do but to fold his arms in silence, and leave the prosecutor to prove the case against him if he could. The penitentiary could not open "its ponderous and marble jaws" to devour him, unless his guilt was made out affirmatively beyond reasonable doubt. The verdict of "Not guilty" was perfectly understood to mean precisely the same as the Scotch verdict of "Not proven." No better protection to innocence could ever be devised. The only reasonable reproach ever urged against

the system has been that it sometimes let the guilty escape.

It will be found, we think, on examination, that this experiment, or this revolution (whichever term may best describe this new statute) must inevitably and very greatly impair both of these defences against a criminal prosecution. It substantially and virtually destroys the presumption of innocence; and it compels an accused party to furnish evidence which may be used against himself.

If the statute merely provided in general terms that the "person charged with any crime or offence should be deemed a competent witness" on the trial of the indictment, its cruelty and injustice would be manifest at once. No man can doubt that it would be utterly unconstitutional, and would be held to be so, in all the courts, without even the slightest hesitation. It is for this reason, that the statute contains the fallacious and idle words, "at his own request, but not otherwise." and the equally idle and fallacious words, "his neglect or refusal to testify shall not create any presumption against defendant." We take the liberty to call these words "idle and fallacious," because the option which is given to the accused party is practically no option at all. In its actual workings, it will be found that this new statute will inevitably *compel* the defendant to testify, and will have substantially the same effect as if did not go through the mockery of saying that he might testify if he pleased.

Let us suppose that a person is on trial on a criminal charge, and that the same evidence which was sufficient to cause the Grand Jury to find a true bill against him is brought forward at the trial. There will be some plausibility in the evidence; otherwise, no bill would have been found. There will be some show of a case against him. The court, the prosecutor, the defendant, and the jury all understand that he *can* testify if he will. In fact, it is difficult to see how the presiding judge can possibly avoid informing him (if he is without counsel) of this privilege which the law gives him. How can he possibly do otherwise than testify? How can he be silent? Or if he should see fit to be silent, of what practical value to him will be the presumption of innocence? How can the jurors avoid the feeling that the reason why he does not testify is because he cannot explain the suspicious appearances of his case, and because he dares not subject himself to the risks and perplexities of a cross-examination? If he has counsel, it is, if possible, even worse and worse; for the feeling will be that his counsel are afraid to put him on the stand. It will be found, in practice, that the defendant, in every case in which there is any apparent plausibility in the charge, will, "at his own request," be made a witness; and the request will be made because he cannot help it. He will *volunteer* under the strongest compulsion, under a necessity that is wholly irresistible. The moment he takes the stand as a witness, the presumption of innocence, that bridge which has carried thousands safely across the roaring gulf of the criminal law, is reduced to a single and a very narrow plank,—he must then stand or fall by the story which he can tell.

But it will be said, that the statute provides in express terms, that his neglect or refusal to testify shall not create any presumption against him. This is an attempt, on the part of the Legislature, to cure the inhumanity of the "experiment," and would answer the purpose admirably, if it could be done by any amount of "provided nevertheless." The difficulty is, that the jurors all know that the defendant has the privilege (as it is called) of making himself a witness if he sees fit; and they also know that he would if he dared. They will, and they must, draw every conceivable inference to his disadvantage if he do not. His neglect or refusal to testify will, and inevitably must, create a presumption against him, even if every page of the statute book contained a provision that it should not. The statutes might as well prohibit the tide from rising, or try to arrest the course of the heavenly bodies, as to prevent a juror from putting upon the defendant's silence the only interpretation that it will bear. The juror cannot fail to see that the defendant must know whether he is guilty or not; must know all about his own connection with the case; must know where he was and what he was doing at the time in controversy; must be able to explain every thing that bears against him; must be not only ready, but most eager to do so, if he is in fact innocent of the charge, and yet that he refuses to do so. There is but one construction to be put on such refusal; and no statute can be devised that will prevent that construction from having its full effect.

The inevitable effect of the statute will be, that "in the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences," the defendant will request to be himself a witness. This will be the invariable course of things in every criminal case which makes any show of plausibility, or exhibits evidence of any force or weight at all against the defendant. The necessity which has been pointed out will press equally and irresistibly on all. The innocent will be ready and the guilty will be compelled to ask the privilege, and all will use it. Passing over the question (though by no means a trivial one) of what value testimony will be that is given under such fearful and overpowering temptation to perjury, let us ask attention to the predicament in which a guilty man will be found. Suppose the evidence against him to be formidable, he may understand, or be advised, that silence would be better for him than any thing he can possibly say; yet, under the pressure of this terrific statute, he must go upon the stand as a witness. Ruin stares him in the face if he do not; and, if he does, what becomes of the constitutional provision that no man shall be compelled to

furnish evidence against himself? Can he decline to answer on the ground that his answer might tend to criminate him? Has he not thrown overboard all his defensive armor? Is he not to be stretched on the rack of cross-examination? Will not all his secrets be wrung out of him by the torture of question after question? Plainly, the result must be that he will be compelled either to furnish evidence against himself, or to defend himself by lies "gross as a mountain;" an alternative to which the Constitution gives us no right to subject even a felon. We then should see the spectacle of smooth, ingenious, and plausible liars wriggling ingeniously, and perhaps with success, out of the toils in which clumsier, and perhaps better, men are hopelessly involved.

It is occasionally said, however, that it is of no eonsequence, or, on the whole, it is a good result rather, if the new statute facilitates the conviction of the guilty, and diminishes their chance of escape. Is it right, however to compel the guilty to furnish evidence against themselves? Are we so fond of perjury, that we insist on forcing every man who really does not wish to go to the penitentiary or house of correction, and yet is guilty, to swear that he is innocent? Is not his plea of "Not guilty" enough? It is idle, however, to waste words on this part of the case. The Constitution says, that no man shall be required to furnish evidence against himself. The statute, practically and in its effect, compels the guilty man either to furnish evidence against himself, or resort to a refuge of lies.

But suppose the defendant to be innocent. He may be wholly innocent of the particular crime laid to his charge, and yet very far short of being a saint or an angel. He may have committed every crime in the decalogue or the statute.book *except* the one set forth in the indictment. He may be a veteran from what Carlyle calls the devil's regiments of the line. He may manifestly belong to the dangerous classes; he may be guilty of the great and heavy crime of rags, stupidity and poverty,—yet he is thrown into the mill of the statute, and whirled off to the stand as a witness, where the most humane and tender of judges cannot protect him. The result is easy to forsee. He is torn to pieces by cross-examination. There are fifty things that he would keep back if he could. In a word, he breaks down; and the jury disbelieve him when he is really telling the truth, and find him guilty of the one crime of which he is really innocent. Surely, the advocates and admirers of the statute would hardly say that it is desirable to convict even a bad man, in such a way as this, of a crime of which he is not guilty.

To illustrate still further the operation of this new system in extorting evidence from the defendant himself, let us take a case which has already occurred, and which may recur at every term of the court. Let us suppose, then, a man by no means dead in trespasses and sins, but having a character to lose, and incommoded, besides, with the possession of a conscience, to be indicted as a common seller of intoxicating liquors. Suppose it to be proved that he is the owner and keeper of a grocery. Suppose some loafer, who has been disappointed in the hope of buying liquor on credit at his shop, should swear positively to the "three distinct and separate sales" within the period covered by the indictment, which the law says shall be sufficient proof of the charge. If he should decline to make himself a witness, the jury would convict him without leaving their seats. He takes the stand, and swears that he never in his life sold one drop to the witness whose testimony has been given in. Then comes the cross-examination; and he finds that the whole subject of the general charge against him is open to inquiry. The confession that he has made three *other* sales is forced out of him; and he is convicted on his own evidence, after he has been successful in demolishing all other evidence in favor of the prosecution.

If, in the trial of an indictment, the defendant is made a competent witness, he must stand or fall by the story which he can tell. If he is a witness at all, he will fare like every other witness, and will besides labor under the disadvantage of being an interested witness; telling his story under suspicious circumstances, and laboring under the most extreme temptation to perjury. The guilty (and, practically, they are more than half of the whole number of the accused parties at a criminal term) will add the crime of perjury to the crime set forth in the indictment. Even of the innocent, some, under the influence of terror and anxiety, may mix some falsehood with the truth, and so incresse the embarrassment and aggravate the dangers of their position; some, and probably not a few, from stupidity, from unskilfulness, or from want of established good character, may tell their story badly, and fail to command belief, even when they speak the truth; others will get no farther than simply to protest their innocence, which protest simply leaves the case where it stood before. In all such cases, the alleged privilege of testifying will simply be either nugatory and useless, or an engine of torture and oppression. It is to be remembered, that the statute is universal in its application, and reaches the case of the adroit and hardened culprit, the experienced felon, the green and ignorant novice, the nervous, timid, and feeble boy or woman, the foreigner, all orders and conditions of men, and almost every form of helplessness. All will be tempted to falsehood; all will be badgered on cross-examination. The experienced and self-possessed villian may possibly succeed in swearing his way through; the inexperienced and unskilled will be swallowed up.

But it is said that appearances may be so much against an innocent man that he cannot escape an unjust and wrongful conviction in any way unless he can testify in his own behalf. It certainly must be a very peculiar and

extraordinary state of facts which could place an innocent man in such a position—so peculiar and so extraordinary that it may be safely said to be of exceedingly rare and infrequent occurrence. False testimony may do it at any time; but it is not possible for mere statutes to protect the accused against perjury. It must be "the lie with circumstance" that creates the danger in such cases; and *mere* denial by the accused, even though under oath, might avail very little. But if appearances are against a defendant,—that is to say, if facts and circumstances are proved, by honest testimony, which tend strongly to prove his guilt,—he, of course, must meet and explain those facts and circumstances. If he has counsel, the defendant's explanation will at least be suggested. If he has no counsel, he will, in answer to the call of the presiding judge, make the suggestion himself. If he is really innocent, all the true and honest evidence against him will be consistent with his innocence. Truth is always consistent with itself, and requires no ingenuity or skill for its exhibition. The explanation will come out and be made known. If it meets and covers the case, it will relieve him, even if it be only laid before the jury as a theory, or as a possible state of facts, consistent with the evidence, and also consistent with the innocence of the defendant. If it do not meet and cover the case, it will avail nothing to swear to it. The presumption of innocence, and the reasonable possibility of innocence, consistently with the facts proved, constitute the real and effective defence in all such cases.

It sometimes happens undoubtedly, especially in the case of atrocious and startling crimes, that the public anxiety and alarm stimulate detectives into extreme activity, and rouse up some witnesses into a degree of positiveness and firmness of recollection that may be quite unwarrantable. Fearful mistakes are sometimes made as to the identity of the person arrested and on trial with the actual perpetrator of some great outrage. But, in such cases, the mere denial by the accused would not be greatly reinforced by his oath. It costs so little for a felon to deny his crime! Of course, he would deny it. The true protection is the discrimination and carefulness of the presiding judge, the zeal and energy of the counsel in defence, the fairness and integrity of the public prosecutor, and, last and best of all, the conscientious and wise caution of the jury.

To sum up, then, the objections to the new system of the administration of criminal justice, we take these points:—

It will be found to be compulsory in its operation, and will force defendants generally, in criminal cases, to take the stand as witnesses.

It will compel the guilty either to criminate themselves, or rely upon perjury for their protection.

It will, to a great degree, deprive all accused parties of the benefit of the presumption of innocence.

It will lead to such an accumulation of false and worthless testimony in the criminal courts, that there will be great danger that jurors will habitually disbelieve all testimony coming from any defendants.

It gives to persons who are really not guilty of any offence charged against them no substantial advantage over the presumption of innocence, and is wholly illusory as a privilege.

It tends to degrade the trial of a criminal case into a personal altercation between the prosecutor and the accused.

It is an experiment entered upon without necessity, not called for by the profession, not petitioned for by anybody, demoralizing from its encouragement of perjury, and useless for the purpose of accomplishlng any substantial good result.—*American Law Review.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENCY—EXECUTION—ATTACHMENT—PRIORITY.—By sec. 13 of 29 Vic., ch. 18, the divesting of any lien or privilege (*i e.* priority of right) does not extend beyond the fact of levying upon or seizing under the writ of execution: it does not extend to the sale thereunder. In this case a writ of execution had been placed in the Sheriff's hands on 15th March, 1866, and on the 26th of the same month a sale of the goods thereunder, commenced at 10 a.m., was completed at 11 a. m At the latter hour of this subsequent day a writ of attachment was placed in the Sheriff's hands against the defendant:

Held, that the attachment was not entitled to prevail over the execution, and that the Sheriff was not, therefore, liable to the assignee of the insolvent for having sold under the execution *Converse* v. *Michie*, 16 U C. C. P. 167, distinguished.—*White* v. *Treadwell* (*Sheriff*), 17 U. C. C. P. 488.

INSOLVENCY—JURISDICTION OF COUNTY JUDGE—APPEAL.—The County Judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the assignee, for the benefit of the estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings.

An order to that effect having been made by the Judge, the assignee appealed therefrom in the interest of the creditors whose transactions the suit impeached for fraud, and the appeal was dismissed with costs; the Court observing that it was not the duty of the assignee to appeal from such an order at the expense of the estate. —*In re Lambe*, 13 U. C. Chan. Rep. 391.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

NOTARY—SEAL.—It is not necessary that the notary who protests a note should use an official seal, or subscribe himself in writing a notary public: any seal which he declares in the protest to be his official seal is sufficient, and the placing his signature before the printed words "notary public" amounts to an adoption of them.—*The Commercial Bank of Canada* v. *Brega*, 17 U. C. C. P. 473.

DEVISE TO SELL FOR PAYMENT OF DEBTS—DELEGATION OF POWER.—A testator devised all his real and personal estate to his executors in fee, in trust for sale to pay debts:

Held, on the authority of *Stronghill* v. *Ansley*, 16 Jur. 676, that a *bona fide* purchaser for value was not bound to enquire whether there were debts which authorized the executors to sell.

By a subsequent clause in his will the testator directed that all his real estate not specifically devised or required to pay debts should be sold by his executors as they thought best, and the moneys arising from the sale and from other sources should, after payment of debts, be invested by them: *Quære*, whether a mere power was created by this clause of the will, and if so, whether it was well executed by a delegated power; or whether, on a fair construction of the whole will, and to give effect to the general purpose which the testator had in view, a similar estate might not be deemed to be continued in the executors for the objects of the second as well as for those of the first clause.—*Burke* v. *Battle*, 17 U. C. C. P. 478.

SALE OF GOODS—WEIGHT NOT ASCERTAINED—DELIVERY AT FUTURE TIME—INSOLVENCY OF VENDOR—CHATTEL MORTGAGE TO BANK.—On the 13th of September, 1866, S. agreed to deliver on account of K. at a railway station, when wanted, 600 boxes factory cheese at a certain rate per pound, and to keep the same insured until wanted. The weight of cheese had not at this time been ascertained; in fact, the whole quantity had not been manufactured. Subsequently two warehouse receipts, dated respectively 21st September and 9th October, were given to K., the one for 330 and the other for 280 boxes, signed by S., and specifying the weight of the cheese. On the 22nd of October K. executed a mortgage to plaintiffs on 400 boxes of cheese purchased by him from S. on or about the 13th of September, and then in the curing house of S., to secure the payment of moneys advanced to him by plaintiffs upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th of October following, and K. became aware of it on the following day. The plaintiffs replevied 341 boxes of cheese.

Quære, whether the property in the cheese passed to K. on the 13th of September; but if it did not, because the weight had not been then ascertained, that objection was removed on the 21st of September, as the receipts of that date specified the weight. But, *Held*, that the fact that the cheese was not to be delivered until a future time, when K. wanted it, and that S. was to keep it insured in the meantime, did not prevent the property passing; for it is the intention of the parties to the contract which is to govern in such cases.

Held, also, that even if the property did not pass before the 21st of September, in consequence of the weight not having been before then ascertained, the subsequent insolvency of S. did not affect K.'s right respecting it; for that the only portion of the Insolvency Act of 1864 applicable to the case (sec. 8, sub-sec. 2) did not in fact apply, as there was no evidence here of obstructing or injuring creditors, but the contrary, the property having been sold at its full value; but even if the case were within the operation of that clause of the act, the contract would be voidable only, under the order of a competent tribunal, and no such order had yet been made, and would only be made upon such protective terms to the person from actual loss or liability as the court might direct.

Held, also, that the mortgage to the plaintiffs was valid, having been taken "by way of additional security for a debt contracted to the Bank in the course of its business," and therefore within C. S. C. ch. 54, sec. 4; that it could not be impeached by any one for want of filing but an opposing creditor of K., and that as S. could not impeach it, neither could the defendant, his assignee in insolvency.—*The Bank of Montreal* v. *McWhirter*, 17 U. C. C. P. 506.

LOCATEE OF CROWN — EXECUTION AGAINST LANDS.—This court will, at the instance of a judgment creditor of a locatee of the Crown, with execution against lands in the hands of the Sheriff, direct the interest of the locatee to be sold, and order him to join in the necessary conveyance to enable the purchaser under the decree to apply to the Crown Lands Department for a patent of the land as vendee or assignee of the locatee.—*Yale* v. *Tollerton*, 13 U. C. Chan. Rep. 302.

DEED OR WILL—CONSTRUCTION.—Where one J. S., living on his farm, made what he called "this indenture" to his son, J. W. S., upon consideration of natural love and affection; and "also that the said J. W. S. hath this day agreed to live with the said J. S., and labour and assist him in working the land hereinafter described, and to maintain P. S., the wife of the said J. S., if she survives him, during her natural life;" conveying the said farm by metes and bounds to him in fee simple, "excepting and reserving nevertheless the entire use and possession of said premises unto the said J. S. and his assigns, for and during the term of his natural life, and this conveyance in no way to take effect until after the decease of the said J. S., the grantor;" the habendum being to have and to hold the premises "after the decease of the said J. S.," to him the said J. W. S., his heirs and assigns, &c.

Held, that the instrument is to be considered as a will, not as a deed, and was therefore revocable.—*Turner and others, Devisees of John Scott* v. *John W. Scott.*—Sup. C. Penn., July 15th, 1867.

HUSBAND AND WIFE—DEED OF TRUST FOR SUPPORTING WIFE — SEPARATION. — Although the policy of the law is to induce a man and wife to resume co-habitation, notwithstanding they may have agreed to a separation, and that on such renewal of co-habitation a deed of separation will be held void; still where property was conveyed to a trustee for the support and maintenance of a wife and her children in settlement of a suit for alimony, and the husband and wife afterwards renewed co-habitation, but the husband subsequently deserted his wife and family, the court refused, at the instance of the husband, to set aside the deed.—*McArthur* v. *Webb*, 13 U. C. Chan. Rep. 303.

INSURANCE.—When a party, on applying to effect an insurance of buildings, over-states the value of them, the policy will not thereby be avoided where it appears that such over-value was not made with a fradulent intent.

Where a party, on applying to effect an insurance, in answer to one of the interrogatories indorsed on the printed form of application, stated that he was the owner of the estate subject to a mortgage in favor of a Building Society for $1,500; the facts being, that he only held a contract of purchase; that a portion of the purchase money remained unpaid; and that a mortgage for the amount mentioned had been agreed for, but not executed; of which facts the Company through their agent was aware:

Held, that the insurance was not avoided by the inaccuracy of the statements in the application, it not being shewn that such misstatement was intentional or material.

A party on applying to insure omitted unintentionally from his description of the property some particulars which he was not asked respecting, but which had the Company's agent known, he swore he would not have insured:

Held, that, there being no fraudulent concealment, the omission to set forth the particulars referred to, did not render the policy void.—*Laidlaw* v. *The London and Liverpool &c., &c., Insurance Co.*, 13 U. C. Chan. Rep. 377.

MARRIED WOMAN—ALIENATION OF HER ESTATE—FORM OF CERTIFICATE.—Where the certificate signed by two Justices of the Peace endorsed on a conveyance by a married woman as to her consent to part with her estate, &c., omitted to state in the body thereof any place where the execution of the deed or the examination of the married woman took place, but, in the margin, the County of Prince Edward was given as the place wherein the Justices were authorized to act.

Held, that such certificate sufficiently complied with the statutes respecting the alienation of the estate of married women.—*Robinson* v. *Byers*, 13 U. C. Chan. Rep. 388.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., Q.C., *Reporter to the Court.*)

MITCHELL v. BARRY.

Water Course—Action for obstruction—Injury to Plaintiff's right—Right to recover, though no damage proved.

The plaintiff declared that he was entitled to the water of a certain stream for working his mill, and complained that defendant, owning a mill higher up, had unlawfully deposited sawdust, bark, &c., in the stream, which was carried down and choked up the plaintiff's mill pond and races, &c. Defendant by his second plea denied the plaintiff's right to the water, which the plaintiff sufficiently proved, but there being no appreciable damage, the jury found a general verdict for defendant.

Held, that there must be a new trial for the right being established, the deposit of sawdust, &c., was an injury to it, for which the plaintiff was entitled to a verdict.

When an act done would be evidence against the existence of a right, it is an injury to such right, for which the party injured may sue.

[Q. B., H. T., 1867.]

The declaration stated that the plaintiff was possessed of certain land and a water grist-mill, water-wheel, head-race and tail-race, in the township of Pickering, and near to a certain water-course and stream, and was entitled to the benefit of the water of the said water-course for the working the said mill, and ought to have been supplied with a fall of water flowing down and along the bed and channel of the said stream into a certain mill-pond of the plaintiff, formed by a wier or dam of the plaintiff, erected across the

said stream, and out of the said pond along the said head-race, and upon and over the said water-wheel, and thence into and along the said tail-race, and from thence into the bed or channel of the said stream belonging to the plaintiff, immediately below the said weir and tail-race; which fall of water, by means of the mill-pond, head-race, weir, and tail-race, until the committing of the grievances, &c., was of right used by the plaintiff for the working his mill; that defendant was possessed of a saw-mill on the said stream higher up than the plaintiff's mill; yet the defendant on divers days, &c., unlawfully placed and deposited and caused to be placed and deposited into the bed and channel of the said stream, and upon the banks and sides thereof, near the defendant's mill, large quantities of sawdust, slabs bark, wastewood and refuse of his mill, whereby the said sawdust, &c., fell and were washed, blown and carried down the said stream, along the channel thereof, into plaintiff's mill-pond, and his head and tail-races, and into and upon the plaintiff's part of the bed and channel of the stream, below the weir and tail-race, whereby the said mill-pond and races on the plaintiff's part of the bed of the stream, below the weir and tail-race, were filled and obstructed by the said sawdust, &c., and the fall of water to the plaintiff's mill, for the working of his mill, was greatly diminished; that heretofore, and whilst the plaintiff was so possessed, &c., and before the commencement of this suit, the plaintiff gave notice to defendant, and requested him to remove the said obstructions and prevent the continuance of the said grievances; yet defendent did not, &c., and the plaintiff was hindered from working and using the said mill and fall of water, &c.

Pleas.—1. Not guilty. 2. Traversing the plaintiff's right to enjoy the benefit and advantage of the water of the said water-course for working of the said mill. Issue.

The trial took place at Whitby, in October last, before Morrison, J.

The substance of the plaintiff's evidence was to shew that there was a gradual accumulation of sawdust and other refuse which came down from defendant's saw mill and was deposited in the mill-pond principally, though some small quantity also seemed to have found its way, mixed with mud and sand which washed in from the natural banks of the pond and stream, into the head-race of the plaintiff's mill. The evidence scarcely warranted the conclusion that there was any appreciable damage from this latter cause, for which the defendant could be made liable; at all events, the damage actually sustained by the hindrance of the working of the mill was not so proved as to afford the foundation of a verdict for more than nominal damages, and as regarded the deposit in the plaintiff's mill-pond, there was no foundation whatever for more than nominal damages.

The jury found for defendant generally.

Robt. A. Harrison, in Michaelmas term, obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence and perverse; and for misdirection, in charging the jury to find a verdict for defendant, unless the plaintiff was proved to their satisfaction to have sustained substantial damage, and refusing to tell them that if the plaintiff had the right to the flow of water in a state of nature, the interference of the plaintiff with that right, if established, entitled the plaintiff at least to a verdict for nominal damages, although no special damage was proved; for the repetition of the unlawful act, if uninterrupted and undisturbed, will lay the foundation of a legal right.

M. C. Cameron, Q.C., shewed cause, citing *Frankum* v. *Earl of Falmouth*, 2 A. & E. 452; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Dickinson* v. *The Grand Junction Canal Co.*, 7 Ex. 299.

Harrison, in support of the rule, cited *Wood* v. *Waud*, 3 Ex. 748; *Embrey* v. *Owen*, 6 Ex. 353; *Rochdale Canal Co.* v. *King*, 14 Q.B. 135; *Bickett* v. *Morris*, L. R. 1 Sc. & Div. App. 47; *Watson* v. *Perine et al*, 13 C. P. 229; Addison on Torts, 58.

DRAPER, C.J., delivered the judgment of the Court.

If this general verdict for the defendant involved no other question or consequence than the claim to small damages and the refusal of the jury to award them, we should be prepared to discharge the rule at once.

But the second plea put in issue the plaintiff's right to the water of the stream for the working of his mill; and the jury, as the verdict is taken, have found against the plaintiff upon that question, and, as appears to us, improperly.

If this denial of the plaintiff's right to the use of the water is sustained, then the defendant may apparently continue to allow sawdust and mill-refuse to pass from his saw-mill into the stream and so into the plaintiff's mill-pond, and sooner or later a continuous deposit of this character at the bottom of the pond will diminished the space for holding water, and so diminish the volume of water kept back by the dam or weir, for the working of the mill. In time, the injury, not now appreciable, will become serious, while twenty years' enjoyment without interruptien will afford evidence of an easement in the owners of the defendant's saw-mill, to deposit sawdust, &c., on the plaintiff's land, and thus the owners of the plaintiff's grist-mill will be remediless, when the injury becomes severely felt.

The plaintiff's counsel objected at the trial to the learned Judge's charge, because he directed that unless the plaintiff proved he had suffered damage the defendant was entitledto a verdict on the first issue. In the rule this objection is amplified into a statement that the learned Judge charged the jury to find for the defendant unless the plaintiff was proved to their satisfaction to have sustained substantial damages, and refused to tell them that if the plaintiff had the right to the flow of water in a state of nature, the interference with that right, if established, entitled the plaintiff to at least nominal damages. The learned Judge's report affords no colour for this amplification, but it shews that the jury, when they rendered a general verdict for the defendant, stated in answer to a question that they did not consider the second issue. Still if judgment be entered on the general finding on the record, it will greatly embarrass if it will not wholly bar an action, when this apparently continuous deposit in the plaintiff's mill-pond does not create serious loss and damage.

Now if the plaintiff has the right to the water of the stream for the working of his mill, and we think there was sufficient evidence to sustain it, then the deposit of sawdust in the bed of the

stream, or in the mill-pond, which according to one witness includes the bed of the stream, is an inlury to the right, even though the plaintiff had lost nothing in the working of his mill. In *Nicklin* v. *Williams*, 10 Ex. 259, during the argument, Parke, B. says, (p. 267): "Whenever an act done would be evidence against the existence of a right, that is sn injury to the righi, and the party injured may bring an action in respect of it." And although *Nicklin* v. *Williams* was not upheld (see *Bonomi* v. *Backhouse*, in appeal, E. B. & E. 646, and *Backhouse* v. *Bonomi*, in error, 7 Jur. N. S. 800, in Dom. Proc., yet the principle above stated is neither shaken nor questioned.

It appears to us therefore there must be a new trial, with costs to abide the event.

Rule absolute.

PRACTICE COURT.

(Reported by HENRY O'BRIEN, ESQ., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

ADSHEAD v. GRANT.

29, 30 *Vic. cap.* 53, *sec* 98—*Seizure under fi. fa. goods—Claim by Collector for taxes—Priority.*

A sheriff returned to a *ven. ex.* and *fi. fa.* residue against goods, that he had made $50, out of which he had paid a collector of taxes $48 39, claimed for taxes due by defendant at the time of the seizure under the writ, on land upon which the goods were, and of which the sheriff had notice prior to the sale, and that he had retained balance towards his fees, &c. No distress had been made by the collector.

Held, that the sheriff must, nevertheless, account to the execution creditor for the $50, because a distress by the collector is a necessary antecedent to obtaining the benefit of the statute.

[P. C., E. T., 1867.]

E. Martin, last term, obtained a rule on the sheriff of the United Counties of Prescott and Russell, to show cause why his return to the writ of *venditioni exponas* for part, and *alias fieri facias* for residue, should not be quashed, because it contradicted the return made by him to the previous writ of *fieri facias* against goods, and contradicts also the said writ of *venditioni exponas* and *fieri facias* for residue, and because the return complained of was vague and uncertain, and did not show under what writ the goods were seized and sold, or what goods were sold; and why he should not make a proper return; or why he should not pay the plaintiff, or bring into court the sum of fifty dollars mentioned in the return, or so much thereof as should remain after deducting his fees, but without deducting the taxes mentioned in the return; or why, if the taxes should properly be deducted, he should not pay to the plaintiff or bring into court the balance, after payment of the taxes and sheriff's fees, and amend the return made by him as aforesaid according to the facts; and why he should not pay the costs of this application.

The return to the original *fi. fa.* against goods was, "Goods on hand to the value of $20, and *nulla bona* as to the residue;" and the return to the second writ was, "I have caused to be made of the goods $50, out of which I have paid to the collector of taxes for the municipality of Longueuil, in which the said goods and chattels were at the time of the seizure and sale thereof by me, the sum of $48 39, claimed by him for taxes of the lands and premises whereon the said goods were taken in execution, and of which I had notice from him prior to the sale—due by the defendant to the municipality at the time of the seizure—and I have retained the sum of $1 60, the residue thereof, towards my own fees; and that the defendant has no other goods, &c., whereof, &c."

H. Cameron, during this Term, showed cause. He filed the affidavit of the sheriff, which stated the delivery of the original *fi. fa.* to him on or about the 27th November, 1866, endorsed to levy $1,926 34 for debt, and $63 50 for costs, besides interest, sheriff's fees, &c.; a seizure made of certain goods, and a return of the same being on hand to the value of $20; the delivery of the *ven. ex.* and *fi. fa.* for residue to him on the 17th December, under which he sold the goods so seized for $50; the seizure of the goods on land of the defendant in the town of L'Orignal; the notice by the collector of the township of Longueuil to the sheriff, that the taxes for the past year, charged on the land, amounting to $48 39, were due, and that he required payment of the same to be made or secured to him out of the proceeds of the goods before the removal of the same from the land; the giving of the undertaking by the sheriff to pay the taxes, and the sale of the goods for $50; and his belief that this amount was rightly paid by him for taxes, and that his return is correct; and the conclusion was, "And I am advised and believe that the right of the collector [of the township] to be paid the said taxes arises under the English statute 43 Geo. III. cap. 99, sec. 37, and the Canadian statute 29 & 30 Vic. cap. 53, sec. 98, the said defendant being a non-resident owner of lands."

Martin supported the rule. What the collector did was not a seizure by him: Arch. Pr. 2 edn. 619; *Nash* v. *Dickenson*, L. R. 2 C. P. 252, and the collector could not take goods in the custody of the law.

ADAM WILSON, J.—The affidavit is very obscurely worded. It is stated that the lands on which the goods were seized by the sheriff is situate in the town of L'Orignal, and again that it is situate in the township of Longueuil; and that the defendant does not reside on the land, but two or three miles distant from it; and from this it is desired, in connection with the last paragraph of the affidavit, that it should be assumed the defendant was a non-resident owner of the land, and, as such non-resident he had required his name to be entered on the roll, under the 29 & 30 Vic. cap. 53, sec. 98, or the prior act of the Consolidated Statutes for Upper Canada, cap. 55, sec. 97; and that (assuming the roll to have been given to the collector) the collector had duly made a demand on the defendant for payment of the taxes, so as to be entitled to distrain.

I cannot take all this for granted. But even if it were true, I am not of opinion that the collector has the right to forbid the removal of the goods by the sheriff, who acts under an execution. The statute enables the collector to "make distress of any goods and chattels which he may find upon the land;" and *if he make distress*, then "no claim of property, lien or privilege shall be available to prevent the sale, or the payment of the taxes and costs out of the proceeds thereof;" under which latter words it is very probable the distress by the collector would supersede, to the extent of the taxes, the prior seizure of the sheriff

under the execution; but the mere notice by the collector is not to have this effect.

In the case of landlords, under the 8 Anne, cap. 14, the provision is very different: it is, that "no goods on any land leased for life, &c., shall be liable to be taken by virtue of an execution on any pretence whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of the goods from the premises by virtue of the execution, pay to the landlord all such sums as are due for rent for the premises at the time of taking such goods by virtue of the execution, provided the arrears do not exceed one year's rent, &c."

In the absence of a *distress* by the collector, I must, even if the return were sufficient in other respects, direct the sheriff to return and account to the execution creditor for the $50 produced by the sale of the goods.

Rule absolute.

CHANCERY REPORTS.

(*Reported by* ALEX. GRANT, Esq., *Reporter to the Court.*)

POWELL v. BEGLEY.

Injunction—Patent right—Chair back pump.

The simplicity of an invention is no reason why a patent in respect thereof should not be protected; where, therefore, by a simple contrivance of cutting away a portion of the log out of which a pump was to be manufactured, thus giving it the form of a chair; and by the introduction into the tube of a conical tube through which the piston worked, the plaintiff had been enabled to construct a force-pump made of wood, for which he had procured a patent of invention, the court restrained the infringement of the patent.

[13 U. C. Chan. Rep. 38.]

This cause came on for the examination of witnesses and hearing before the Chancellor at the sittings of the Court at Toronto, in the spring of 1867.

Bell, Q C., and *Tilt*, for the plaintiff.

C. S. Patterson and *J. C. Hamilton*, for the defendant.

Miller v. *Scott*, 6 U. C. Q. B. 205; *Smith* v. *Ball*, 21 U. C. Q. B. 122; *Tetley* v. *Easton*, 2 E. & B. 956; *Emery* v. *Iredale*, 11 U. C. C. P. at page 117; *Newton* v. *Grand Junction Railway Co.*, 5 Exch. 331: *Harwood* v. *The Great Northern Railway Co.*, 12 L. T. N. S. 771; *Thompson* v. *James*, 32 Beav. 570; *Lister* v. *Leather*, 8 Ellis & B. 1004, 1023, 1033; *Merrill* v. *Cousins*, 26 U. C. Q. B. 49; *McCormack* v. *Gray*, 7 H. & N. 25; *Ormson* v. *Clarke*, 14 C. B. N. S. 475; *Horton* v. *McMahon*, 16 C. B. N. S. 141; *The Patent Bottle Envelope Co.* v. *Seymer*, 5 C. B. N. S. 164; *Booth* v. *Kennard*, 3 Jur. N. S. 21, were referred to.

VANKOUGHNET, C.—I think the novelty introduced by the plaintiff into the use of, and construction for that use, of wood as a force pump, is entitled to the protection of a patent. It is established that the old wooden log lift-pump has been in use for upwards of thirty years; and though force-pumps are as old, probably, as hills and valleys, it appears never to have occurred to any one to adapt a wooden pump to such a purpose until some three years ago, when the plaintiff so applied it by a contrivance simple enough in itself, but not, on that account, the less ingenious or the less worthy of merit. The frame of the ordinary lift-pump in use previously and since was formed by excavating and boring through a log of pine wood. Through this hollow the piston was inserted, and it was worked by a handle on the outside of the frame. In this way the purposes of a lift-pump were accomplished. But in a frame so constituted the means for providing a force-pump were wanting, and impossible, as it proved. To obviate this difficulty, instead of permitting the frame to retain its square or circular form, the plaintiff's ingenuity suggested the cutting away about two-thirds of the face of the solid log of wood for about two-thirds of its length, leaving the bottom or lower extremity of the log, say its one-third part, solid. The log thus presented the shape of a rude chair, in itself no novelty, for such forms of chairs were not uncommon in olden times and may be seen now. This shape, however, has given to the pump which the plaintiff has continued to use through the medium of this frame, the name of "Chair-backed Pump." Now, on the chair-back the piston, worked on the side by a handle, is fastened, and about mid-way down it is divided by a hinge and the lower length passes through an iron belt or groove, so that it descends perpendicularly on to the box or solid part of the log below, or what may be called the seat of the chair, and into an orifice in this seat passing down it through a conical packing box of iron inserted in the seat. This packing-box is of an unusual shape, being conical and inserted in the log seat from below and forced up through the tube cut therein till it reaches nearly the top; being of larger circumference at the bottom than at the top, which gives it its conical shape. By this shape, as well as by an iron band inserted in the top of the upper part of this log-seat at a distance of about half an inch from the outer edge of the ring through which the piston passes, whereby the wood forming the ring is held firm and tight in its place, the position of the pack-box is secured, and there is no chance of its becoming loose or being forced upwards, unless the chair or log which holds it gives way. Well, by this contrivance of sending the piston down into the tube of this otherwise solid portion of the pump frame or body, through the packing-box so tightly closed as to exclude all air, the power of forcing up water is obtained. It is clear, and is admitted that this could not be effected in the old enclosed pump or chamber, because it would be necessary to remove the facing of it to secure a perpendicular descent of the piston and to prepare the lower part of it for the reception of the piston, and for the packing-box. Now, to whom did this notion, this new idea of so preparing the pump-body or frame as to serve the purposes of or furnish the means for employing a force-pump occur, but to the plaintiff? It is clear that he, by this alteration, converted the old wooden lift-pump into a shape which enables the forcing power to be used in and by it. During the many long years the wooden-pump has been used, this idea does not suggest itself to any one, but to the plaintiff; and it seems to me that it has that merit of invention which falls within the language of the Lord Chancellor in *Penn* v. *Bibby*, Law Rep. 2 Ch. App. 127. His lordship there after speaking of the difficulty of laying down any rule in such matters, says: In every case of this description one main consideration seems to be, whether the new application lies so much out

of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test, which cannot be considered an unfair one, to the present case, it appears to me impossible to say that the patented invention is merely an application of an old thing to a new purpose."

The usefulness of this invention of the plaintiff is not questioned. To the farmers it must be of the greatest possible value. At a cost of $5 more than the ordinary lift-pump—a cost in all of from $25 to $80—a forcing apparatus can be applied to the chair-shaped pump, by which, as is proved, a stream of water of considerable volume can be thrown a distance of from eighty to one hundred feet. Consider the great advantage of this on isolated premsies, where fire engines are not to be had; the farmer can use the pump for all ordinary domestic purposes with greater ease than he can the old-shaped one, for it is proved to work more easily—though if this had been its only merit a patent for it could not have been maintained, I think; but, in an emergency, with little if any more force applied to it, he can by attaching a hose convey water to buildings on fire within a hundred feet, and more, of the pump, and will most probably thus extinguish the flames. One man, or as some of the witnesses say, a child, can produce, by working the pump, a sufficient stream of water for this purpose. No doubt, force-pumps, with perpendicular pistons, constructed of metal and permanently affixed to walls or solid frames, have been in use for many a year; but, an ordinary wooden-pump, never, until adapted to the purpose by the change which the plaintiff has introduced. It is said, however, that the defendant is not infringing the plaintiff's patent because he does not apply to the pump, manufactured and sold by him, the appliances necessary to work it as a force-pump. True; but by adopting the chair-back shape, he enables those to whom he sells to make these appliances without any necessity for the plaintiff's aid, and without any notice to him. It would be a great grievance and wrong to the plaintiff to tell him that he must search all over the country for every individual who converts one of the pumps sold by defendant into a force-pump, and apply to the Court for an injunction against him. The man who, by disposing of the plaintiff's contrivance puts it in the power of others to interfere with the plaintiff's patent right is the wrong-doer, and should be punished. The chair-back shape is the contrivance, and, on the evidence, the only contrivance, by means of which a force-pump of wood can be formed and used—and it is not valuable for any other purpose of a pump. The old style of pump answers the purposes of the ordinary lift-pump as well, and the use of the chair-back shape can have no other advantage than to enable the possessor of it to turn it into a force-pump. The evidence shows that the defendant adopted in manufacture this form of pump, with the deliberate intention of damaging the plaintiff; and its importance as a novelty in his estimation, is established by his marking on the article when exposed for sale "Begley's Patent." This is a fraud upon the public; and the defendant cannot complain if he is judged by his own estimate of the importance of the invention. I had occasion to make some remarks upon the effect of such conduct in a case of *Walker* v. *Alley*, ante p. 366. It is contended that the specifications do not sufficiently describe the invention. They are not very artistically prepared, and the language is somewhat obscure and vague, but probably not so much so to mechanics and farmers as to those accustomed to more choice and accurate expressions; still, I think, they in substance describe the invention as a wooden force-pump, provided by a chair-back shape or frame, with a piston passing through an iron groove fastened on the back of the chair, and working in its lower half perpendicularly into the chair-bottom through a tightly enclosed and secured conical iron packing box.

I decree a perpetual injunction and account with costs.

THE BANK OF MONTREAL v. MCTAVISH.

Fire policy seizable under execution.

A fire policy, after a loss has taken place, and money has become payable thereon, is such a specialty or security for money as is seizable under execution, though the amount payable has not been ascertained.

Where such a policy was verbally assigned to a creditor by a person in insolvent circumstances, in satisfaction of a debt not due, and in consideration of an advance of money at the time, the assignment was held void, as a fraudulent preference within the Consol. Stat. U. C. ch. 26, sec. 18.

[13 U. C. Chan. Rep.]

Hearing at Toronto before Vice-Chancellor Mowat on evidence, taken partly before him at Stratford at the sittings of the court there in the Spring of 1867, and partly afterwards before the examiner by consent.

Blake, Q. C., for the plaintiffs.

Moss and *Rae* for the defendants.

MOWAT, V. C.—The plaintiffs are execution creditors of the defendant, William M. Cardell; and the substantial object of the bill is to obtain payment upon their execution of the amount due on a Fire Policy, dated 12th August, 1864, and under which the defendants, The County of Perth Mutual Fire Insurance Company, who are the insurers, became liable in respect of a fire which took place on the 19th October following. Before the amount to be paid on the policy had been adjusted with the Company, viz., on the 19th December, 1864, Cardell assigned this policy to the defendant, Alexander McTavish, in satisfaction of three promissory notes then held by McTavish, and to which Cardell was a party, and in consideration of a further sum of $100 in cash. The notes were not due at the time of this transaction. The plaintiffs contend that this assignment was a fraudulent preference within the meaning of the Statute U. C. Con. ch. 26, sec. 18. The plaintiffs were creditors of Cardell at this time.

I am satisfied from the evidence that at the time of this assignment Cardell was in insolvent circumstances, and unable to pay his debts in full; that both he and McTavish were aware of this at the time of negotiating for the transfer; that the object of McTavish in advancing the $100 was to obtain a preferance over Cardell's other creditors to the extent of the balance; and that Cardell intended he should have this preference, and made the assignment with that intent. Cardell was more anxious, I have no doubt, to get the $100 than to give a preference to

McTavish; what he wanted that sum for, or what use he made of it, does not very distinctly appear; the evidence furnishes no ground for supposing that he wanted it for any emergency of business, or that he applied it to any purpose of which his creditors, directly or indirectly, got the advantage.

It does not seem to me to be material for the plaintiffs to make out that the intent to prefer was the assignor's sole intent, or even principal motive, in making the assignment. I think it sufficient that the preference was one intent, and am of opinion that any other motive which operated with the assignor, was not of such a character as to render this intent harmless in reference to the policy of the Act.

There was some forcible argument at the bar as to whether notice by McTavish of his debtor's insolvency was material to the plaintiff's case; but it is unnecessary for me to express any opinion on that point, as I think he had such notice.

The Sheriff is authorized by the 261st section of the Common Law Procedure Act to "seize specialties or other securities for money." A fire policy under seal, after money has become payable thereon, is certainly within these words; and I have failed to satisfy myself that the fact of the amount to be paid not having been ascertained and liquidated before the assignment, or of the policy being in a Mutual Insurance Company—circumstances relied on by the defendant—constitutes any solid ground for holding that the policy was not within the meaning, as well as the words of the statute. I must therefore decree for the plaintiffs.

Part of the consideration for the assignment was money advanced at the time, but, the assignment being void as a fraudulent preference, McTavish could not, I think, in equity, any more than at law—*Lempriere* v. *Pasley*, 2 T. R. 485; *Ayling* v. *Williams*, 5 C. & P. 401; *Featherstone* v. *Hutchinson*, Cro. Eliz. 199; *Scott* v. *Agilmore*, 3 Taunt 226; *Thomas* v. *Williams*, 10 B. & C. 671; *Ferguson* v. *Norman*, 6 Sc. 810; *Higgins* v. *Pett*, 4 Exh. 324—claim to hold it as a security for the advance, or any part of it.

After the assignment, Cardell agreed with the Company to accept $300 in full, in respect of his loss, and the plaintiffs acquiesce in this agreement. I understood all parties to admit that more than that sum was due the plaintiffs on their execution. If so, the decree will be for payment to the plaintiffs of that sum by the Company, less the Company's costs of this suit. The plaintiffs will add the Company's costs to their own, and are entitled to both against the other defendants. If it is not admitted that so much is coming to the plaintiffs on their execution, there must be a reference to ascertain the amount.

CORRESPONDENCE.

The Question of Division Courts Costs.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Business has fallen off in the Division Courts *so very perceptibly*, that the clerks in the country and small town courts, who have for several years, by the exercise of very great prudence and economy, maintained their families on incomes not exceeding those of carpenters or masons, are now reduced to very near starvation point. Is it any crime then I ask that they should *charge all they legally can* for their services? Especially since all they can legally claim is such an amount in comparison with the work which has to be done for it as no other men have been asked to accept.

I say fearlessly that no body of men in Canada have been worse paid, more unjustly used, or more insulted by public men than the respectable body of Division Court Clerks of the Province of Ontario, and their Bailiffs. The number of those of them who go beyond the correct rendering of the tariff in charging costs, are I know, and will continue to think until proof is given, fitly represented by 0.

I do not know whether I am "the out County Clerk" who is accused of having charged $4 on an application for new trial, by your correspondent, or no; but lately on an application for a new trial, where one of the parties lived out of the county and sundry papers and notices had to be served requiring transmission to the clerk of the division in which the party lived, the fees amounted to $3 36, of which 30c. went to the F. F. for judge's orders.

It certainly is out of my memory and I think out of that of the very "oldest inhabitant" when justice or law could be got without money or without price, or mercy either for that matter, except in Heaven. The *Queen's* judges are *now* I presume paid by the public, as the "*King's* judges" were formerly. But I have not yet heard of lawyers being paid by the public, nor, except in part, officers of the courts either. And the County Court judges are paid from the Fee Fund, so cannot be said to be paid by the public in the sense that the superior court judges are said to be. "In Toronto and many counties, bailiffs claim, and are allowed fees, varying from 30 to 75c. on return of executions *nulla bona*," and very properly so and on good authority—that of

the late Hon. S. B. Harrison, one of the five framers of the Division Court Rules, and no mean authority on matters of law and practice. He told me nearly thirteen years ago, when I asked him what authority the bailiff had for the charge, that "the item in the tariff enforcing execution" was the authority. And I looked no higher for a warrant to continue a practice that had so good a foundation in justice, and that was in force since Division Courts were established. Your correspondent thinks it simply extortion. I think it simply justice. And I conceive that I am supported in my view by the practice in the courts presided over by that most excellent judge, Mr. Gowan, of the County of Simcoe, whose practice it is to fine his bailiffs if they do not return executions within 30 days, "The law says bailiffs shall forfeit their fees." If they have no fees on *nulla bona* returns, how can they forfeit them? Clearly they cannot. Yet in Simcoe if the return is not made within the allotted time, the bailiff is fined the amount exactly of the fee that he is allowed for enforcing execution. One of two things is to me very plain, either the bailiff has a right to the fee on return of *nulla bona*, or the judge has no right to inflict a fine for non-returning of execution. Well, in my view, his honour is quite right in inflicting the fine, and all clerks are quite right in taxing the fee for the bailiff. It has been over and over again complained of, that bailiffs are liable to be sent (and are sent) scores of miles all over the county without recompense, whenever a spiteful or ill designing person who has an unsettled judgment wants to play them a trick. A paltry, 25c., 30c., 40c., will procure an execution against a defendant, said defendant being *well known not to have a cent* above what our very humane laws allow him to cheat his creditors out of. And go the bailiff must, it may be hub-deep in mud, it may be to the further end of the county, and all his remuneration for a day's time lost, tolls, feed for horse and man, wear and tear of buggy and harness, body and mind, is (your correspondent says nothing at all) from 30 to 75c. In my opinion, any plaintiff or his agent who orders an *alias* execution and will not shew goods liable to seizure, should himself be made pay the bailiff's fees, as if levy had been made and money made.

Your correspondent objects to the charge of the transmission fees on transcript of judgment and appeals to *the letter* of the tariff. "For service," it does not say what or whose service. I appeal to the letter also of the law, and hold that the transcript is sent for the *service* of the plaintiff, in enabling him to recover his debt. Whether the charge is right in the letter of the law or not, 'tis righteous in the spirit, which is, that the clerk shall be paid for his trouble in transmitting papers. It is very easy and very wrong for your correspondent to get up a bad feeling against the officers of the courts by his insinuations. "Clerks are in the habit," and "'tis said one clerk, &c." because, both with ignorant and prejudiced persons and also often with those who are neither, "it is said one clerk" does so and so, speedily becomes the firm belief that *all clerks* really do the thing imputed.

I have heard so many false charges brought against judges, clerks, bailiffs and lawyers, that I believe none without positive proof. And I do not believe what your correspondent says about charging for judges' certificates on execution. There is no warrant for such a charge (there should be) and as Division Courts Clerks are not generally either fools or knaves, I do not think any of them would make the charge.

It is just possible that the cost of a $20 suit may by the foolishness or knavery of the defendant, be run up to $20. But I venture to say not one in five hundred does, and never illegally or by fault or fraud of judge, clerk or bailiff, or apart from witness fees, and your correspondent does not know much of the relation of costs of Division Court and County Court suits, or he would not venture on the assertion that Division Court costs are higher in proportion. I have no more to say now in remarks upon your communicated article in your August number; but I have a word to say to my brother clerks. To them I would say, you know that our fees were always miserably inadequate as compensation for the time, sense and care required of us in the discharge of our onerous duties. You know that when said fees ever did attain a bulk sufficient to do anything more than support our families, we had to work night and day, employ clerks, or get our wives, and sisters, sons or daughters, to help us. If we were paid even poorly for everything required of us by law to do, we might yet make a living. Therefore, I propose that the clerks of each county should meet some day soon,

and after such consideration draw up a just and moderate tariff as would deserve and command the attention and approbation of our several judges. Then send one of their number as a delegate, to a meeting to be held in some central place, with said tariff. The tariffs so brought together to be compared, and one fixed upon by the delegates and that to be printed and a copy sent to each county judge with a request from all the clerks to all the judges to interest themselves, and see that their clerks get common justice from the Legislature, fair wages for work done.

I have a list of duties required to be performed by Division Court Clerks without any remuneration, that would fill a column of your journal, but I do not wish to afflict your honest soul with such a list of wrong, and I have taken up too much of your time and space already I fear. For eight years past I have been musing (and that was *a musing* that was not *amusing*) and at last the fire has kindled and I have writ with my pen. Are not we Division Court Clerks as a body, as respectable and intelligent a body of men as the clerks of County Courts, Crown and Pleas, Surrogate Courts, or even as County Crown attorneys, or even as the sheriffs? We have to sit our long days in court like the former; they get $4 per day. We get nothing. They get fees for filing papers. We file twice the number and get nothing. They swear witnesses at 20c. each. We have to swear dozens of them for nothing. The Crown Attorney writes letters at 25c. each, paper found. We write dozens on our own paper for nothing. The sheriff receives, takes charge of and pays over money and gets five per cent. for doing so. We have to do the same with many more entries, and get nothing per cent. for doing it. All those gentlemen have offices, books and stationery provided for them. We have to provide all these at our own expense, and then they are the property of the County Crown Attorney. Sir, my surety bonds amount to twelve thousand dollars ($12,000) just the same as the sheriff of the county, and a little less than the clerk of the Crown and Pleas.

Their working time is over at 3 o'clock, P.M. Mine is never over if any one chooses to call for my services. Their incomes are small enough, and mine is not much more than half theirs. Why should it not be more nearly equal; not that I care about the proportion it bears to theirs, if it was in itself enough to supply the modest wants of my not numerous family.

If I could keep my family warmly clad, any other man's may go in silk and satins for me. If I can feed my family on plain wholesome food, any other man's may have all the luxuries money can get him. Nor do I want to see my country in distress that I may accumulate riches. But I do want this, that I and my brother clerks and our bailiffs should be paid a fair remuneration for the work we are called upon to do; taking into account that as we are expected to be on hand to do that work when wanted, which prevents us from going abroad to look for other work, the pay for the hours work we do, should be made to cover the hours we are forced to be (as regards money making work) idle.

I am Sir,

Your obedient servant,

T. A. AGAR,

Clerk 1st Division Court, Co. Peel.

Jury trials in Division Courts—A question as to the power to nonsuit.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN.—The Division Court Act (Consolidated Statutes of Canada, sec. 84, page 149,) contains this provision: "On the day named in the summons, the defendant shall in person, or by some person on his behalf, appear in the Court to answer, and on answer being made, the judge shall, without further pleading or formal joinder of issue, proceed, in a summary way, to try the cause, and give judgment; and in case satisfactory proof is not given to the judge, entitling either party to judgment, *he may non-suit the plaintiff;* and the plaintiff may, before verdict in jury cases, and before judgment pronounced in other cases, insist on being nonsuited." Then again, in the rules of the Division Court, having the force of Statute Law, we find this in addition to the above law as to nonsuit, see General Rule 69: "In cases where the hearing is by jury, the judge has the same power to nonsuit as in ordinary cases." Then we will advert to the clause as to jury trials: "Five jurors shall be empanelled and sworn *to do justice* between the parties whose cause they are required to try, according *to the best of their skill and ability*, and to give a true verdict according to the evidence, and the verdict of every jury shall be unanimous." See

sec. 131, page 158, Consolidated Statutes of Upper Canada. Now the question arises under these sections and said rule, whether the judge on a jury trial can, if he thinks the plaintiff's evidence insufficient, force him to take a nonsuit against his will, or whether he is not in fact (as in the Superior Courts,) simply to instruct the jury to find a verdict for the defendant, as the plaintiff refuses the nonsuit. I contend that the latter is the proper course, and that the rule 69 does not conflict with this even, but merely gives the judge the power (which he might not otherwise have in jury cases) to nonsuit in jury cases with the plaintiff's consent. The contrary view is taken by several judges, and by the judge who presides over the Division Court in Toronto, and by the judge who presides over the Division Courts in the County of York. They contend that the judge has the power, whether the plaintiff consents or not, to nonsuit, and that the rule as to this in Division Courts is different from the practice in the Superior Courts.

Now I contend that the right of jury trial was given to the people in Division Courts, as a safeguard, to some extent, against the judge, and that a plaintiff having chosen his mode of trial, cannot be deprived of it, simply because a presiding judge may take a different view of the facts or their relevancy, or the importance of evidence from what they would have taken. That to grant such a power in a judge is tantamount to destroying the trial by jury, is saying that after all the jury are not to be judges of the fact, but only to act as the judge may dictate; is virtually making the judge the sole disposer of all cases. I say the rule comes in merely to say that, in jury cases, as in other cases, the judge, under ordinary rules of practice, as in the Supreme Courts, may nonsuit; not that he can do so at his mere will. If this rule had not been made, it might be thought he could not nonsuit even with consent, although I admit section 84 gave the power to the plaintiff to take a nonsuit.

But if there is a doubt, it is better to give it in favour of the plaintiff's right to go to the jury—reserving the right to grant a new trial to the defeated party. I see no difference between our County Court Act and the English County Court Act, (although the English Act has not our rule 69).

It has been held in England, agreeably to my view, that the judge cannot nonsuit against the plaintiff's *nil;* see *Stancliff* v. *Clarke*, 7 Exchequer Reports, 439; 21 L. J. Exch. 129; Davis County Court Practice, title, Nonsuit, 114. Then sec. 69, Consol. Stat. U. C. page 147, says that in certain cases the practice of the Superior Courts may be applied to Division Court practice. I would be happy to have the views on this matter of the learned editors of your Journal.

C. M. D.

Toronto, 22nd August, 1867.

[We are of the impression that our correspondent is right in the main in his view of the practice.—Eds. L. C. G.]

Dog Act—Liquor Licenses.

To the Editors of the Local Courts' Gasetee

Gentlemen,—Regarding the Act 29, 30 Vic. cap. 55, sec. 14, there is a difference of opinion held by justices and councillors in this quarter. Some insisting that the "returns usual in cases of conviction" should be made in *all cases* that come before justices under said Act. And others, that returns are *only* necessary where the owners of the dogs are proven.

If returns should be made in all cases, even where the owners of the dogs are not known, should the municipality in such cases be styled the defendants.

Also, is a person holding a license from a municipality for the sale of liquor by the quart, disqualified to act as councillor for such municipality. The council of which he would form a part, having the regulating of the amount of license to be paid, and the security to be furnished for the observance of the conditions of such license, and the by-laws of the municipality. Your opinion on the foregoing will oblige,

A Justice of the Peace.

[1. It does not at present appear to us that the certificate of the justices spoken of in section 9 of the Act for the protection of sheep, can be construed to mean a "conviction," which must be returned to the Quarter Sessions under the provisions of Con. Stat. U. C. cap. 124, alluded to apparently in section 14. There is certainly a "trial or hearing," but nobody is convicted, nor is any fine, forfeiture, penalty or damages imposed; there is in fact no certain person to impose a fine or penalty upon. The object of the first part of section 9 is to certify to the Municipality the name of

the person entitled to relief and the amount to be paid him, but even then only to be paid out of a particular fund. It would, however, seem to be necessary to make a return "in each case," which may perhaps be interpreted to mean *every case* to the Clerk of the Municipality, and this for obvious reasons.

2. The person described does not, so far as the facts are stated, appear to be within the disqualifying clause, 73 of the Municipal Act. Our correspondent will perhaps explain himself.—EDS. L. C. G.]

—Tariff for guardians under Insolvent Act. Sale of interest in Crown Lands under fi. fa.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—In your number of July, a barrister—Prescott," asks whether "the interest of a person in Crown Lands before patent issues, is saleable under *fi. fa.?* By reference to Chancery Reports, vol. xiii. page 302—1867—"*Yale* v. *Tollerton*," he will see that the Chancellor has decided that it is.

I wish to call your attention to the want of a tariff for guardians under the Insolvent Act; as the law now stands, when an assignee is appointed it sometimes happens that the guardian is deprived of all power of collecting from him, not only his equitable claim for his time and trouble, but even the money he has been compelled to advance in travelling to and fro, and having the property taken care of. Some such table as the following, would, I conceive, be equitable:

Taking care of assets—per day—where assets of estate $500 and less.....	$1 00
Over $500 and not over $1,000..	2 00
Over $1,000 and not over $5,000.	3 00
Over $5,000 and not over $10,000.	4 00
All over $10,000.....	5 00

All disbursements to be allowed in addition.

Taking into consideration the fact that the guardian has great responsibility in taking charge of the estate, I think the fees are not at all beyond what they should be.

Yours, &c.,

Brockville, Aug. 13, '67. ST. LAWRENCE.

[1. That may be, but even so, is the Crown bound or would it recognise an assignment in such case?

2. Before committing ourselves to these figures, we should like to hear from others who are *au fait* with these matters. — EDS. L. J.]

Miss Longsworth's final appeal to the House of Lords was on Tuesday last dismissed. The Lord Chancellor delivered judgment at considerable length, Lord Cranworth signified his concurrance with the decision in fewer words, and Lord Colonsay did little more than barely express his acquiescence. Lord Westbury, who was present, said he had not intended to give any vote; he had been absent during the argument in consequence of a domestic affliction He had, however, heard the appellants address, and would have striven to attend during the rest of the argument had he felt any reasonable ground for believing that the appeal could be sustained. Miss Longworth now petitions the House o Lords, stating the composition of the Court which sat on her appeal, and the withdrawal of Lord Westbury, and proceeds to say that Lord Colonsay, having been one of the judges of the Court which gave the decision appealed from, ought not to have sat to hear an appeal from his own decision. There being but two other judges left, Miss Longworth submits that the Court was not properly constituted according to the practice and requirements of Parliament, and prays to have her appeal re-argued.

"Where." asks the *Manchester Guardian*, is "trade unionism to end? We gather from a case heard before the local bench recently, that Oldham has a 'washerwoman's union,' with its regularly appointed officers and outside world of charring 'knobsticks.' One Bridget Coleman, it appears, is secretary of this society. On Saturday night Bridget drank too much, and on turning out into the street assaulted another washerwoman who did not belong to 'the union,' and whom she denounced as a 'knobstick.' She was sentenced to seven day's hard labour for disorderly conduct.

PATRIARCHS OF THE LAW.—"Dodd's Book of Dignities" affords the following extraordinary instance of longevity amongst our great men of the law:—Ex-Chancellor Brougham, 89 years; Ex-Chancellor St. Leonards, 86; Ex-Chancellor of Ireland, Blackburne, 85; Ex-Judge Lord Wensleydale, 85; Ex-Chief Justice of Ireland, Lefroy, 91; Ex-Chief Baron Pollock, 84; Acting Judge of Admiralty, Lushington, 85. Total age of seven persons 604 years. This gives an average to each of more than 86 years and 5 months. But if the exact birthday was given, it is probable the average would reach 87.—*Times.*

APPOINTMENTS TO OFFICE.

COUNTY JUDGES.

HERBERT STONE McDONALD, of Osgoode Hall, Esq., Barrister-at-Law, to be Deputy Judge of the County Court, in and for the United Counties of Leeds and Grenville.—(Gazetted 24th August, 1867.)

SHERIFFS.

WILLIAM FERGUSON, Esq., to be Sheriff of the County of Frontenac, in the room of Thomas A. Corbett, Esquire, resigned.—(Gazetted 17th August, 1867.)

TO CORRESPONDENTS.

"T. A. AGAR." "C. M. D.," "JUSTICE OF THE PEACE," "ST. LAWRENCE."—Under "Correspondence."