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THE

UPPER CANADA LAW JOURNAL,

(NEW SERIES,)

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FROM JANUARY TO DECEMBER, 1867.

EDITED BY

W. D. ARDAGH, ESQ., BARRISTER-AT-LAW; ROBT. A. HARRISON, ESQ., D.C.L., Q.C.;
AND HENRY O'BRIEN, ESQ., BARRISTER-AT-LAW.

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DIARY FOR JANUARY.

1. Tues. . *Circumcision.* Taxes to be comp- from this day.
5. Satur. Last day for Tp. Vill. and Town Clerk to make
6. SUN.. *Epiphany.* [returns to Co. Clerk.
7. Mon . Co. Ct. and Surrog. Ct. Term ends. Mun. Elec.
8. Tues... Elec. Scho l Trustees Heir and Dev. sitt. com.
9. Wed .. Assizes County York.
12. Satur. County Ct. and Surrogate Ct. Term ends.
13. SUN .. *1st Sunday after Epiphany*
14. Mon. .. Election of Police Trustees in Police Villages
15 Tues... Treas & Cham of Mun. to make return to Board of Audit. School reports to be made,
19. Satur. Articles, &c., to be left with Sec. of Law Society.
20. SUN... *2nd Sunday after Epiphany.*
21. Mon. .. Members of Municipal Councils (except Co's) and Trust ot Police Vil. to hold 1st meeting.
22. Tues... Heir and Devisee sitt. ends Mems. Co Council
23. Wed .. Dec. of office by Sch. Tr. [to hold 1st meeting.
25 Friday *Conversum of St. Paul.*
27. SUN .. *3rd Sunday after Epiphany.*
30. Wed. . Appeal from Chancery Cham. School Finan ial Report to Board of Audit.
31. Thur .. Last day for Counties and Cities to make return to Provincial Secretary.

NOTICE.

Subscribers in arrears are requested to make immediate payment of the sums due by them. All payments for the current year made before the 1st March next will be received as cash payments, and will secure the advantages of the lower rates.

THE

Upper Canada Law Journal.

JANUARY, 1867.

SHEET ALMANAC FOR 1867.

Our Sheet Almanac for 1867 is sent with the present number. Recent legislation has made considerable change in it necessary, and some information which we were hitherto enabled to afford, we cannot now give. For instance,—it will, it is apprehended, be necessary for the judges to make some new rules as to the disposal of business in Easter and Michaelmas Terms, owing to the sittings now occupying three weeks instead two, as formerly; as this does not affect Easter Term, the paper days and new trial days are left, as to that term, as before. The same cause affects the sittings of the Court of Error and Appeal, the result apparently being that there will only be two sittings of that court during the present year.

The same act which makes these alterations also leaves it in the discretion of the Chief Justices and judges of the superior courts to fix the time for the holding of the three yearly assizes for the city of Toronto and the County of York, in the same manner as the outside circuits are arranged. This of course prevents us from giving the days upon which the various proceedings in a suit may be taken. Perhaps some enterprising student will compile and send us for publication a table containing the necessary information as regards these as well as the other counties, as soon as the assize lists are made known by the judges next term.

It will be noticed that more information is given in the Almanac than formerly for the benefit of Chancery practitioners, and persons interested in school matters. The remaining parts are much as usual.

COUNTY JUDGES.

One of the most important requirements in the orderly government of a country is upright and efficient judges—men who will administer the law without fear, favour or affection: with painstaking industry and the severity of logical analysis: having a thorough grounding in the fundamental principles of the common law and of equity jurisprudence, combined with a thorough and practical knowledge of the legislative changes that are being daily made both in the common and statute law. To this must be added, what are perhaps rarer qualities, an intuitive insight into character and the workings of human nature, and a keen observance and appreciation of the customs, wants and necessities of the people with whom they are either mediately or immediately brought in contact.

This last requisite applies with peculiar force to County judges in this country. Often obliged to decide upon the spur of the moment, with no assistance from books, or from the arguments of experienced counsel—with a mass of evidence, perhaps "pitchforked" into court without order, rhyme or reason—in a crowded court room, with but comparatively little time to devote to each case, it is little to be wondered at, if judges sometimes give decisions which are not all that could be desired. The greater care should therefore be exercised in the selection of men to fill these offices,—men who are not only sound lawyers, but also who can quickly and correctly discover the point at issue, analyse and apply the evidence, scrutinise motives, and attach to the evidence of each witness the credibility or importance which it deserves.

The following remarks, taken from a leading legal publication in England, with reference to

the appointment and position of the county judges there, are so much to the purpose that we copy them:

"There is no subject at present more deserving of the attention of the legislature and of the bar than the administration of law in the county courts. In the great majority of cases over which the jurisdiction of these courts extends, there is no appeal from the decision of the judge who decides upon them in the first instance. It may be true that they are occasionally of trifling importance to the parties concerned. On the other hand, to the majority of the suitors, who are of the poorer class, they are of great moment, and the decisions thus pronounced affect the existence of homes and the future of many lives. But the administration of law has a wider bearing than that which concerns the interest of the litigants in any particular case. It is necessary for the promotion of good citizenship and loyalty to the Crown and the institutions of the country that the law of the land should be fairly administered by every authorised tribunal. In many cases the vagaries of our county court judges are not a credit to the profession or the government. Some of these gentlemen carry out a law and practice of their own, decide upon principles of absolute morality, and not in accordance with legal authority, and hold courts which are only distinguished for loud talk between the litigants and the judge, and other great irregularities. * * * * Above all, care should be taken that good men should be appointed to the important position of a county court judge."

There is good and bad of every thing in this world; and though we are not now complaining of the appointments that have been hitherto made in this country, or say that persons appointed to offices of high public trust for political reasons are unfitted, *ipso facto*, from occupying their positions with advantage to the public, we do say that political motives or party influences, or the desire to shelve a friend, or silence an opponent, should have nothing to do with the appointment of the justiciary of the country.

Whilst making the general remarks contained in the last few sentences, we do not wish to be understood as referring to appointments of this kind that have lately been made. On the contrary, we have reason to believe that the appointments to the county judgeships of Huron, of Bruce, and of Peel, have been made with a due regard for the interests of the public, irrespective of any of the objectionable influences alluded to. Mr. Brough is a Queen's counsel of high standing at the equity bar, who, though not very conversant with common law practice, (which, however, he will soon pick up,) takes with him to his new sphere of action in the Division Courts, a thorough knowledge of the principles of equity jurisprudence, as distinguished from those uncertain, crude notions of natural justice, which some few judges, we are afraid, practically put in its place, thereby doing much "substantial *injustice*" to all parties, unsettling the ideas of the people, as to what is or is not law, under a particular state of facts, and so causing unnecessary litigation, injuring trade, and bringing their courts into contempt. Mr. Kingsmill, the county judge of the new county of Bruce, is also well fitted, by his knowledge of the country people, their ways and customs, obtained by an extensive and varied practice in the country, and by his good common sense and tact and general knowledge of law, for the post which has been assigned him. The judge of the newly separated county of Peel is a gentleman of less experience than either of the other two, but that will mend by time. It might be objected to him that it is unadvisable on principle to select a person to occupy a judicial position in the place in which he has been living, and whilst there is some force in this, we do not think it of much importance in this particular case, and certainly if the feeling which is already entertained of Mr. Scott in the locality where he resides is any index of the future, there is every reason to think that his career will be a useful one.

We wish these gentlemen every success in the laborious and responsible duties which they have undertaken to perform.

DIGEST OF ENGLISH REPORTS.

The value of the new series of Law and Equity Reports to the profession in this country is day by day better known and appreciated. They must necessarily become *the Reports*, and cases will be cited from them in preference to any other series, such as the reports (excellent as they are) published in the *Solicitors' Journal and Weekly Reporter*, the *Law Times*, and the *Jurist*. The price, however, is greater than that of those valuable publications, and the combination of interesting matter in the weeklies, for a compara.

tively small sum, will help to keep them up; and, indeed being old favourites, we should be sorry to miss them, though indeed as to one of them, the *Jurist*, it appears that it is intended to discontinue it shortly.

A new era in law reporting may be said to date from the commencement of the publication of the reports first mentioned, which may now be said to be the "orthodox" reports. This being the case, and the new series being in a permanent and complete form, and the reports which will be most generally referred to by judges and counsel, and desiring as far as possible to give such of our readers as do not feel justified in going to the expense of subscribing for them, the benefit to be derived from a knowledge of what they contain, we contemplate commencing with our next issue a digest of all the cases that have since their commencement appeared, and will hereafter from time to time appear in them, affecting or bearing upon the laws of Upper Canada. It is, we think, unnecessary to publish all the cases, as they would take up too much room without any compensating advantage, but a full and judicious selection will be made, leaving out nothing but cases referring to statutes, or to law not in force in this country.

It will take some numbers to bring up the cases of last year, after which the new cases will be given with promptness and regularity, and under such heads as the number and variety of the decisions may render advisable. In addition to this it is proposed to give at the end of each year a full index of the matter contained in the digest.

We are led to think that this digest, and index in connection with it, will be of great service to all, and particularly to country practitioners; and we trust that the time and labour it will involve will be appreciated, and that the enterprise will command an increased measure of support from the profession.

The first number of the Practice Court and Chambers' Reports under the new arrangement is, we understand, in course of preparation by Mr. O'Brien, and will be issued as soon as a sufficient number of decisions are collected. They will in the meantime, so as to give the profession as early notice of them as possible, appear in the *Law Journal*, and of necessity, as a general thing, before they can be published in the new form.

JUDGMENTS—MICH. TERM, 1866.

QUEEN'S BENCH.

Present — Draper, C. J.; Hagarty, J.; Morrison, J.

Monday, December 17, 1866.

Magrath v. *Todd.* — *Held*, that a defect in an affidavit of the execution of a discharge of mortgage which the registrar overlooked, not being an objection patent on the face of the document as registered, was no objection to the registry. (*Robson* v. *Waddell* distinguished.) *Held also*, that defendant being mortgagee of the term which he since foreclosed was bound by the covenant to pay rent contained in the original lease. Postea to plaintiff.

Lyster v. *Rumage.*—Postea to plaintiff for an undivided two-thirds of the land sought to be recovered. Leave to appeal granted to defendant in this case and *Lyster* v. *Kirkpatrick.*

Waddell v. *Corbett* —Rule discharged.

Carrick v. *Johnston.*—Judgment for defendant on demurrer to plea.

Griffith v. *Hall.* — Judgment for plaintiff on demurrer, with leave to amend on payment of costs

In re Scott and the Corporation of the County of Peterborough.—*Held* that the 'Surveyors' Act does not extend to the re-survey of a whole township, but only certain concessions therein. Rule absolute to quash by-law, with costs.

The Corporation of the County of Peterborough v. *the Corporation of the Township of Smith.*—Judgment for defendants on demurrer. Count held bad and plea held good.

Williamson v. *the Gore District Mutual Fire Insurance Co* —Rule discharged, with costs.

Golding v. *Belknap.*—Judgment for plaintiff on demurrer.

Wilson v. *Biggar* —Judgment for defendant on demurrer, with leave to apply to a Judge in Chambers, on affidavit, to amend.

May v. *Baskerville.* — Upon defendant undertaking to let plaintiff have wood on the wharf, rule to be discharged, otherwise rule absolute for new trial, costs to abide the event.

In re Lovekin v. *Podger.* — Appeal from the County Court of the County of Victoria allowed, and rule in court below discharged.

Mitton v. *Duck.*—Rule discharged, with leave to appeal.

Langway v. *the Corporation of the Township of Logan.*—Appeal allowed.

Ryan v. *Devereux.* — Rule absolute for new trial. Costs to abide the event.

Davis v. *Barnett.*—Judgment for defendant on demurrer to the first and second counts.

The Queen v. *Esmonde.* — Judgment for the Crown.

In re Kinghorn v. *the Corporation of the City of Kingston.*—Rule absolute to quash by-law, with costs.

Smith v. *Armstrong.*—Rule nisi discharged.

The Queen v. *Hishon.*—Conviction quashed.

Furnival v. *Saunders.*—Rule absolute.

Kinloch v. *Hall* —Rule discharged.

Merrill v. *Cousins.*—Rule absolute.

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Bell v. *Mills* —Stands.

The Queen v. *The Canadian Welland Navigation Company.*—Rule nisi refused.

Darling v. *Hitchcock.* — Rule nisi refused. Leave to appeal granted.

McLennan v. *The Port Burwell Harbour Company* —Rule nisi refused.

Ockerman v. *Clapp.*—Rule nisi refused.

Price v. *McCormick et al* —Rule refused.

Rastrick v. *The Great Western Railway Company* —Stands.

Pomroy v. *Wilson* —*Held*, that a Court of Quarter Sessions sitting in appeal on a decision from a magistrate's conviction cannot reserve a point for the decision of one or other of the Superior Courts: so no decision given on the merits.

Clarke v *Chipman* —*Held*, that in order to sustain an action for money paid, it is enough to show a virtual though not an actual payment of money. Rule discharged.

Bank of Upper Canada v. *Owen.*—*Held*, that a venue laid in "the United Counties of," &c., and not County of, &c., one of the United Counties of," &c., not sufficient. Judgment for defendant on demurrer. Leave to amend on payment of costs.

Unitarian Congregation v. *The Western Assurance Company.*—Postea to plaintiffs.

Rathwell v. *Rathwell.*—Rule absolute to enter verdict for plaintiff for $219.

Scratch v. *Jackson.*—Stands till next term

Souter et al. v. *Hagaman.*—Rule absolute for new trial, on payment of costs before 1st day of next term, otherwise rule discharged.

Gore Bank v. *Meredith et al.*—Rule absolute to enter nonsuit.

In re Hyland and the Judge of the County Court of the County of Hastings.—Rule discharged.

Bickell v. *Mathewson et al* —Rule absolute, with costs to abide the event, including costs of the special case.

Hodgins v. *Graham.*—Rule absolute.

Jones v. *Seaton.*—Rule absolute with costs.

Clissold v. *Machell.*—Rule absolute to extend the time for delivery of appeal on payment of costs.

COMMON PLEAS.

Present — RICHARDS, C J.; ADAM WILSON, J.; JOHN WILSON, J.

December 17, 1866.

Buchanan v. *Harres.*—Rule discharged.

Bannerman v. *Dewson.*—Rule discharged.

Lewis v. *Kelly.*—Rule discharged.

Anderson v. *Orchard.*—Rule discharged.

Carscallan v. *The Corporation of the Township of Saltfleet.*—Judgment for plaintiff on demurrer, with liberty to defendants to amend on payment of costs within four weeks.

Miller v. *Miller.* — Judgment for plaintiff on demurrer to second and third pleas

Black v. *Allan* —Rule absolute to enter verdict for defendant.

Glass v. *O'Grady.*—Rule discharged

Commercial Bank v *Cotton et al.* — Judgment for plaintiffs on demurrer.

Wiseman v. *Williams et al* — Judgment for plaintiff on demurrer. Plaintiff's rule discharged. Defendant's rule refused.

Merner v. *Klein.*—Rule absolute for new trial. Costs to abide the event.

Stabler v. *Linster.*—Rule refused.

In re Lennox and the Police Commissioners of the City of Toronto.—*Held*, that Police Commissioners have no power to pass by-laws or regulations imposing penalties for non-compliance with their by-laws or regulations. Rule absolute to quash conviction.

Furnival v. *Saunders* — Rule absolute for a prohibition.

Kinloch v. *Hall.* — *Held* that a plaintiff, although deprived of all costs in respect of his verdict under sec. 324 of the C L P. Act, may yet have full costs on a successful demurrer to pleas of the defendant Rule discharged, but as the point a new one, without costs

Cousins v. *Merrill.* — Rule absolute, without costs.

December 22, 1866.

In re Leys v *McPherson* —Appeal from the decision of the Judge of the County Court of the United Counties of York and Peel allowed, and rule nisi in the court below to be discharged.

Killbride v. *Cameron* —Stands for production of exhibits.

Cosford v. *Drew* — Defendants amendment upon payment of 25s. costs, and their judgment for defendants without costs.

Miller v. *Wiley et al.*—Judgment for demandant.

Meyers v. *Brown.*—*Held*, that if taxes be validly paid before sale of lands for taxes the sale is void. Judgment for plaintiff on special case.

The Queen v. *Hall.*—Judgment for defendant.

Wright v. *Skinner.*—Rule absolute to enter a nonsuit.

McCurdy v. *Swift.*—Rule absolute.

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

Flood v. *The Great Western Railway Company.* Leave to appeal granted.

Bacon left a will appointing six executors, but no property except his name and memory, which he bequeathed to "men's charitable speeches, to foreign nations, and the next age."

Lord Clarendon had nothing to leave his daughter but his executor's kindness; and Lord Nelson left neither a will of real or personal estate behind him, although he bequeathed his adopted daughter to the beneficence of his country.

SELECTIONS.

ACQUIESCENCE BY LANDLORD IN EXPENDITURE BY TENANT.

Ramsden v. Dyson, Dom. Proc. 14 W. R. 926.

This celebrated case, sometimes known as the Huddersfield tenant-right case, is important, not only in a legal point of view, as affording an admirable illustration of the rules of law affecting the question in the cause, but also from the magnitude of the interests involved, and the extraordinary circumstances which gave rise to it, which may be fairly described by saying that half a million of money had been laid out on land without any better title than a few entries in a rent book. The ownership of the soil, upon which the greater part of the town of Huddersfield is built, was at issue in the case. This vast property had been dealt with in a manner which, according to the contention of the landlord, was an attempt to introduce a new system of conveyancing, while it amounted, in the view taken by the tenants, to the creation of new copyholds in the present century. The facts were these—The town of Huddersfield stands almost entirely upon land the property of the Ramsden family. The late Sir John Ramsden, in whose time the practice which formed the subject of the suit, arose, lived at a distance from the town, where he was represented by certain subordinate agents. The regular course pursued, whenever any person wished to take land for building purposes, was as follows:—application was made to the local agent, the ground was staked out, and particulars thereof, with the name of the tenant, were entered in the estate books, which were regularly kept like the Court Rolls of a manor. Two courses were then open to the tenant: he might either obtain a lease, in which case of course no question arose; or on the other hand he might hold on at a fixed rent, relying merely on the entry of his name in the estate books, without any further contract or agreement whatsoever. This was sometimes called tenant right; and strange to say, this was the course which appears to have been generally preferred by the inhabitants of Huddersfield, canny Yorkshiremen though they were. Whenever it was desired to sell or mortgage any of these tenements, many of which were of great value, it was effected by a mere entry in the estate books. Sir John himself appears to have taken little share in the management of the property, but it was shown that his local agents were in the habit of urging those who applied to them, to rely on the tenant right, and not to take leases, assuring them that they might depend implicitly on the honour of the Ramsden family, that they would never be disturbed, and that they might have leases whenever they chose. There can be no doubt that it was generally believed at the time that these assurances were authorised by Sir John Ramsden; but it is equally certain that no evidence could be produced to prove that Sir John was even aware that they were made. It appeared that hitherto persons who held land on the tenant-right tenure had always received leases upon application; but, in the opinion of the House of Lords, the evidence showed that the terms of these leases had been settled by agreement at the time when they were granted, and were not regulated by any ascertained custom, as alleged on the part of the tenants.

Upon this state of things it was contended by the present Sir John Ramsden that the persons in question were, in equity as well as at law, mere tenants at will. He denied that there was any obligation on the part of the Ramsden family to treat them otherwise, and conceived that he acted towards them in an honourable and considerate manner by offering them leases for 99 years. The tenants on the other hand contended that the understanding upon which they had taken their land and laid out their money was that they were entitled on demand to leases renewable for ever, and that any disturbance of their tenancies amounted to a fraudulent breach of faith against which they had a right to be relieved in equity: and a bill was accordingly filed on their part to try the point.

It does not fall within our province to consider the question in any other than its legal aspect. Thus viewed it cannot be denied that there were several circumstances which bore heavily against the case of the tenants. In the first place it appeared that those who took their land on the tenant-right tenure, paid generally about half the amount of rent demanded from those who had leases, a circumstance difficult to explain upon the theory that both tenures were equally beneficial. Moreover they were themselves in doubt with regard to the precise terms of the leases, to which, on their theory, they were entitled,—a serious difficulty in the way of granting an injunction; while the House of Lords, as before mentioned, was of opinion that the terms were settled in each case by special agreement.

It being the opinion of all the judges, before whom the cause was heard, that no case of contract was satisfactorily established, it remained to be considered whether relief could be given on the ground of fraud; and it was upon this point that the decision ultimately turned.

The law upon this subject depends mainly upon two cases, each of which embodies, as it were, an important principle. *Gregory* v. *Michell*, 8 Ves. 328 decides that if a tenant, under an expectation created or encouraged by his landlord, that he shall have a certain interest in land, lays out money upon it, and the landlord, knowing of the expenditure, lies by and allows it to go on, this will amount to a species of fraud, against which relief will be given in equity, either in the shape of a specific interest in the land, if the terms of the con-

tract are precise, or in that of compensation for the money laid out. On the other hand, *Pilling* v. *Armitage*, 12 Ves. 85, decides that if a tenant lays out money in building, &c., in the hope of an extended term or otherwise, but without the knowledge of the landlord, he has no claim to relief either in law or equity. The question was whether the present case came within the one rule or the other, a point which of course depended upon the evidence. Vice-Chancellor Stuart, in whose court the suit was originally brought, took the tenants' view of the matter, considering that substantial justice was on their side; and decreed accordingly. From this decision the case was taken direct to the House of Lords, when Lord Kingsdown agreed with the court below; but, the majority of the learned Lords present being of a contrary opinion, it was declared that the bill ought to have been dismissed. We shall join the following passage from the judgment of Lord Chancellor Cranworth as embodying substantially the view taken by the House of Lords:—"If a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build. I have already stated that there was no agreement with the landlord, for any further estate or interest, but if it could have been shown on the part of the respondent that the landlord, believing the tenant to be ignorant of his rights, had purposely advised him to go on, the case might fall within the same principle as a case of fraud. But no such case has been made out to my satisfaction."

Thus ended this celebrated case, much to the advantage of Sir John Ramsden, and equally to the detriment of the townspeople of Huddersfield, a memorable instance of the danger of attempting to dispense with the proper legal forms of conveyancing.—*Solicitors' Journal.*

RECENT LEGAL APPOINTMENTS.

The legal consequences which flow from a change of ministry are always of interest to the profession, and those which the recent change has produced, both in England and Ireland, have been of more than usual importance. The highest office on the bench and the highest offices at the bar, are of course necessarily involved in such a proceeding; but both at Westminster and Dublin further effects have resulted from the going out of one ministry and the coming in of another, which we have recently witnessed. In Scotland the necessary changes are confined to the law-officers of the Crown, and do not affect the bench; and in the instance now referred to, no such collateral results as have been experienced in Westminster Hall and the Four Courts, have disturbed the serenity of the Parliament House.

The English appointments, we may take upon us to say, have been most satisfactory to the profession. Nothing could be more proper than that the great seal should be again entrusted to Lord Chelmsford. When in 1858, he was made Lord Chancellor, doubts were entertained as to the manner in which one, whose fame had been achieved at the Common Law Bar, would acquit himself as an equity judge; but the result proved that these doubts had been uncalled for. Since he left office in 1859, his judgments in the House of Lords have still further advanced his reputation as a lawyer. No man was ever more lucid in the statement of his arguments and views than Lord Chelmsford. We have had many more learned and profound lawyers, but few who could set forth their opinions on any legal question in a more clear and intelligible manner. His ability as a *nisi prius* advocate was universally acknowledged, and he was equally distinguished when at the bar by the manner in which he conducted an argument in banc. The qualities which he has shown as an appellate judge, were only such, as those who knew him had anticipated; and whether he may be destined to occupy the woolsack for a longer or shorter period, it may be confidentially expected that his judicial reputation will be proportionately enhanced.

The appointment of Sir Hugh Cairns as Attorney-General, was, under the circumstances, almost a matter of course. No one has ever doubted his great ability as a lawyer, and his efficiency in the House of Commons made him invaluable to any ministry. No less deserving was Mr. Bovill of the position which he has attained as Solicitor-General. His successful career at the bar, and his popularity with the members of his circuit and the bar generally, rendered his appointment highly satisfactory to the profession. No man ever more fairly and honourably earned the important position of Solicitor-General than Mr Bovill; and whatever fortune may have in store for him, we are persuaded that he will be found qualified for any office to which he may be called.

With respect to the circumstances which led to the vacancy on the bench, which has been filled up by the appointment of Sir Fitzroy Kelly as Lord Chief Baron of the Court of Exchequer, we must be allowed to express a sincere wish that anything similar may never again occur. When a judge feels himself incapacitated for the proper discharge of his duties, he ought to retire at once, and not wait for a change of ministry, or any party or political contingency. The proceeding to which we refer was scarcely fair to the bar, and it was certainly not satisfactory to the public. But as regards the appointment of Sir Fitzroy Kelly, we may venture to say, that it has been unanimously approved of by the profession. His great ability, the high posi-

tion which he occupied at the bar during so many years, and the kindness and courtesy which he invariably showed towards all the members of the profession with whom he was brought into contact, have rendered his elevation to the bench as popular as any other we have ever known. The only cause of regret must be, that he was not appointed to a judicial office at an earlier period in his career. But however much we may feel this, we have entire confidence that he will discharge in a thoroughly efficient manner the duties of his new position. Over-subtlety and over-copiousness were the faults of Sir Fitzroy at the bar, and these would be still more serious faults on the bench. Those, however, who have had opportunities of meeting him in consultation, know how readily he could seize the main features of a case, how quickly he could grasp the true bearing of facts, and how skilfully he could thread his way through any legal complication. The patience and attention, also, which he brought to the consideration of any matter that came before him, are well known to all. These qualities, we make no doubt, will shine out conspicuously on the bench; and it will be found, we feel confident, that the method which he too much followed at the bar, of making every possible point, and leaving nothing unsaid that could be said, was only adopted by him from his great anxiety for the interests entrusted to him. We may be very sure that on all occasions he will give an attentive and patient hearing to the bar, and that, as a rule, he will only interrupt counsel, arguing in banc, for his own information, or for the purpose of saving the time of the court. We are equally convinced that he will in no case allow himself to be carried away by any prejudice or feeling in the discharge of his duty as a judge; that he will interpret and apply the law in a calm and scrupulous manner; and that whenever he has to exercise a discretion, it will be done in an impartial and liberal spirit. The only danger is lest from his desire to lay everything fairly before the jury, he should be lead into to great prolixity in summing up; but against this tendency we have every confidence that he will endeavour to guard himself.*—*Law Magazine.*

* Since the above was in type, the resignation of Sir J. L. Knight Bruce and the new appointments consequent thereupon have taken place. We may well congratulate both the public and the profession on the acceptance by Sir Hugh Cairns, of a seat on the Bench as one of the Lord's Justices of Appeal. No man could be better qualified for such an office. Whatever sacrifice Sir Hugh Cairns may have made, we trust that he will find he has received no small compensation in having attained a position of great dignity and usefulness where he will be perfectly at home, and where his fine legal intellect will have ample scope. We need scarcely add that he carries with him to the Bench, the best wishes of the profession. The appointment of Mr. Rolt as Attorney-General, has received universal approbation, and there is only one opinion as to the very handsome manner in which Sir W. Bovill has acted.

THE RETIREMENT OF CHIEF JUSTICE ERLE.

Very seldom in the history of the legal profession has there been witnessed a more impressive scene than that presented on Monday last in the Court of Common Pleas. One of the greatest magistrates who has presided in an English court of justice since the days of Lord Mansfield was sitting on the bench he had so long adorned for the last time, and members of the bar to whom he had endeared himself by long years of patient forbearance and never-failing courtesy crowded every corner of the court, eager to do him honour. It is not every day that the public and professional voice alike demand that a retiring judge should bid a formal farewell to active life. But in some cases it is impossible that he should disappear from the busy scenes of professional existence without public observation. Chief Justice Erle was himself anxious to have descended unnoticed into privacy; but, as the Attorney-General observed in his admirable address, it was impossible that he should be permitted to do so. "There are occasions," he said "where an enthusiastic and unanimous feeling of veneration and regard requires expression," and this was one of them. From the leader of the bar to the humblest junior, one sentiment animated the profession:—a sentiment of profound respect for one of the noblest, and, at the same time, most simple characters that has ever lent dignity to the administration of justice.

The eloquent language of Sir John Rolt, although spoken only in the name of the bar, will be adopted by the entire legal profession, and by the public. Indeed it would be impossible to praise too highly the manner in which the retiring judge performed the duties of his office, nor could any words express too warmly the affectionate respect which was felt for him by all practitioners in his court.

In expectation of the ceremony, the Court of Common Pleas was crowded long before the judges took their seats. About half-past eleven the business of the day began by the delivered of judgments in the only two cases in which the Court had taken time for consideration. The motions being few and short, the Court adjourned after sitting for about an hour. The Attorney-General, the Solicitor-General, and Queen's Advocate now came into court. Sir Roundell Palmer also took his place in the front row of the bar. Every seat in the court had long before been filled. And now every foot of standing-room was also occupied. At one o'clock all the judges of Common Pleas came into court and took their seats. Lady Erle had a place upon the bench, and many other ladies were seated in the galleries. The whole of the bar then rose, and the Attorney-General delivered an address which was admirably appropriate in language, and sounded like the genuine utterance of the speaker's heart

The bar found a worthy spokesman in an Attorney-General, whose own great qualities enabled him thoroughly to appreciate those of Sir William Erle. He was right in supposing that a mere panegyric on the high judicial qualities of the Chief Justice would have been wholly insufficient. A tribute was required, and was eloquently rendered to "the simplicity and elevation of character" with which the exercise of these qualities had been illustrated. Scarcely ever, in truth, has so gentle a disposition or so kind a heart been associated with so strong a head.

The hearers of that speech, while ackowledging that the head of the English bar well sustained its reputation, could not forget that which is perhaps the highest merit of the speaker, that his mental culture has been mainly the work of the leisure hours of a laborious professional career. But we will venture to say now on behalf of the body of solicitors, as the Attorney-General has said on behalf of the bar, that we feel, and desire to acknowledge, that under Sir William Erle's presidency in the Court of Common Pleas the great judicial duty of reconciling, as far as may be, positive law with moral justice, has been satisfied. The court of which he has been chief judge has attained the highest confidence of the suitor, the public, and the profession. We will say also, adopting the words already quoted, that the simplicity and elevation of character of the retiring judge commanded admiration, while his kindness and courtesy won regard. The clearness of his charges to juries, and the quaint humour by which he often illustrated his meaning, will be long remembered by practitioners in his court. It is true that when he had once formed an opinion he rarely changed it, but his opinion was very likely to be right. When Sir E. V. Williams, who is unfortunately deaf, was a judge of his court, it was usual with him to repeat, for the benefit of his colleague the arguments of counsel, giving to them occasionally a slight and exquisitely droll variation. In discussing legal questions he always used simple and lucid language, because he was thoroughly master of the subject he discussed. In disposing of business at Nisi Prius he was rapid without undue haste, and certainly there was no signs when he sat before the Long Vacation in Middlesex and London, of any failure of those mental powers which made him one of the best judges known either within living memory or by tradition. Using once more the words of the Attorney-General, Sir William Erie has retired from judicial life while still in "the full possession of the greatest judicial qualities."

It may confidently be asserted that Sir William Erle never wilfully and unnecessarily inflicted pain or humiliation or any human being. His conduct to young professional men was especially courteous. The youthful members of many a circuit will always retain a grateful recollection of the cordial and graceful hospitality which converted the "judges' dinner" from a solemn ceremony into a happy festival. He possessed, in an eminent degree the art of putting men at their ease. All he demanded was that they should be as unaffected as he himself. There was nothing of the "don" about him, though he was every inch a "chief." In his manners a rare combination was exhibited between perfect dignity and hearty kindliness.

It was a remarkable coincidence that this retirement took place on the very same day on which, forty-seven years before, Mr. Erle was called to the bar. He was called on 26th November, 1819, and in 1835 he received a silk gown. Upon the retirement from the Western Circuit of Mr. Serjeant Wilde, and Sir William Follett, Mr. Erle became the leader, having next to him, in amount of business, Mr. Crowder (afterwards a judge of the Court of Common Pleas), and Mr. Serjeant Bompas. Sir Alexander Cockburn also belonged to the Western Circuit at that time, but he did not come regularly. It is remarkable that this circuit should have reckond among its members at the same time three men who were afterwards Chief Justices of the Common Pleas, and of whom one became Lord Chancellor, besides Sir William Follett, who probably would have become Lord Chancellor had he lived till 1852. Although the west of England is not conspicuous either for wealth or intellectual activity it has usually happened that the leaders of its circuit are amongst the foremost advocates of the entire bar. Those who have known Sir William Erle upon the bench will not need to be told that he was never an orator at the bar, but he was a very forcible speaker, and an exceedingly keen and dexterous cross-examiner.

During the last twenty years three judges have obtained the honour of a public recognition of their virtues upon their retirement from the bench—Sir John Patterson, Sir John Coleridge, and Chief Justice Erle, and it is hardly too much to say of the last that he combines the high qualities of the two first. Singularly enough all three owed their judicial position in the first instance to the same political opponent—Lord Chancellor Lyndhurst. Sir John Patterson was made a judge in 1830, previous to the resignation of the Duke of Wellington. Sir John Coleridge was appointed during the brief ministry of Peel in 1834-5, and Sir William Erle was placed in the Common Pleas in 1844, during the second ministry of the same statesman. Two years later he was transferred to the Queen's Bench, where he remained until, in 1859, upon the promotion of Sir Alexander Cockburn, he returned to preside over his old court. It will be long ere we look upon his like again. Many judges have inspired as much respect, but few have ever been regarded with as much affection.

His plain speech and homely manners might have disguised from a superficial observer of the daily work of the court the fact that its

chief was an accomplished lawyer. He laboured with untiring diligence to do his duty, and he has been rewarded by the unanimous testimony of the profession that he did it well It was evident when he answered the Attorney-General's address that he was labouring under strong emotion. He had written out his speech beforehand, not because he had any difficulty on ordinary occasions in clothing his thoughts in appropriate words; but because on this occasion he could hardly trust himself to control his feelings, and the written speech before him was, if we may so say, something to hold on by. It was altogether akin to his character to prepare a formal harangue at this or any other time, and if his speech be looked at it will be found like all his utterances, simple, natural, and going exactly to the point. "I have laboured to do justly according to law, and to obey humbly the power that gave me a sense of right." Such was his own description of a judicial career, extending over twenty-two years, in which he had devoted the best of his abilities to the duties of his office unceasingly to the present time, when he found need for some abatement of work. The word of approval pronounced by the Attorney-General were "a strong support and reward" to him. Let us say once more that those words spoken on behalf of the bar are adopted by the solicitors, and that the entire legal profession join in heartily bidding Sir William Erle farewell.

The homage of all, to quote once again the eloquent words of the Attorney-General, is alike due "to the worth of the man, as well as to the dignity of the judge."

He has retired while apparently retaining full possession of his fine judicial faculties, but obeying an inward warning that he needed some relief from labour. It is to be hoped that the country will still enjoy the benefit of his great learning and long and varied experience in a court of ultimate appeal, and also that the court which he has quitted will maintain the reputation which it acquired under his presidency.—*Solicitors' Journal.*

SIR JAMES LEWIS KNIGHT BRUCE, D.C.L., F.R.S., F.S.A.

The Right Hon. Sir James Bruce, whose death is announced in another column, was the youngest son of Mr. John Knight, a gentleman of property in Devonshire, by Margaret, only daughter and heiress of William Bruce, of Kennet, Glamorganshire, Esq. James Lewis Knight was born in 1791, and was originall intended for a solicitor. Circumstances, however, rendered it advisable that he should select the other branch of the profession, and accordingly, in 1812, he was admitted a student of the Honourable Society of Lincoln's inn, by which he was in 1817 called to the bar. He at first joined the South Wales circuit, but very soon devoted himself exclusively to practice in Equity, where his great talents and industry soon secured a large practice. In 1829 he was appointed King's Counsel, and in 1831 was returned to Parliament for Bishop's Castle—a borough which, in the next year, found its way into the celebrated "Schedule A." In 1834 he received the degree of D.C.L., "*honoris causâ*," from the University of Oxford.

In 1837 he assumed the additional surname of Bruce by Royal license, out of complement to the family of his mother, whose name, indeed, seems to have been a favorite amongst her family generally. The Lord Justice's eldest brother is John Bruce Pryce, Esq., of Duffryn, Glamorganshire (whose second son again is well known as the Right Hon. Henry Austin Bruce, *umquhile* Vice-President of the Education Board,) and his second brother, the only member of the family who adhered to his patronymic, was the late Dean of Llandaff, Dr. William Bruce Knight.

When the memorable contest concerning the Municipal Corporations Reform Bill was in progress in 1835 Mr. Knight was selected as their counsel, along with Sir Charles Wetherell, by the opponents of that measure, and was heard at the bar of the House of Lords in opposition to it. He was afterwards one of the leading counsel in the celebrated case of *Small* v. *Atwood*, the late Lord Truro (then Mr. Serjeant Wilde) being his opponent; this was the last case of any importance in which he appeared as counsel, for the Act (5 Vict. c. 5) for abolishing the Equity Jurisdiction of the Court of Exchequer, which was even then in its progress through Parliament, authorised the appointment of two new Vice-Chancellors, and Mr. Knight Bruce and Mr. (late Sir James) Wigram were accordingly selected for the office. Appointed to this post at the age of fifty, he has for a period of a quarter of a century continued with "discrimination, ability, and good temper," to discharge the onerous duties of an equity judge. When, in 1851, the Act (14 & 15 Vict. c. 83) constituting the Court of Appeal in Chancery was passed, Sir James L. Knight Bruce and Lord Cranworth, then the two senior Vice-Chancellors, were promoted to be Lords Justices of that court, the vacant Vice-Chancellorships being filled by Vice-Chancellor Kindersley and the late Sir James Parker. From that time until his retirement in the course of last vacation Lord Justice Knight Bruce acted as senior judge of the Court of Appeal, at first, along with Lord Cranworth, and, after his appointment to the woolsack in December, 1852, along with Lord Justice Turner, who now succeeds him as senior judge of the Court, and he also, during the same period, rendered inestimable service as one of the members of the Judicial Committee of the Privy Council. Although it is true that his Lordship's energies were rapidly failing, so much so that for nearly a twelvemonth he had not, we believe, delivered a single judgment at

length, simply contenting himself with an expression of concurrence in, or dissent from, the judgment pronounced by Lord Justice Turner, yet even when he seemed to be feeblest, and when to a casual observer he appeared practically unconscious of all that was passing, he would suddenly bring out one of his characteristic terse humorous sayings which would prove to the attentive observer that he had not really lost a single word.

The following extract from an article in the *Gurdian* is attributed to a great dignitary at the bar, than whom no one is better entitled to pronounce an opinion:

"But though his great penetration and quickness, and his wonderful aptitude and talent for business, made him, in his best days, an admirable judge, so far as concerned the interests of the suitors, yet his habit, which very much increased on him of late years, of deciding the case on hand with a few short words, without examining and stating at length the reasons for his judgment and the law which bore on it, have prevented him, perhaps, from taking that great and distinguished position as judge of which he was so eminently capable. Of the numerous judgments delivered by him, those which will hereafter be referred to as settling or elucidating the law are few and far between; and their number is by no means such as we should have anticipated from his great general reputation and undoubted learning and capacity. Yet there are some few judgments of his which will be remembered, not only for their sparkling cleverness and power, but as examples of legal reasoning and as settlements of vexed and intricate legal questions. Sometimes, too, there was a certain irrepressible humour about even his gravest judgments, which was eminently characteristic of his general mode of getting through the otherwise dull and prosaic transactions of the court in which he sat. Thus, in the 'Burgess's anchovy case,' in which two brothers Burgess, sons of the original inventor of the sauce, were the litigants, and in which the brother who succeeded to the business and 'the Sauce,' complained that the brother who had not inherited it was nevertheless vending 'Burgess's' sauce, the Lord Justice, deciding against the complainant, commenced as follows:—'All the Queen's subjects are entitled to manufacture pickles and sauces, and not the less so that their fathers have done it before them All the Queen's subjects are entitled to use their own names, and not the less so that their fathers have done it before them.' The conclusion followed of course."

The following is an extract from the opening of his judgment in *Barrow* v. *Barrow*,—a good specimen of his wit, humour, and felicity of expression:—

"These and two other suits are the fruits of an alliance between a solicitor and a widow who, for the first sixty days of their married life—namely, from the 30th of July to the 28th of September, 1850, lived, as well as quarrelled, together, but at the end of that period parted, exchanging a state of conflict which, though continual, was merely domestic, for the more conspicuous, more disciplined, and more effectual warfare of Lincoln's-inn and Doctors'-commons."

It is needless to multiply instances. If any of our readers wish to see how a vein of concentrated humour which would have done honour to Hook, expressed in the tersest and most epigrammatical language, can be sustained throughout the whole of a lengthened discourse, without detracting for a moment from the clear logical accuracy and "consequence" of the reasoning, that reasoning being itself a perfect example of judicial logic, let him read the judgment of the Lord Justice in *Thomas* v. *Roberts* (the *Agapemone* case), 3 De. G. & Sm. 758.

Sir J. L. Knight Bruce married in 1812 (at the early age of twenty-one), the daughter of Thomas Newton, Esq., by whom he leaves surviving one son, Lewis Bruce, who acted as his private secretary, and two daughters, Eliza, the wife of F. S. D. Tyssen, Esq., and Caroline, widow of the late John George Phillimore, Esq., Q.C., a bencher of Lincoln's-inn, and reader in constitutional law and legal history to the Inns of Court. His eldest son, Horace Lewis, died in 1848, leaving issue. Sir James died at Roehampton, Priory, Surrey, on Wednesday, November 7, at about four o'clock p.m. Although his death cannot be called "sudden," as his health had been obviously failing for so many months, and he had been besides peculiarly unwell during the last fortnight, yet, it was, believe, "unexpected," that is, it was not anticipated that this particular attack would terminate as it has done, though but slight, if any, hopes were entertained of his ultimate recovery from the disease.—*Solicitors Journal.*

ADDRESS TO THE LATE CHIEF JUSTICE LEFROY.

A deputation from the Council of the Incorporated Law Society of Ireland, consisting of the following gentlemen—Richard J. T. Orpen, President; Arthur Barlow and Edward Reeves, vice-presidents; Robert J. T. Macrory, John H. Nunn, John Fox Goodman, William Read, Henry Thomas Dix, Thomas Crozier, and John H. Goddard, Secretary—waited on Tuesday upon the Right Hon. Thomas Lefroy, late Lord Chief Justice of Ireland, for the purpose of presenting him with an address, of which the following is a copy:—

"*To the Right Honorable Thomas Lefroy, late Chief Justice of Ireland.*

"Sir—On behalf of the attorneys and solicitors of Ireland we desire to offer you the expression of our deep respect and esteem upon the occasion of your retirement from the high office which you have long filled with such ability and dignity. It is with much pleasure that we bear testimony to the profound learning, deep sagacity, and un-

wavering patience which has ever marked your judicial character, and although we feel that your lengthened public service forms ample reason for retirement from the onerous duties of the bench, we are sensible that by that event it has lost one of its brightest ornaments, in whose hands justice was administered, not only with power and impartially, but also with that dignity which should ever accompany such administration, and which secures for it reverence and honour. We desire particularly to refer to the support you have uniformly afforded us in endeavouring to uphold the character and social status of our profession, for which we tender our grateful acknowledgement. Trusting that the remaining years of a life so honourably and profitably spent may be passed in happiness and peace—I remain, sir, on behalf of the council, your faithful servant,

"Richard J. Theo Orpen, President.

"John Goddard, Secretary, Solicitors' Hall,
Four Courts, Dublin, 20th November."

The late Lord Chief Justice thereupon read and handed to the president a reply (written out entirely by himself, to be preserved as a record by the society) of which the following is a copy:—

"Leeson-street, Nov. 20, 1866.

"Gentlemen—I find it difficult adequately to express the gratification I feel in receiving the address you have presented to me on behalf of the attorneys and solicitors of Ireland. Such testimony, not only of approbation, but, as you have kindly said, of respect and esteem, founded upon the discharge of those public duties, of which, for more than a quarter of a century, the members of your body have necessarily been constant and watchful observers, may well be regarded as a source of honourable pride and pleasure, and I beg to assure you I shall always so esteem it. Your address refers to a subject which has long engaged my anxious attention, and though now withdrawn from the sphere of duty in which I could effectively assist the praiseworthy efforts of the Law Society to uphold the character and social status of that important branch of the legal profession to which you belong, yet I shall not cease to feel a deep interest in the subject. My long experience in the administration of justice has strengthened my early convictions as to the evil of the practice which now prevails of allowing men to take upon them the duties of your profession who have neither the education nor the intelligence necessary for the purpose: a practice which is opposed to the well and wisely established rule in England, and which deprives the suitors of the security they ought to have in being represented by those who have been admitted as members of your profession, and who, as officers of the court, are subject to its control. It seems to me that the interests not only of your profession, but of society at large, require the abolition of such a practice, and if a remedy cannot otherwise be provided for the evil, I trust the aid of the Legislature may be obtained for the purpose.—I remain, gentlemen, yours very faithfully and obliged,

"Thomas Lefroy."

The members of the deputation, after the presentation of the address, were hospitably entertained at a handsome luncheon provided for them.—*Exchange.*

COMMISSION IN ENGLAND FOR A DIGEST OF THE LAWS.

The *Gazette* of Tuesday last contains the announcement that the Queen has been pleased to appoint the Right Hon. Robert Monsey, Baron Cranworth, the Right Hon. Richard, Baron Westbury, the Right Hon. Sir Hugh M'Calmont Cairns, Bart., a judge of the Court of Appeal in Chancery, the Right Hon. Sir James Plaisted Wilde, Bart., Judge Ordinary of the Court of Probate and Divorce, the Right Hon. Robert Lowe, Sir W. Page Wood, Knt., a Vice Chancellor. Sir George Bowyer, Bart., Sir Roundel Palmer, Knt., Sir John George Shaw Lefevre, K. C. B., Sir Thomas Erskine May, K. C. B., William Thomas Shave Daniel, Esq., one of her Majesty's counsel: Henry Thring Esq. and Francis Savage Reilly, Esq.; Barristers-at-Law, to be her Majesty's commissioners to enquire into the expediency of a Digest of Law, and the best means of accomplishing that digest, and otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions.

There is but the one opinion as to the expediency . nay, the absolute necessity, for the accomplishment of this difficult. this Herculean task. It is as much for the benefit of the public at large as for the profession in particular that our judge-made law should be brought within easy reference to the practitioner and student by exhibiting it in a compendious and accessible form; by expunging all that is obsolete—all that has been overruled. And as the expense of this great and desirable undertaking will bear some proportion to the extent of the work to be accomplished, which must be paid out of the public treasury, we are interested in seeing that the commission is composed of such practical materials as will afford some reasonable guarantee that the work will be effectively performed. Of the great talent and ability of the body of the commissioners there can be no second opinion. But it is not great talent alone that is required for such a commission as this; we want that practical ability and experience which can advise and suggest, and can overcome the difficulties that must be constantly cropping up: we want a practical mind that has already been engaged upon the analysis, arrangement, and condensation of our law; and we look in vain to the constitution of this commision for such men; indeed they seem to be designedly omitted. — *Solicitor's Journal.*

The celebrated Sarah, Duchess of Marlborough, left Pitt £10,000 for "the noble defence he had made for support of the laws, of England, and to prevent the ruin of his country." A similar bequest was not long since made to Mr. Disraeli.

Chatterton's will was a strange one, consisting of a mixture of levity, bitter satire, and actual despair, announcing a purpose of self-destruction.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Markham v. The Great Western Railway Company.

Railway Act, sec. 147—Horse not "in charge."

The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendant's railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed—*Held*, upon a bill of exceptions tendered in the County Court and error thereon, that the horse was not "in charge of" any person within Consol. Stat. C., c. 66, sec. 14, and that the plaintiff could not recover.

[Q. B., T. T., 30 Vic., 1866.]

Error from the County Court of Essex.

Defendants were sued for killing the plaintiff's horse. The defence was rested on the provisions of Consol. Stat. C., c. 66, secs. 147, 148, 149.

It appeared from the plaintiff's evidence that, just as it was getting dark in the evening, the plaintiff's son, nineteen years old, was riding one horse, leading another, and driving a third horse in front, along a road crossing the railway.

The horse killed was from sixty to one hundred feet in front of the driver. He apparently heard the train and attempted to run across the track, but was killed when he got half way over. It was blowing so hard that the witness could not hear the train till it was close upon him, and heard no whistle till the train was right upon him; it had just commenced to rain; he said he did not take much notice about the train.

On this it was objected that the plaintiff must fail; that the horse was at large, and not "in charge of" any person, &c., under the statute.

The learned judge, however, left the question to the jury, who found for the plaintiff.

The defendants tendered a bill of exceptions, upon which error was brought to this court.

Irving, Q. C., for the defendants.

Prince, Q. C., contra.

The cases cited are referred to the judgments.

Hagarty, J.—The objection comes before us as if on a demurrer to evidence—whether, admitting the truth of the plaintiff's evidence, it was sufficient in law to entitle her to recover.

Was the horse killed "at large," or was it "in charge," within the meaning of the statute?

Cases have occurred under the act in our own courts nearly approaching to the present.

In *Thompson* v. *Grand Trunk Railway Co.* (18 U. C. Q. B. 94), a boy was driving four horses loose before him. He drove them through a gate on a road about sixty yards from the crossing. He tried to get ahead of the horses as he saw the train approaching, but they ran to the crossing and were killed. The late Sir *John Robinson* said: "There could be no stronger case against the plaintiff's recovering, even if there was no such statute in force as the 20 Vic., ch. 12, sec. 16; but with that statute in force, there can be not the slightest room for doubt, for we consider it clear that upon the facts proved these horses cannot be held to have been *in charge* of the boy within the meaning of the statute, so that he could prevent their loitering or stopping in the highway at the point of intersection with the railway. If he had had even one of the four horses secured by a bridle or halter, there would have been rather more pretence for admitting the horses to be in his charge, for the others would probably, though not certainly, have remained near the one he was leading."

In the next case in the same volume, *Cooley* v. *The Grand Trunk Railway Co.*, (p. 96), the plaintiff's servant drove his three horses for them barn to the highway, and along the highway to a watering place existing close to the railway track. He used no halter nor did anything more than drive them loose before him. A train came, and the horses ran on and along the track, and one was killed. It was held that the plaintiff could not recover; the same learned judge saying it was clear that the plaintiff's horse when it got upon the railway was not in charge of any person within the meaning of the statute.

We cannot distinguish the case before us from those cited, unless the fact that the plaintiff's servant was riding one horse and leading the others, will enable us to say that the third horse allowed to go loose in front was in his charge.

In the first case cited the Chief Justice notices, without deciding, the aspect of such a state of facts. He says there would have there been rather more pretence for admitting the horse to have been in charge. We are unable to see how the horse driven from sixty to one hundred feet in front of the others, which doubtless were duly "in charge," can be said to have been properly under the man's control. The event shewed his utter inability to prevent the animal running on or across the track. Common sense would suggest that in the dusk of the evening a train rushing rapidly past the point that the witness was approaching, would startle a horse so driven, and render him quite unmanageable.

If animals usually driven—viz.: oxen, pigs or sheep—have to approach or cross a railway, we should naturally consider them as "in charge" when the person or persons driving them could readily head them off or turn them if necessary from the track; but a mounted man leading a second horse would be, as happened here, quite unable to stop a horse driven before him and allowed to be from fifteen to twenty-five yards in front. He would be at least equally helpless while he had to manage his own horse and that which he was leading, and at the same time prevent the animal some distance before him from rushing forward to the track, as if he were on foot with all three horses loose before him.

We had occasion in a former case of *McGee* v. *The G. W. R. Co.* 23 U. C. Q. B. 293, to notice the large object of public safety contemplated by the legislature in making this most salutary provision respecting cattle. See also *Studer* v. *Buffalo and Lake Huron Railroad Co.*, *ante*, p. 163. It should not be frittered away by such distinctions as are sought to be established between this and the decided cases.

We think the horse was not under that control and care which a due regard to the lives of the travelling public (if not to railway corporations) required its owner to have provided for it at the time it was killed by defendants' train; and that the appeal to this court must be allowed, and the judgment below be reversed.

Draper, C. J.—I agree in the views expressed by my brother Hagarty, and based upon the judgments of this court given when Sir John Robinson presided over it.

The result of those decisions I take to be, that horses which are driven near or across the railway loose, without halter, bridle, or other similar fastening, and therefore under no actual present check or holdfast, and are not so close to their driver as to be under his immediate manual control and restraint, are not "in charge" within the spirit and meaning of sec. 147 of "*The Railway Act*" of this Province.

Hence where the evidence for the plaintiff clearly and decisively shews that a horse for the killing of which by their locomotive, &c., an action is brought against a railway company, was not so in charge, the judge presiding at the trial ought, as a matter of law, to rule that the company have incurred no liability whatever.

Courts and juries should never lose sight of what has been so properly averted to by my learned brother as the object of the provisions in this respect of the Railway Act. It was not merely to protect these companies, but to prevent the recurrence of those frightful catastrophes, so dangerous and destructive to passengers on railway trains, which have been caused by horses and cattle getting upon the railway track. By throwing the responsibility upon the owners of permitting their horses, sheep, swine or other cattle, to be at large upon any highway within half a mile of the intersection of such highway with any railway or grade, unless such cattle are in charge of some person, and depriving them of any remedy against the railway company in case of their cattle, &c., being killed, the legislature make it their interest to diminish one of the risks to which the public are exposed in making use of the railway.

Appeal allowed.

The Corporation of the City of Toronto v. The Great Western Railway Company.

Railway—Assessment.

The Court of Revision confirmed the assessment of a lot of land occupied by a Railway Company at $1200 annual value, and assessed the station built upon it at $1500, and the County Court judge being appealed to, confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court," whether after the valuation of the land had been fixed in accordance with Sec. 30 of the Assessment Act the building could be added. *Held*, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision.

[Q. B., T T., 30 Vic., 1866.]

Special Case. The assessors for the City of Toronto assessed certain land and premises belonging to the Great Western Railway Company, who appealed to the Court of Revision, who assessed the land itself at an annual value of $1200, and also assessed the large frame Railway Station erected upon the same lot of land at an annual value of $1500.

It was stated in the case that the land in question, bounded by Scott street on the east, Esplanade street on the south, Yonge street on the west, and a lane on the north, was a lot on the whole of which the company had erected a building, which, together with the land, was used entirely for railway purposes: that through the building were laid several railway tracks, and on each side thereof, all being upon the premises in question, were placed buildings used for freight-shed, clerk's office, waiting room for passengers, baggage room, &c., &c, the building on each side of the track being connected by a roof, and all forming a railway station, being the terminus of the Great Western Railway in Toronto, and no part being used except for railway purposes.

From this assessment the Great Western Railway Company appealed to the judge of the County Court, who confirmed the assessment of the land at an annual value of $1200, and decided that "subject to the question whether such property could be assessed in addition to the value of the land as previously assessed, by a building thereon used for railway purposes, he confirmed the value of the large railway station at the sum," &c., (as the Court of Revision had done) "and left for the determination of a higher court whether, after the valuation of the land had been fixed in accordance with the 30th section of the Assessment Act, there was or was not power to add thereto the value of the buildings of the nature in this case described."

The city brought an action for the two amounts which had been imposed as rates upon these separate annual values, and this, by consent of the parties, and by a judge's order, was made a special case for adjudication by this court without pleadings, the question submitted being "whether the company can be assessed for the value of the buildings used and occupied for railway purposes under the provisions of the Assessment Act, when the land occupied by the railway upon which such buildings rest has been already assessed at the average value of land in the locality as land used for railway purposes.

C. Robinson, Q C., for the plaintiffs, cited *Great Western R. W. Co.* v. *Rouse*, 15 U. C. Q B. 168; *Municipality of London* v. *G. W. R W. Co.*, 17 U. C. Q. B. 264; Consol Stat. U. C. c. 56, sec. 30.

Irving, Q. C., for the defendants cited *In re Great Western R. W. Co.*, 2 U. C. L J. 193; *Regina* v. *Glamorganshire Canal Co.*, 3 E. & E. 186; *Cother* v. *Midland R. W. Co.*, 2 Phillips 469.

Draper, C. J., delivered the judgment of the court.

This action seems very like an attempt to make this court a tribunal to review the determination of the judge of the County Court under the Assessment Act, the 64th and 68th sections of which appear to us to intend that his decision shall be final.

Supposing that the learned judge of the County Court had simply confirmed the decision of the Court of Revision, we do not imagine it would be questioned that neither in this nor in any other form could his judgment be reviewed. But in place of a simple confirmation the case states that the learned judge has confirmed it, subject to the question left for the determination of a higher court whether he is right in confirming it or no. We think this is in law a confirmation, and the reservation is inoperative, for the first was his duty if that was the conclusion he arrived at, and the latter was not contemplated or

authorized by the statute. We assume he intended to confirm because he has said he has confirmed, though he has desired to subject his opinion to review or even reversal. But either he has confirmed or he has not discharged the duty cast upon him by the legislature, for he certainly has neither varied nor reversed the decision of the Court of Review.

As to the question itself, as at present advised, we do not think it would be found to present any great difficulty, and if the city assessors or the Court of Revision had put the two annual values into one, as forming the whole valuation of the "land," though there might have been an appeal to the County Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how, under the statute, his decision could have been brought in question.

But for the purpose of determining this case as presented, we have no objection to state our opinion that the judge of the County Court has confirmed the assessment as revised by the Court of Revision, and we think this court cannot review or annul his adjudication.

Judgment for the plaintiffs.

PRACTICE COURT.

(Reported by Henry O'Brien, *Esq., Barrister-at-Law and Reporter in Practice Court and Chambers.)*

Randall et al. v. Burton et al.

Action on bond—Limit of amount to be recovered—Penalty.

Action on bond payable by instalments. Judgment was entered for the amount of the penalty. Proceedings were had from time to time by *sca. fa. Held* that the defendants were bound to pay the expense of levying the sum due but that the whole amount he plaintiffs were entitled to recover is limited to the penalty.

The plaintiff may not charge interest on the penalty, or amounts remaining due thereon.

[P. C., M. T, 1866.]

The plaintiffs brought an action against the defendants on a bond made in the penal sum of $3,000, subject to a condition for the payment of $2,782 48 in five equal instalments of $556 53, together with interest on the whole amount remaining due at the time of the payment of each instalment; that judgment was recovered and entered on the 25th November, 1864, for $3,000 debt, 1s. damages for the detention, with costs to the amount of 40s., and $82 43 costs of suit; that the breach assigned in that action was the non-payment of the first instalment with interest and damages, which were assessed at $758 65; that the plaintiffs afterwards, on the 1st December, 1864, sued out a writ of *scire facias* on the judgment, and suggested or assigned two further breaches of the condition of the bond, viz: for the non-payment of the second and third instalments with interest, amounting to $1,380 18; that afterwards on the 6th June, 1865 the plaintiffs sued out another writ of *scire facias* on the judgment, and suggested a further breach of the said conditions, viz: for non-payment of the 4th instalment, amounting with interest to $651 13. That these three sums of $758 65 $1,380 18, and $651 13, making in all $2,789 95, were fully paid and satisfied to the plaintiffs, and that the defendants also fully paid and satisfied the costs of the judgment, and also the costs of the writs of *scire facias* and proceedings had thereon, and of all executions issued thereon, and the defendant also paid the sum of $50 for levying the said sum of $1,380 18. It further appeared that the plaintiffs on the 1st June, 1866, issued another writ of *scire facias*, and suggested as a further breach of the conditions of the said bond the non-payment of the fifth and last instalment of $556 57, and interest on that amount for one year, which amount the plaintiffs claim to be payable to them with the costs on this last proceeding, which were taxed at $40 93. On the other hand the defendants contended that all they were liable to pay was the amount of the costs, and the difference between $3,000, the penalty of the bond for which judgment was entered, and the sum of $2,839 85 they previously paid, and which included the $50 expenses of levying above referred; contending that that sum of $50, under the statute of 8 & 9 Wm. III. c. 11, sec. 8, is to be taken and credited as part payment of the judgment, and that in that case as the master reports, only $160 15, would remain unpaid upon the judgment. The defendants paid the sum of $160 15, as well as the $40 93 costs, to the plaintiffs' attorney, and that under an order of Mr. Justice John Wilson, they paid into court a sum of $50 for the plaintiffs, should the court be of opinion that the defendants were not entitled to have or take credit for the $50 which they paid on account of the levying the sum of $1,380 18 already mentioned.

In Michaelmas Term last *S. Richards*, Q.C., obtained a rule calling upon the plaintiffs to shew cause why all proceedings on the judgment in this cause, or upon or under the writ of *scire facias* issued on said judgment, should not be stayed, and why satisfaction should not be entered on record of the judgment rule in this cause, on the ground that the said judgment and the bond upon which the same was recovered have been fully paid and satisfied; and why the sum of $50 paid into court under the order of Mr. Justice John Wilson should not be paid out to the defendants, on the ground that said judgment had been satisfied exclusive and independent of said sum so paid into court.

The rule was drawn up on reading the Master's report, and affidavits and papers filed.

M. C. Cameron, Q. C., shewed cause, and contended that after a judgment on a bond the amount of the judgment, not the penalty mentioned in the bond, must be looked at. The judgment becomes the debt, and the defendant must discharge that and its incidents without reference to the amount of the penalty. The defendant applies necessarily to the equitable jurisdiction of the court, and must satisfy everything that can reasonably be said to be included in the obligation. He cited *McClure* v *Dunkin*, 1 East. 436. As to the costs they always follow the judgment, and our statute gives interest on a judgment after recovery.

S. Richards, Q. C., supported his rule. The plaintiff cannot go beyond the penalty in the bond under the statute of Wm. III. upon which these proceedings were taken, the costs are part of the debt. The penalty in this bond, which is payable by instalments, must necessarily be the limit of the claim. It might be

different if it were a simple bond upon which judgment could be recovered and execution issued in the ordinary manner without proceeding by *scire facias*. He referred to 1 Saund 58 *b*, and Foster on *Scire Facias*. The statute which gives interest on a judgment does not apply in cases like this, where execution cannot issue for the whole amount of the judgment recovered, and where proceedings by *scire facias* must be had.

He contended that the case of *McClure* v. *Dunkin* was not analogous, and cited *Wilde* v. *Clarkson*, 6 T. R. 304; *Brunscombe* v. *Scarborough*, 6 Q. B. 13; *White* v. *Sealy*, Dougl. 49.

Morrison, J.—The only point on which I had any doubt was with regard to the $50 expenses of levying, arising from the peculiar wording of the 8th section of the Statute of Wm., and from what is said in Foster on *scire facias*, page 39; but I think, under the 270 sec. of our Common Law Procedure Act, which provides that upon *any* execution against the person, lands, or goods the sheriff may, in addition to the sum recovered by the judgment, levy the poundage fees, expenses of the execution, &c., as well as from the reason of the thing, that the defendants were liable to pay such expenses over and above the amount of the penalty; and I think I am borne out in that view from what is said in Bac ab. 2 vol. 335, Title Costs, L.: "If the judgment be for a penalty the plaintiff has a right to recover the whole of his debt, independent of the expenses of the execution, which in that case must be sustained by the defendant," and refers to marginal note "a," which cites 43 Geo. III. c. 46, s. 5, which is a provision almost similar to the Common Law Procedure Act, sec. 270. It seems to me it would be very unreasonable were the rule otherwise. I am therefore of opinion that the defendants were not entitled to apply the expenses of levying in reduction of the amount due on the penalty. As to the other point, the whole current of authority shows clearly that the plaintiff having sued on his bond and having recovered judgment for the penalty, under the statute of Wm., the whole amount he is entitled to recover is limited to the penalty, which in the present case is $3,000. The plaintiffs also contended on the argument that they were entitled to compute and charge interest on the penalty and the amounts remaining due thereon from time to time. No authority was cited to support that view, nor can I find any; while the principles upon which all the decisions rest go to show the contrary; see *Clark* v. *Seton*, 6 Ves. 411. I am therefore of opinion that the $50 paid into court should be paid to the plaintiffs. That all further proceedings in this cause be stayed, and that satisfaction be entered of record on the judgment roll in this cause. As the question is a new one, no costs are allowed to either party on this application.

Wilson et al v Dewar.

Interpleader—Notice of trial—Affidavit of merits.

Notice of trial is as essential in interpleader and feigned issues as in ordinary cases.

[P. C., M. T., 1866.]

This was an interpleader issue, the order in which was made on the 18th day of May last, whereby it was ordered that the claimants should be the plaintiffs and the execution creditor the defendants, and that the usual issue was to be prepared by the plaintiffs, and that it should be tried at the then next assizes for the county of Halton. The issue was entered for trial at Milton assizes, and a verdict taken for the plaintiff, no person appearing on the part of the defendant. No notice of trial was served or given by the plaintiffs to the defendant, or his attorney, of the intended trial.

During last Michaelmas term, *Beaty* obtained a rule *nisi*, to set aside the verdict for irregularity, with costs, on the ground that the issue herein was entered for trial without any notice of trial having been given.

M. C. Cameron, Q. C., shewed cause.

Notice of trial is not essential in interpleader cases. The order directed the issue to be tried at a particular assize, and the making up, delivery and return of the issues is in itself a sufficient notice of trial. Even if a notice is necessary, a verbal one, under the circumstances, was sufficient, and that was given, as appears by affidavits filed.

As to the practice laid down in Ch. Arch., p. 903 (1866), the direction there given is under a statute different from ours, and the order there would not state *when* the trial would take place. No case is cited in support of the Editor's position. The defendant's affidavit of merits is also insufficient. In case of decision being adverse, he would ask that the order might be amended to allow the plaintiff allowed to go down to trial at the next Halton assizes.

He filed affidavits to account for the want of notice, and shewing that the parties were practising on easy terms.

Beaty, contra.

As to affidavit of merits in interpleader cases, and the necessity for same in moving against verdicts, see *Proudfoot* v *Harley*, 11 U. C. C. P. 389; *Vidal* v. *Bank of Upper Canada*, 15 U. C. C. P. 421; *Consumers' Gas Co.* v. *Kissock*, 5 U. C. Q. B. 542.

The practice has always been in this country and England, to give notice of trial in interpleader cases. He referred to Ch. Arch., p. 90, and p. 1398, to be read in connection therewith, Verbal notice is insufficient, see R. G., No 131. and even if parties on easy terms, it would make no difference.

As to the terms which were asked to be imposed, he cited *Sewell* v. *B. B. & G. R. W. Co.*, 3 U. C. L. J. 29.

Morrison, J.—The only question to be determined is, whether in interpleader cases a notice of trial, as in other cases, is necessary. I can find no direct authority; but the text-books, in referring to notices of trial, say it must be given in all cases: Lush 492, and in Arch. Prac., 11 ed., p. 891, under the heading of "Proceedings upon a feigned issue," the practice is said to be after the issue is settled between the parties to indorse on the copy served a notice of trial, as in ordinary cases; and in looking into Gilbert's Bills of Costs, in Sheriff's Interpleader Cases, I find the charge for the notice of trial; and the Master here informs me, the practice is to give

notice of trial, and it is allowed as a taxable item.

Then, as to the contention of the plaintiff's that it is unnecessary to serve notice of trial, as the judge's order states that the issue shall be tried at the particular assizes. In cases of peremptory undertakings to try at particular sittings, a fresh notice of trial is required: 1 H. B. 222; 1 Dowl., P. C. 148—same vol. 444; and in *Ellis* v. *Trusler*, 2 W. B. 798, it was held that a notice of trial must be given by plaintiff, notwithstanding a special day is fixed for the trial by rule of court. The plaintiff in the issue has the conduct of the cause; it is his duty, I take it, to enter the record for trial; he may decline to go to trial or contest the right of the defendants, and it is only reasonable and certainly convenient that he should give a notice of trial, in order that the defendants may prepare for the trial of the issue; any other practice would lead to confusion and uncertainty. I am therefore of opinion that a notice of trial was necessary, and as the plaintiffs did not give such notice, this rule must be made absolute with costs. As the assize mentioned in the interpleader order has passed, and considering the special circumstances mentioned in the affidavit filed by the plaintiffs, it will be part of the rule that the issue shall be tried at the next assize for the county of Halton, and that the interpleader order must be amended accordingly.

COMMON LAW CHAMBERS.

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

Anonymous.

Ejectment—Con. Stat. U. C., cap 27. ss. 57, 58—Lease with right of purchase—Holding over.

The defendant went into possession as tenant of A. under a lease with a right to purchase at a certain sum. He elected to purchase and remained in possession for about a year after the determination of the lease, when plaintiff, the mortgagee of the lessor, brought ejectment and demanded security for costs and damages, as against a tenant overholding.

Held, 1. That the plaintiff was entitled to the relief asked, as the defendant's character as tenant had not been that of a vendee. 2. That it made no difference that the plaintiff was mortgagee of the lessor.

[Chambers, 1864.]

This was an action of ejectment.

The plaintiff obtained a summons calling on the defendant to show cause why the defendant, within such time as the presiding judge in Chambers should fix, should not enter into a recognizance, by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages, which might be recovered by the claimant in this action, in pursuance of the provisions of the statute in that behalf

The plaintiff filed a lease made, dated the 15th of May, 1860, between A. of the first part, and the defendant, described as a Barrister-at-law, of the 2nd part, by which A let the premises in question in this cause to the defendant for three years at the rent of £50 payable quarterly.

There were the usual covenants to pay rent, &c. &c.

The lease then concluded with a clause that the defendant should have the right of purchasing the premises at any time during the term that he might elect for £837 10s.

A covenanted for himself, his heirs or assigns, that he or they would, at any time during the term, whenever the defendant should signify his intention to purchase, by mailing a notice of such intention addressed to A. at his last place of residence in Canada, sell and convey in fee simple, free from dower and all other encumbrances whatsoever, the said premises to the defendant in fee for the sum of £837 10s, payable by the defendant after having made such election to purchase.

It was sworn that the defendant had enjoyed the premises during the said three years, and that his interest had expired.

That some short time before the expiration of the lease the defendant gave notice to A. of his intention to purchase the premises, and demanded an abstract of title; which the defendant says he proceeded to have made out but had great difficulty in making it.

That about the 29th of September, 1863, the abstract was served on the defendant—that it was afterwards corrected and served again about the 13th October thereafter, and that he has taken no objection to it.

The affidavit then set out various facts bearing upon the case and material to be considered, because they have not been answered by the defendant, to the effect that the defendant never had any intention of purchasing, and was not acting in good faith, and was insolvent.

The ejectment summons was issued on the 28th of April, 1864, and served on the 30th of the same month.

Before the writ was sued out possession was demanded of the defendant, but he refused to give it up.

He was also served with a notice informing him that he would be required to give security for the costs and damages of this action.

The defendant appeared to the writ and put in a notice of title, by which he denied the plaintiff's title, and set up title in himself, under the agreement to purchase.

John B. Read showed cause, and insisted on the right to purchase upon which the defendant had acted, having put an end to the relation of landlord and tenant between the parties, and therefore the defendant, although it were admitted he was holding possession without a legal title, was yet not holding over his possession as a tenant after the expiration of his tenancy, and could not therefore be called upon to give the security demanded of him; but whatever A. might have been entitled to, this claimant was never entitled to, as he was not the lessor.

Hector Cameron for the plaintiff, contended that the existing demise by deed was not put an end to at law upon the election made by the defendant to purchase; that this lease expired by efflux of time, notwithstanding the election so made, and the defendant having remained in possession after the expiration of his tenancy, was a person holding over within the meaning of the statute. He referred to *Robinson* v. *Smith*, 17 U. C. Q. B. 218; *Henrehan* v. *Gallagher*, 10 Grant 488, and afterwards on appeal

Adam Wilson, J.—The defendant had a term created by deed for three years from the 15th of May, 1860, which would therefore continue to subsist for that period as a valid and legal estate unless expressly determined by surrender or other effectual method.

The defendant contends that the election which he has exercised to purchase the property in fee simple has so put an end to the term of years, so that from the time when he gave notice of his election to purchase he no longer stood in the relation of tenant for years to the owner of the reversion but in the character of a vendee of the freehold, and when the three years expired by lapse of time that he did not then hold over as a tenant against his landlord, but was in possession as such vendee.

The statute cap. 27 of the Consolidated Statutes for U. C., sec. 57, enacts to the effect following: In case the term or interest of any tenant of any lands, holding the same under a lease or agreement in writing for any term or number of years certain or from year to year expires, or is determined either by the landlord or tenant by regular notice to quit, and in case a demand of possession be made upon the tenant, or any person holding under him, and in case the tenant or person refuse to deliver up possession, and the landlord thereupon proceeds by action of ejectment to recover possession, he may at the foot of the writ address a notice to the tenant or person requiring him to find such if ordered by the court or a judge.

Sec. 58. Upon the appearance of the party, . . . and upon the landlord producing the lease or agreement, and upon affidavit that the premises have been actually enjoyed under the lease or agreement, that the interest of the tenant has expired, and that possession has been lawfully demanded, the landlord may move the court or apply to a judge for a rule or summons for the tenant or person to show cause why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which may be recovered by the claimant in the action; and the court or judge may on cause shown, or on affidavit of the service of the rule or summons if no cause be shewn, make the same absolute in whole or in part, and order such tenant or person within a time to be fixed upon, on consideration of all the circumstances, to find such bail with such conditions and in such manner as shall be specified in the rule or summons, or the part of the same so made absolute.

When the defendant elected to buy under the provisions of the lease his right to purchase was the reversionary interest, he did not then necessarily and immediately put an end to his estate for years. In equity no doubt he did do so, or perhaps it might rather be that he would do so or not according as the vendor would or would not be able to perfect the title, and until it was known whether this would be done or not the term would be in suspense and the rent also, as consequent upon it. It might not be beneficial to the tenant that his term should be absolutely determined by his election to purchase without any regard to whether he was to get the benefit of his purchase or not; for in this manner he might lose the interest on a long beneficial leasehold merely by electing to buy the reversion, while the vendor might never be able to perfect his title to it during the time of the treaty for the purchase of the reversion. The term and rent would in equity probably both be suspended, and the tenant would during such suspense be in as a vendee and at interest instead of rent: *Townley* v. *Bedwell*, 14 Ves. 591.

Besides this it is clear that A had first to make a good title to the defendant before their relative positions were to be altered, for he is to convey free from all encumbrances, and the defendant is to pay the purchase money after electing to purchase, and "immediately upon receiving such conveyance free from all encumbrances"

The mere election to purchase, particularly where from a title having to be first made perfect by the vendor, or from any other cause, the tenant may never be bound to accept the reversion does not operate as a surrender of the term, the term still subsists: *Doe d. Grey* v. *Stanion*, 1 M. & W. 695; and rent is still distrainable at law for the same: *Torte* v. *Darby et al*, 15 M. & W. 601. The term, however, would expire by efflux of time on the 15th of May, 1861

The question then arises, to what claim is the defendant's prolonged possession referable?

Is it in right of his agreement to purchase, or is it a mere tortious holding over after the expiration of his tenancy?

He was never let into possession as a vendee. He had the right of possession as a tenant when he elected to become a vendee, and his holding over after the term cannot, without the consent of his landlord, be converted by the defendant into an actual assent by the landlord to the rightfulness of such an occupation, commenced at a time when the landlord could neither give nor withhold his consent.

It appears from the papers filed that the defendant, whatever the landlord meant, intended to keep the possession as a vendee, presuming he had the right to do so, but I think the affidavit filed requires me to consider the proceedings of the defendant with a good deal of caution.

In an ordinary case I might feel much difficulty in saying that the possession of a person having the right to purchase and having elected to purchase, being in possession for about one year after the determination of his lease before the landlord disputed his possession, and negotiating all this time respecting his rights as vendee, was and could only be in the possession of such person as a tenant wrongfully holding over. Yet on the facts of this case and the character of the defendant's possession not being a fact or act in law, but a matter of fact only, to be ascertained and determined by the circumstances, I do not think I can say that his character of tenant has ever been clearly and irrevocably altered, so that I think I ought to hold that this defendant is still a tenant wrongfully holding over the possession against his landlord, and that he is within the provisions of the statute in question.

I find no difficulty in extending the same rights to this claimant, who is a mortgagee in fee from A., the lessor, under a mortgage executed before the defendant's lease expired, which I would have extended to A. if he had still continued the landlord, although this is the ground upon

which Mr. Read most strongly opposed the present application.

The defendant should therefore be ordered to find security for the equivalent of the rent at $200 a year from February, 1863, when it was last paid till November, 1864, when possession may, if it can be, be recoverable, making $350; and in the further sum of $100 for the costs of the suit, making a total of $450. The recognizance will be in a penalty in double this amount, conditioned for the payment of the costs and damages of the suit The two sureties must also become responsible in the like penalty, but in the same recognizance jointly and severally for the due payment of the costs and damages of this suit, and that this recognizance and security be perfected by the sixteenth day of July instant.

In re Lamb, an Insolvent.

Insolvent Act of 1864—*Application by insolvent for discharge —Fraudulent preference—Neglect to keep proper books of accounts—Measure of punishment.*

It appeared, on an application by an insolvent for his discharge under the Insolvent Act of 1864, that he had within three months before his assignment paid one of his creditors in full under such circumstances as was considered to amount to a fraudulent preference and had neglected to keep proper cash books or books of account suitable to his trade. The County Judge granted a discharge suspensively, to take effect four months after the order made.

Upon an appeal from this order by a creditor the judge in Chambers thought that the judge below had acted with extreme leniency, and though he would not interfere with the order that he made, dismissed the appeal but without costs.

Remarks upon the breach of duty in not keeping proper books of account which should be severely punished.

The requirements of the act on debtors asking for discharge should be peremptorily insisted on.

[Chambers, Nov. 27, 1866]

The facts of this case are fully set out in the petition of the creditors of the insolvent, who appealed against the order made by the judge of the County Court of the United Counties of Lennox and Addington, granting to the above insolvent a discharge, suspensively to take effect on 1st February, 1867.

The petition stated:

That the above named insolvent, Thomas Lamb, on the first day of June, in the year of our Lord 1865, made an assignment under the Insolvent Act of 1864, to Henry Thorp Forward, of the Town of Napanee, in the County of Lennox and Addington, Esquire.

That the petitioners were at the time of the said assignment, and previously thereto, and have ever since been, and still are creditors of the said insolvent to a large amount, and duly proved their claim against him before the said assignee within the time and in the manner prescribed by the said Act

That the insolvent gave notice of his intention to apply to the judge of the County Court of the Counties of Lennox and Addington on the tenth day of August, A.D. 1866, for a discharge under the said Act; and on that day he presented to said judge in his Chambers, in the Town of Napanee, a petition for such discharge by his attorney *ad litem*, which said petition was in the words and figures following, that is to say:

"Insolvent Act of 1864.

"In the County Court of the Counties of Lennox and Addington.

"*In the matter of Thomas Lamb, an insolvent.*

"The petition of Thomas Lamb, of the Town of Napanee, in the Counties of Lennox and Addington, Merchant,

"Humbly sheweth,—That your petitioner made an assignment under the Insolvent Act of 1864, to Henry T. Forward, Esquire, official assignee, which assignment bears date the first day of June, in the year of our Lord one thousand eight hundred and sixty-five.

"That one year has elapsed from the date of the said assignment, and your petitioner has not obtained from the required proportion of his creditors a consent to his discharge.

"That your petitioner has given notice of his intention to apply for his discharge according to the provisions of the said act, and has complied with all the provisions and requirements of the said act

"Your petitioner therefore prays that he may obtain an absolute and final discharge under the above mentioned act.

"Dated at Napanee this 10th day of August, A.D. 1866.

That on the said tenth day of August, at the time of the presentation of the said petition, the petitioners appeared, by William Albert Reeve, of the Town of Napanee, Esquire, their counsel, and opposed the prayer of the said petition. Petitioners, examined the said insolvent upon oath before the said judge.

That after said insolvent had been so examined and had been cross-examined by his attorney *ad litem*, the said application was adjourned until the tenth day of September, A.D. 1866 to enable the petitioners to produce certain witnesses for the purpose of examining them before the said judge on the said application, and upon the said tenth day of September the said William Albert Reeve did produce certain witnesses before the said judge, and examined them on behalf of the said petitioners touching the affairs of the said insolvent, which said witnesses or most of them were cross-examined by the attorney *ad litem* for said insolvent. [A copy of the examinations of the insolvent and the witnesses was annexed, but the matter of them is sufficiently stated hereafter]

That after hearing the evidence and the arguments of counsel for the said insolvent, and for the petitioners and other creditors of said insolvent, the said judge of the County Court of the County of Lennox and Addington, on the sixth day of October, A.D. 1866, in presence of counsel aforesaid, delivered his judgment in writing upon the matter of said application as follows:

"In the matter of Thomas Lamb, an insolvent

"The petioner made his assignment on 1st June, 1865, and having been unable to obtain a composition and discharge from his creditors, now seeks for an order from the court granting his discharge

"The prayer of his petition is opposed by several creditors on the grounds of fraudulent retention or concealment of part of his estate, prevarication and false statements in examina-

tion, fraudulent preference of particular creditors, and lastly, of deficient books of account.

"On hearing the parties and attentively considering the facts disclosed on the insolvents examination before me, I see no reason to believe that he has fraudulently concealed or retained any part of his effects, nor do I think that he was guilty of any prevarication or false statements, on the contrary the insolvents conduct since his assignment seems to me to be fair and honest, and not liable to the censures attempted to be cast upon it.

"There are, however, two charges made against the insolvent respecting his conduct before the assignment to which no answer appears to be given. It is shewn that in the month of April, 1865, within less than three months before the assignment, the insolvent being indebted to his shopman, McCan, in $300 for wages and borrowed money, gave him promissory notes of his customers to the amount of $400, in full satisfaction of the debt There can be no doubt that this transaction was wholly illegal and amounted to a fraudulent preference; however natural it may be for a man pressed by his servant, who was also his creditor, for wages and loans to satisfy such a claim in the way the insolvent did, yet the provisions of the Insolvent Act of 1864 clearly point out that such a payment is a fraud upon the other creditors

"The second charge made against the insolvent is, that he did not keep a cash book nor other sufficient books of account suitable to his trade, which is not denied by the insolvent

"Under these circumstances, although I do not consider with the creditors, that the insolvent should never be discharged at all, yet it seems right that some penalty should be inflicted in consequence of the faults committed by him in the above mentioned instances I therefore order that his discharge shall be suspended until 1st February, 1867, and will sign an order granting his discharge suspensively to take effect on that day"

That in accordance with the said judgment the said Judge granted and signed an order, bearing date on the said sixth day of October, A. D. 1866, as follows:

"INSOLVENT ACT OF 1864.

"In the matter of Thomas Lamb, an insolvent.

"Whereas, Thomas Lamb, of the Town of Napanee, in the County of Lennox and Addington, Merchant, made an assignment under the Insolvent Act of 1864, bearing date upon the first day of June, in the year 1865; and whereas after the expiration of one year from the date of the said assignment, having given due notice thereof, and having in all respects complied with the provisions of the said Act, the said Thomas Lamb did on the tenth day of August, in the year one thousand eight hundred and sixty-six, present his petition to me, James Joseph Burrowes, Judge of the County Court of the County of Lennox and Addington, praying for his discharge under the said act, and whereas the said insolvent has undergone a full examination before me touching his affairs.

"Now therefore I, the said judge, after hearing the said insolvent and such of his creditors as objected to his discharge, and all the evidence adduced as well on the part of the said creditors as of the said insolvent, and having duly considered the said allegations and proofs, do hereby according to the form of the said Insolvent Act grant the discharge of the said Thomas Lamb suspensively, and do order that such discharge shall be suspended until and shall go into operation and have effect upon and after the first day of February, in the year one thousand eight hundred and sixty-seven.

"Witness my hand," &c

The petitioners being dissatisfied with the said order and decision, made an application to a judge of one of the Superior Courts of Common Law, presiding in Chambers in Toronto, to be allowed to appeal from the said order and decision, and on the seventh day of November, A.D. 1866, an order was granted by the Chief Justice of Upper Canada, allowing the petitioners to appeal to one of the judges of the Superior Courts of Common Law in Chambers from the said order.

That since the allowance of the said appeal, and within five days therefrom, the petitioners gave security in the manner required by the said Insolvent Act of 1864, that they would duly prosecute the said appeal, and pay all costs

The petitioners therefore prayed that the said order and decision of the judge of the County Court of the County of Lennox and Addington might be revised, and the same reversed and the discharge of the said insolvent, Thomas Lamb, under the said act might be absolutely refused, or that such order be made in the matter as should seem meet.

Osler for the appellants.
Holmested for the insolvents
No cases were cited by either party.

HAGARTY J.—The learned judge below considered the insolvent's conduct to be reprehensible in not keeping proper books of account, and suspended his discharge for six months I do not think it wise to interfere with the exercise of such a discretion on the part of a judge who has heard the examination of the insolvent and been cognizant of the various proceedings in the case, except in a very clear case in which the appellate jurisdiction is necessarily invoked to prevent an undoubted injustice.

I think that the learned judge acted with extreme leniency, and possibly took a milder view of the bankrupt's misconduct than I should have done, judging wholly from the papers before me. Had he, with his superior opportunities of forming a correct opinion, passed a much more severe sentence I should certainly not interfere with it on the insolvent's application I think the insolvent's neglect to keep proper books a most serious breach of duty, causing great possible injury to his creditors, and tending to raise strong distrust of his integrity. The evidence of his being a very illiterate man suggests the only possible excuse, and weighed, I presume, with the learned judge It might perhaps be said that it was not very prudent for his creditors to trust a man so unfit for the conduct of business or the keeping of accounts with such large quantities of goods on credit. I do not differ from the learned judge's view as to the alleged preference. As to the neglect to keep proper books I think it would be well always to punish such a

breach of duty in a severe and exemplary manner.

We have in this country in our legislation done everything to favour debtors and render the escape from liability as easy as possible to them. It will be well at all events that the very easy requirements of the Insolvent Act on debtors asking for their discharge should be peremptorily insisted on, and proper punishment awarded to any breach of the trader's duties in conducting his business.

I gladly avail myself of the power given me by sub-sec. 6 of sec 7 of the act, and, while feeling bound to dismiss the appeal, do so without costs

I think Mr Lamb's creditors had just ground for feeling indignant at his conduct and in opposing his discharge, and endeavouring to have some punishment inflicted upon him.

CHANCERY REPORTS.

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

FOWLER v. BOULTON.

Practice—Examination of parties

Where a plaintiff, though duly served with subpœna and the examiner's appointment, does not appear to be examined under 22nd Order of the 3rd of June, 1853, the defendant's motion that he do attend or stand committed, is made *ex parte*, unless the court sees fit to direct notice to be given.

A defendant has a right to examine the plaintiff as soon as his own answer is filed, though there may be other defendants who have not answered; and it is not necessary to serve such other defendants with notice of the examination.

The plaintiff by amending his bill does not postpone his liability to be examined until after the time for answering the amendments expires.

Service on the solicitor of a copy of the examiner's appointment for the examination of a party is a sufficient notice to the solicitor; and it is not necessary that the appointment should name the parties at length.

Two of the defendants in this case, having filed their answers, obtained an appointment from one of the examiners for the examination of the plaintiff under the 22nd General Order of the 3rd of June, 1853, section 7, as regulated by the General Order of the 6th of April, 1857. This appointment was served on the plaintiff's solicitors, and was served on the plaintiff himself with a subpœna *ad test.* The plaintiff did not attend at the time and place named in the appointment, but his counsel attended, and objected that his client was not bound to attend for several reasons which the examiner set forth in a certificate of the facts, and which are stated in the Vice-Chancellor's judgment.

Mr. *McLennan*, for the defendant, thereupon moved *ex parte* for the usual order, that the plaintiff do attend at his own expense and be sworn and examined, or stand committed.

Mr. *S. Blake*, for the plaintiff, being present, was allowed to oppose the motion. He submitted, also, that the motion could only be made on notice.

MOWAT, V. C.—A motion of this kind is made *ex parte* where the person to be examined is a witness; 2 Daniel's Practice, Perkins' ed. 1057; and an *ex parte* motion has been allowed in several cases where the person to be examined was a party to the suit In one case of the latter class notice is said to have been required; but this appears to have been done not on the ground that a notice was necessary, but that the court, in the exercise of its discretion, thought it to be expedient in the circumstances of that particular case. A different rule would increase expense and delay, and would afford additional temptation to unwilling parties to try the experiment of declining to attend, and to put opponents to the inconvenience, trouble and expense which such a course imposes.

The first objection which the plaintiff's counsel made before the examiner was, that the plaintiff had amended his bill since these defendants answered, and that the time for answering the amendments has not expired. I see nothing in the order to sustain this objection. The examination is a substitute for the old practice of filing a cross-bill for discovery; and in such case the rule was, that the defendant to the original bill was not entitled to an answer to the cross-bill until he answered the original bill, but if the plaintiff in the suit amended his bill after the defendant answered, this was no ground for postponing his own answer to the cross-bill. I see no reason why the amendment should have a different effect in this respect under the substituted proceedings which have been adopted in this country.

The second objection was that the plaintiff's solicitors had not been served with sufficient notice of the intended examination, but only with a copy of the examiner's appointment, and that this appointment was entitled "*Fowler* v. *Boulton*," instead of being entitled with the names of all the parties to the suit in full. In proceeding before the Master, before whom all examinations were formerly taken in this country, his warrant is the only notice that is served on the solicitors, 2 Smith's Pract. 149, 2nd Ed. 150, and never gives the full style of the cause, Bennett's Master's Office, p. 1, App. There are many other notices and papers in a cause for which by the English practice this short title is sufficient, 2 Ayckbourne's Chancery Practice, pp 73, 90, 93, 103, to 100. I think there is neither authority nor reason for holding the notice in the present case to be insufficient.

The third objection is, that the defendants who wish to examine the plaintiff have not served the other defendants with notice of his examination; but I see no ground for holding such notice to be necessary: the examination is not evidence against the defendants; the Orders of the Court do not declare that notice of it is to be given to them; if a cross-bill for discovery were filed under the old practice, the other defendants would not have been parties to it; and if, in addition to these considerations, I may compare the convenience of each course, as a guide for ascertaining what the rule is, I think that the balance of convenience is not in favor of what the plaintiff contends for. So also as to the expense. The rule contended for would add to the expense of almost every examination where the defendants do not appear in the suit by the same solicitor, and it would, I think, be very seldom, and only in very special cases, that the opposite rule would, in practice, render necessary the expense of a second examination of the plaintiff.

To these three objections stated to the examiner Mr. Blake, in his argument before me, added a fourth, viz, that the plaintiff is not liable to examination until the answers of the other defendants are in. This objection seems to me to have no better foundation than the others. The analogy in case of a cross-bill is against it. The language of the General Order is not in its favor. This Order provides that any party plaintiff may be "examined at any time after answer: and any party defendant may be examined at any time after answer," &c. It is clear that the expression "after answer," in the second case referred to, does not mean after all the answers are filed; and the fair inference is, that the same expression in the first case had not that meaning either. I think that after any defendant files his answer, the plaintiff may, under the order, examine such defendant, and that the defendant may examine the plaintiff, whatever may be the position of the cause in reference to the other defendants,—over which the plaintiff, and not the defendant, has the control.

An affidavit must be filed of the service of the subpœna and appointment. The usual order will then go.

McNabb v. Nicholl.

Pleading—Pro confesso—Statute of frauds.

The plaintiff by his bill alleged that certain lands had been conveyed to the defendant to hold in trust for the grantors, and that the defendant had not given any value or consideration therefor, the conveyance being made in order to prevent the grantor foolishly and improvidently disposing of or parting with his estate; but did not allege any writing evidencing the trust. The defendant having suffered the bill to be taken against him *pro confesso*.

Held, [Per Vankoughnet, C.] that the facts stated, remaining undenied, were sufficient to enable the court to declare the defendant a trustee, and that it was not indispensible that the bill should allege that the trust was evidenced by any writing.

This was a hearing *pro confesso*. The bill in the cause alleged that Peter McNabb, deceased, having, during his life time, been seized in fee of the east half of lot No 6, in the 4th concession of the township of Erin, containing 100 acres, did, on the 14th of February, 1851, convey this property to the defendant, 'without his giving any value or consideration therefor, and upon trust for him, the said Peter McNabb, and for his benefit, so as to prevent the said Peter McNabb foolishly and improvidently disposing of or parting with the said lot." The bill contained further allegations, to the effect that the conveyance was solely for the purpose of enabling the defendant to hold the lot in trust for Peter McNabb. It alleged the decease of Peter McNabb intestate, and that plaintiff and others were entitled as heirs at law; the occupation of the property by defendant, and his refusal to convey to the plaintiff and other heirs, and the pretence set up by the defendant, that the lot had been conveyed to him absolutely. The prayer of the bill was, that the defendant might be declared a trustee for the plaintiff and the other heirs of Peter McNabb.

On the cause being called on,

Mr. *Crooks*, Q. C., for the plaintiff, asked for a decree as prayed.

Vankoughnet, C.—I entertain no doubt that it was not necessary that the bill should contain an allegation that the trust was evidenced or admitted by writing. The plaintiff states the trust in his bill, and this is all that is necessary for the purposes of pleading. He has then to prove the trust by proper evidence. The question here is, whether any evidence is necessary, the bill not having alleged the trust to be in writing, and the defendant having allowed it to be taken *pro confesso*, or as confessed—or having thus confessed it—though not in writing, as he might have done in an answer. There is no admission in writing here by the defendant, nor is any evidence in writing shewn.

In *Davies* v. *Otty*, 33 Beav. 540, the question arose, or might have arisen, upon demurrer. The bill did not allege that the trust was evidenced by writing. The Master of the Rolls held the bill sufficient and overruled the demurrer. Now, suppose the defendant had not answered, but had allowed the demurrer to stand, I apprehend the plaintiff would have taken his decree as a matter of course, and without evidence. He would not be called upon for proof, and yet the demurrer contained no admission in writing, of the terms of the trust. The effect, I think, of the bill being taken as confessed, cannot be less. It at least amounts to this, that the defendant waives all proof by the plaintiff.

Morley v. Matthews.

Practice—Reference back to Master—Evidence—Correcting report.

Where a reference back to the Master to review his report is directed, the Master is at liberty to receive further evidence,

Where the court on a reference back to the Master, does not mean that he shall take further evidence, the order contains a direction to that effect; unless the reference back is expressed to be for a purpose on which further evidence could not be material.

The court will at almost any stage of a cause make a special order for the correction of slips in a Master's report.

Motion to quash the certificate of the Master at London, on the ground that one of the schedules prepared by the Master had been omitted from his report by mistake.

Roaf, Q. C., and *Chadwick*, in support of the application.

Blake, Q. C., contra.

Mowat, V. C.,—The Master at London made a report in this cause, dated the 10th day of July, 1866, which the plaintiffs appealed against. The first ground of appeal was allowed by consent without argument, and was in the following words: "That the Master should have taken a separate account of the principal or corpus of the estate, and of the income which by the testator's will is charged with legacies, and have allowed against such principal or corpus the proper charges affecting the same, and have allowed as against such income, first, such disbursements as were properly chargeable against the income; second, the annuity to the testator's widow and sister; and, third, the sums payable to the testator's children."

Under the order allowing this objection (12th September, 1865,) the Master has ruled that he may allow as income sums which by his former report he did not allow either as principal or income; but that he is not at liberty to allow

any sums as principal which he did not allow by his former report.

No ground was suggested to me on which this distinction can be supported. If the Master can take an account of further sums of income, he can take an account of further sums of principal, and I think the practice does not require or authorize the exclusion of either. The general rule is that on a reference back to the Master to review his report, he is entitled to receive further evidence. In *Twyford* v. *Truill*, 3 M. & C. 649, Lord Cottenham said: "I have always been of opinion that the Master is entitled to receive further evidence. It seems to me nonsense to refer it back to the Master, unless he is at liberty to receive further evidence; because the conclusion afforded by the evidence already taken might have been drawn by the court without the assistance of the Master." The case of *Livesey* v. *Livesey*, 10 Sim. 331, is to the same effect. I apprehend, therefore, that where the court does not mean that the Master should take further evidence, the order must contain a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could not be material.

The objection of the appellants in the present case that the Master should have taken "a separate account of the principal or corpus," and income, respectively, not that he should by his report have distinguished how much of the amount thereby found was for principal and how much for income I know of no practice that forbids the Master, upon the allowance, simply, of such an objection, to charge for either principal or income sums he had not charged by his previous report.

Whatever may have been the notion in the mind of the gentleman who drew the Reason of Appeal, or in the minds of the counsel who consented to its being allowed, all I can say is that the language employed, the meaning and effect of which alone I have to consider, is not such as by the practice of the court excludes additional charges.

It appears that the only item hitherto excluded by the Master was omitted from his first report by a mere slip, the receipt of the money having been admitted by the accounting party in his accounts brought into the Master's office. The court will at almost any stage of a cause make a special order for the correction of slips of that kind in a Master's report, *Richardson* v. *Ward*, 13 B. 110; *Ellis* v. *Maxwell*, Ib. 287; *Prentice* v. *Mensal*, 6 Sim 271; *Turner* v. *Turner*, 1 J. & W. 39; *Turner* v. *Turner*, 1 Swanst. 154. But the items which may be added by the Master when a report is sent back to be reviewed do not appear to be confined to this class.

The question was argued before me by counsel for all, and I have followed the example of Lord Cottenham in *Twyford* v. *Traill*, 3 M. & C. 649, and expressed my desire of the parties, though this is not strictly regular. No order can be drawn up on the motion except as to costs. I think the costs of the application should be paid by Mrs. Matthews, who has wrongfully resisted being charged with the item which has given rise to the Master's erroneous ruling. See General Order, No. 36, of December 20th, 1865.

Re Owens

Insolvency Act—Appeal.

Notice of the application for an allowance of appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days.

Where the notice was served in time, but named a day for the application, which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable in the discretion of the judge.

This was a motion in Chambers by creditors for the allowance of an appeal from the decision of the County Court Judge, in respect of the insolvent's certificate.

Mr. *Hodgins*, in support of the application.

Mr. *Cattanach*, contra.

Mowat, V. C.—The 9th section of the Insolvency Act of 1864, sub-sec. 12, makes the order of the County Court Judge "final unless appealed from in the manner herein provided for appeals from the court or judge." This manner is pointed out in the 7th section, the 2nd sub-sec. of which provides that the party dissatisfied may in Upper Canada appeal "to either of the superior common law courts or to the Court of Chancery, or to any one of the judges of the said courts; first obtaining the allowance of such appeal .....by a judge of any of the courts to which such appeal may be made."

The third sub-section provides that "such appeal shall not be permitted unless the party desiring to appeal applies for the allowance of the appeal, with notice to the opposite party within five days from the day on which the judgment of the judge is rendered." By the act of 1865, chapter 18, section 15, the delay of applying for the allowance of an appeal is thereby extended to eight days, instead of five.

In the present case the order from which these creditors desire to appeal was made on the 2nd of June The creditors reside in Montreal; the insolvent resides in Guelph; and the notice of application for the allowance of the appeal was served on the 7th, and was returnable on the 9th of June. The notice, therefore, was both served and returnable within eight days from the rendering of the judgment.

Mr. Cattanach, for the insolvent, objects, however, that the notice was insufficient on various grounds The most formidable of these grounds is this:—A subsequent section of the act of 1864, section 11, sub-section 9, provides "that one clear day's notice of any petition, motion or rule, shall be sufficient if the party notified resides within fifteen miles of the place where the proceeding is to be taken, and one extra day shall be sufficient allowance for each additional fifteen miles of distance between the place of service and the place of proceeding" Here, it is said, there has been but one clear day's notice; while the insolvent resides at Guelph, and was therefore entitled to longer notice: and that the notice served was therefore insufficient and irregular, and that the application for allowance should consequently be refused The effect of yielding to this objection would be to prevent any appeal now from the decision complained of.

The notice contemplated by this enactment, according to the construction of this and the other clause which is contended for, would render

all appeals impossible where the party to be notified resides 120 miles from Toronto. It seems necessary, therefore, to hold that, according to the intention of the act, if the service is within the eight days, the application may be for a day subsequent.

It is to be observed also, that the notice specified is declared to be sufficient—it is not declared to be indispensable.

Mr. Hodgins answers these objections by referring to the 13th and 14th sub-divisions of the same eleventh section, which provide, amongst other things, that "no allegation or statement shall be held to be insufficiently made, unless, by reason of any alleged insufficiency, the opposing party be misled or taken by surprise;" and that "no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended under the rules and practice of the court."

When the notice of allowance is served within the time required by the 7th section, can I amend the irregularity of the return day, not being such as to allow the time mentioned in the 11th section? I think I would not be carrying out the spirit or intention of the act if I should refuse to allow the amendment. The appealing creditors were guilty of no negligent delay; they served their notice with reasonable promptitude; the 7th section, as amended, seemed to require that not only the notice should be served, but the allowance moved for, within the eight days; and the notice, therefore, named the last day but one of the eight for the application (the last day, the 10th of June, being Sunday). I am satisfied that a mistake made under these circumstances, was not such a mistake as the legislature intended to put beyond the possibility of correction. I say this after reading the enactments of the English Bankruptcy Law, on the subject of amendments, and the English cases to which I was referred on the part of the insolvent.

The other objections to the form of the notice are, that it is not entitled in any court, and that it does not mention on what evidence the motion is to be made. I think that, according to the practice of this court, the notice must be regarded as irregular in these respects, but I think that it may be amended.

It is further objected, that the notice should state the grounds of appeal. I do not think this omission is an irregularity.

It is further objected, that it does not appear that the applicants have proved any debt against the insolvent. I think this omission may be supplied.

The appellants must pay the cost of the day.

If the respondent insists on the objections, the motion must stand over to a future day; the defective evidence to be supplied, and the notice for the allowance to be amended

CHANCERY CHAMBERS.

Reported by J. W. Fletcher, Esq., *Solicitor.*

Wiman v. Bradstreet.

Discovery—Principal and agent—Privilege.

Letters received by the agent of a party to a cause from other parties, although written in confidence, but relating to the subject matter of the cause—*Held*, to be in the custody or power of the principal, and not exempt from production under an order to produce. No communication privileged, except as between a solicitor and his client. Such letters must be produced entire and not mutilated.

[Chambers, 29th Nov. 1866.]

In this suit a writ of sequestration had issued against the defendants, for contempt in not producing certain documents admitted by them to be their property.

The bill was filed for the purpose of obtaining an injunction to restrain the defendants from publishing a mercantile reference book or directory, alleged to be compiled in part from a similar work published by the plaintiffs. The plaintiffs suspecting that the defendants would make extracts from their work, purposely inserted therein the name of a village called Apricot, in the county of Ontario, which village, in fact, had no existence; doing so for the purpose of setting a trap for the defendants. The device was successful, the defendants actually inserting in their work the fictitious name. In order to prove the alleged misconduct of the defendants, the plaintiffs were desirous that the letter from the agents of the defendants, relating to this village of Apricot, should be produced. This the defendants refused to do, setting up that these communications were confidential and privileged, being obtained privately from particular persons, and necessarily so on account of the peculiar nature of their business. Certain letters were produced by the defendants, out of which the names of persons from whom information was obtained had been cut.

Huson Murray moved to set aside the sequestration, contending that the affidavit on production, filed by the defendants, was sufficient, and that as the letter spoken of had passed between third parties, that they were exempt from production. His clients had produced all the documents relating to the cause, which they were compellable to produce, and they were therefore entitled to have the sequestration discharged with costs. He cited *Edmonds* v. *Lord Foley*, 10 W. R. 210.

S. H. Blake, for the plaintiffs, said that the letters in question were material to support his case. They were not privileged communications; on the contrary, being made to the agents of the defendants, and being in the custody and under their control, they were liable to production. He cited Wigram on Dis. 216-7 and 289. The parties writing the letters, if known, could be examined as witnesses for the plaintiffs, and made to disclose the contents of the letters in question. Documents produced must be produced entire and not mutilated.

The Judges' Secretary.—In this cause the defendants move to discharge a sequestration obtained by the plaintiff against them for non-production of books and papers, the order for production having now, as they allege, been obeyed. In answer to the motion, the plaintiff contends, that the defendants have not produced certain letters, which, by their affidavit on production, they admit are in their possession, and that others, which have been produced, are in a mutilated form, portions of the letters having been cut out before production. The defendants seek to exercise themselves from production of the letters which they have not produced, on the

ground that they are not in their possession or under their control, but that they are the private property of their agent, written to him by a correspondent of his own, and not by any one in the employment of the defendants. I do not think that the excuse is sufficient to protect the letters. The statement in the affidavit on production is: "We have been informed that our agent, who is engaged in getting up the manuscript of that part of our book which is in question in the suit, has in possession some letters received by him from correspondents employed by him, and in particular a letter giving the information as to the place or village called Apricot, but that he declined to produce the same." On the argument of the motion, it was admitted that but for the agent having been employed in getting up the defendant's book, these letters would not have been received by him, and there is no pretence made on the part of the defendants that it is out of their power to procure these letters and produce them. I must therefore hold that they are documents in the possession, custody and power of the defendants, and that they must be produced. As to the letters which have been produced in a mutilated form, the defendants say they have cut out the names contained in them, because they are letters sent by a travelling agent to the defendant's agent at Detroit, and the names cut out are those of the persons who gave him information as to the standing of the various merchants in the towns he visited, and that these persons gave the information sought from them, under a pledge given by the defendants not to divulge their names, and that "It was under such agreement only that their said correspondent undertook to admit them in said work." I do not think I can attach any weight to this argument. The law knows no privileged communication, except between a solicitor and his client. The agent had no power, by giving any such pledge to oust the jurisdiction of this court to grant discovery, and if he were put in the witness box and examined, he would be compelled to disclose the names of the parties from whom he obtained his information. The argument that the names of these persons are their own property, and that therefore the letters containing their answer are held by the agent as the joint property of those correspondents, so that the court cannot order the production when the latter are not parties to the suit, is answered, and cannot prevail. Besides, these letters are not in the agent's hands, and by their affidavits they are admitted to be the sole property of the defendants. The defendants are bound to supply those portions of the letter which they have kept back. The order to produce not having as yet been fully complied with, I must refuse the motion with costs.

Carr v. Carr.

Interim alimony.

An order for interim alimony will be granted on the marriage being proved or admitted, without showing any other fact or circumstance.

[Chambers, 27th Oct. 1866.]

Fletcher, for plaintiffs, moved for an order for interim alimony.

Spencer appeared for defendant, and asked an enlargement of the motion, for the purpose of procuring further affidavits to support the answer.

Fletcher, contra.

The marriage having been admitted by the answer, no affidavits whatever can be read, and the order must be granted.

The Judges' Secretary held plaintiff entitled to the order and directed the usual reference, remarking that the questions put in issue could not be adjudicated upon in Chambers, which would be done if the merits set up in the answer were considered.

Marshall v. Widder.

Master's office—Incumbrancers—Service.

G. D., and H. D., his wife, incumbrancers, were made parties to the Master's office, and not appearing on the day named in notice A., *held*, by the Master, that an order in Chambers must be obtained, giving the wife liberty to come in and prove her claims separate and apart from her husband. The order in Chambers was afterwards obtained. Service of a fresh notice A. dispensed with.

[Master's Office & Chambers, 7th Jan. 1866.]

This was a common foreclosure suit. The decree was the usual decree, with a reference to the Master as to incumbrancers. The defendants, George Dyett and Harriett Dyett, were found to be the only incumbrancers, and were made parties in the Master's office. On the return day named in the usual notice A. to incumbrancers, which notice had been duly served on the last named parties, the plaintiff's solicitor appeared in the Master's office to prove his claim, no person appearing for the incumbrancers.

The Master, in the absence of any person to represent them, ruled that the reference could not be proceeded with, but that an order in Chambers would have to be obtained, giving the defendant, Harriett Dyett, liberty to come in and prove her claim at some day to be named in the order, not less than fourteen days from the day of the service of the order upon her. The Master thought the practice in the Master's office in such a case analogous to the practice of serving an order to answer a bill of complaint separately upon defendant (a married woman), who had not answered jointly with her husband.

The Judges' Secretary granted the order. Service of a fresh notice A. on the defendant, Harriett Dyett, was deemed unnecessary.

ENGLISH REPORTS.

CHANCERY.

Colenso v. Gladstone.

Colony—Independent Legislature—Bishop—Coercive jurisdiction.

(Continued from page 244.)

The Attorney-General, *Selwyn*, Q.C., and *Pemberton*, for the defendants.—We deny that a bishopric of Natal has been perpetually and irrevocably constituted. It is not alleged that any direct appropriation was made for such a purpose, but that certain funds are subscribed generally for colonial bishoprics, of which some portion was assigned for the establishment of a bishopric of Natal in the proper legal sense of that term. The intention of the founders and

acceptors of the trust was to give the whole discipline and administration of episcopacy, as established in the Church of England, to the colonies. Colonial bishopries were founded in this view; some recognised by colonial Legislatures, some established by the Royal supremacy. As regards the impossibility of maintaining coercive jurisdiction in the dominions of foreign powers, the Jerusalem Bishoprics Act gave the Crown a power to erect sees, with authority extending over the coast of the Mediterranean. Discipline, which is an essential part of the Church of England, where occassion for it exists (Hooker, book 3), was contemplated, not a mere voluntary compact, and identity of discipline with that of the Church of England, to be maintained without an ecclesiastical law. For if there be no ecclesiastical law, all questions connected with the Church must be determined by the civil Courts. If this be so, then Bishop Colenso is a mere titular bishop, without a diocese. No bishop, with Natal as his see, has ever been legally created. According to the decision of the Privy Council, the letters patent of 1853, creating the bishopric of Capetown, were totally void in the colony. The object of the endowment was to support a legal diocesan establishment at Natal, strictly connected with the Church of England. The diocesan jurisdiction is an essential part of such establishment. It was intended to create it by letters patent. The eddowment was given in the belief that it was so created. It has now been decided by the Privy Council that it was not created. It is argued that the letters patent may be taken as having the assent of the Crown to a voluntary association, but the expressions of the Privy Council in deciding that Bishop Colenso could not be bound by his oath of canonical obedience to the Bishop of Capetown decide that even the power of voluntary associations to bind themselves is limited, and cannot introduce an ecclesiastical jurisdiction. It is argued that the Queen, as head of the Church, has power to visit the Bishop of Natal and to try him by commission. This is not so. The Royal supremacy has a double character. Where there is an ecclesiastical law it acts through the established courts. But it cannot act directly on a person because he holds an office (26 Hen. 8, c. 19). Nor can the Queen issue a commission to try Bishop Colenso, the Commission Courts were abolished by 16 Car. 1, c. 11; 13 Car. 2, c. 12, and 1 W. & M. c. 2. An archbishop could not, as alleged, be tried by Royal Commission issued for the purpose: if he committed an offence cognisable by no known procedure the Legislature must provide the means by which he should be tried. It has been argued that the validity of letters patent cannot be tried incidentally in this case, but can only be tried by a *scire facias*. But their effect is not tried here. Their effect is already determined in other decisions, namely, that they could not create a bishop in the full sense of the word, and on that decision we take our stand. Nor does it matter whether, being void in part, they are void for the purpose of establishing such a bishopric as the contributors to this fund intended to support.

November 6.

LORD ROMILLY, Master of the Rolls, after recapitulating very fully the facts of the case and the nature of the claim made, and the defence of the trustees, said that the simple question he had to examine were the force and effect of the letters patent creating the diocese of Natal; whether these letters attempted to confer powers which the Crown had no power to confer in a colony possessing an established legislature but no established Church; and finally, whether the Bishop of Capetown was legally and validly appointed a bishop, in the proper sense of term, by the letters patent of 1853, or whether he was thereby constituted only a bishop in name, and not in effect, so that the trustees of a fund contributed for the purpose of supporting a bishop in the diocese of Natal, were justified in withholding the salary of the plaintiff, on the ground that no such bishop had ever been created.

He observed that the question whether the bishop's works had or had not an heretical tendency so as to disqualify him from being a bishop of the Church of England at all was not now before him. This issue was carefully avoided both in the bill and answer; and he must, in his judgment, proceed on the assumption that the plaintiff was in every way fitted, so far as his moral character and religious tenets went, to exercise the function of a bishop of the Established Church. Nor was he to try the validity of the letters patent themselves in this suit; but he must assume that they were valid in part, so far as to create the new bishopric of Natal, and appoint the plaintiff bishop thereof although they might be invalid in part—*i.e.*, so far as they purported to give him a personal coercive jurisdiction over his clergy, and to subject him to the personal coercive jurisdiction of the metropolitan Bishop of Capetown; and it was an important distinction to be borne in mind throughout, that it was quite possible for letters patent to be invalid in respect of purporting to bestow powers which could not legally exercised, and yet that such partial invalidity would not make them invalid as a whole.

His Lordship then proceeded to consider at length the effect of the nomination of the plaintiff by the Crown. It was not disputed that he thereby acquired the title and dignity of a titular bishop, and all such episcopal authority as can be exercised by a bishop without coercive jurisdiction. Episcopal functions are classed under three heads—"*Ordo*;" or the power of orders, including the rights of Ordination, Confirmation, and the like. "*Jurisdictio*;" *i.e.*, coercive jurisdiction over the clergy of his diocese: and "*Administratio rei familiaria*." The letters patent purported to give the two first of these powers but not the third.

Proceeding to consider the remaining two divisions "*ordo*" and "*jurisdictio*," his Lordship said it was not contested that he was as fully endowed with the first as any other bishop. Such power of orders was in itself universal, not confined to this or that spot, but belonging to a bishop by virtue of his consecration. It was said this only made him a titular and not a territorial bishop; for by this he has no diocese attached to his office. But in no case was a diocese essential to the *status* of a bishop. Every bishop had, by virtue of his office, the universal power of orders, only it was generally found more convenient and beneficial to the cause of

religion and morality that each bishop should have a see or diocese assigned to him, wherein these functions should be exercised exclusively. Therefore even, if the plaintiff might in some sense be called a titular and not a territorial bishop, this made no essential difference; and so far as the powers of orders went there could be no dispute that the plaintiff was validly constituted Bishop of Capetown.

But it was contended that the *jurisdictio* of the plaintiff (his coercive jurisdiction) over the clergy of Natal, which the letters patent professed to give him, and also the jurisdiction of the Bishop of Capetown over the Bishop of Natal, which was also purported to be created by the letters patent, had been judged null and void by the Privy Council, and therefore the plaintiff had never possessed the legal *status* of a bishop. But this contention on the part of the defendants proceeded on a misunderstanding of the real point decided in the cases of *Long* v. *Bishop of Capetown* and *Bishop of Capetown* v. *Bishop of Natal*. It had been decided in these cases that the jurisdiction of the bishops in all colonies having an established Legislature, but not an established Church, must be subject to the civil jurisdiction in the colony, with an appeal to the Queen in Council. But this did not take away the episcopal jurisdiction. It left him the power of instituting to benefices of visiting all the clergy of the Church of England resident in his diocese, and inspecting their morals and of appointing dignitaries of his cathedral. The only limitation to his *jurisdictio* was this: that the power of enforcing obedience to his decrees and removing obstructions to the performance of his episcopal functions was not given him personally, but for these purposes he must have resource to the civil tribunal, and that tribunal would consider the question whether the decree attempted to be enforced by the bishop was consistent with the discipline of the Church of which he was a bishop, and with the principles of justice. The letters patent were inoperative in so far as they purported to give him such a personal power, and also as to the mode of procedure on appeal; for an appeal was decided to lie from the bishop to the civil tribunal in the colony, and thence to the Queen in Council; but he did not see how these details of procedure affected the *status* of the bishop or lessened his powers of *jurisdictio*.

His Lordship proceeded to show that the foundation of the error in the case of the defendant was a mistaken notion as to the position of the English colonial Church. That Church was not merely in union and communion with the Church at home, but formed part of it, and was a branch of it. No doubt the Churches in the colonies were voluntary associations, but this did not mean that they might adopt any ordinances or discipline they chose and still belong to the Church of England. The judicial committee had said that the Church of England established in the colonies was to be regarded "in the same situation with any other religious body, in no better, but in no worse position; and the members might adopt, as the members of any other communion might adopt, rules for enforcing discipline within their body, which would be binding on those who expressly, or by implication, assented to them." These words had created alarm; but they meant only that if any number of persons in England or in the dependencies associated themselves into a religious sect, the law would, in case of any dispute coming before the civil tribunal, first enquire what were the ordinances of that particular sect, and when these were ascertained as a matter of fact, obedience to those ordinances would be enforced. So that a body might, no doubt, agree to call themselves "in communion" with the Church of England, and at the same time agree to be subject to the jurisdiction of a metropolitan bishop; and in such a case, no doubt, the authority of such metropolitan would be binding on that body on account of this consent, but such a body would not form part of the Church of England, as the colonial Church of South Africa professed to do, and their doctrines and discipline might, in some respects, differ from those of the Church of England. When, however, as in this case, a number of persons voluntarily formed themselves into an association, and called themselves members of the Church of England, then they were bound by its doctrines and discipline, and the jurisdiction of its bishop would be upheld and enforced by the civil tribunals of the colony, which tribunals would consider first, as matter of evidence, what were the doctrines and discipline of the English Church; and, secondly, whether the particular orders of the bishop attempted to be enforced were in harmony with the laws and ordinances of the English Church. And it being a fundamental principle of the English Church that the Sovereign is head of the Church, it was impossible for persons voluntarily to associate themselves into a body professing to belong to the English Church, and not to submit their disputes to be decided on the same principles as in England. And in the colonies, where there was an independent Legislature, and where the statutes appointing certain ecclesiastical tribunals in England do not apply, this could only be done by having recourse to the ordinary civil courts of the colonies.

His Lordship proceeded to establish this principle which, as he said, lay at the root of the case, by referring at length to the words of the judgment in *Long* v. *Bishop of Capetown*. In that case it was held that Mr. Long had voluntarily bound himself to the doctrines and discipline of the Church of England, and that if the obedience required of him by the Bishop of Capetown had been obedience to the rules and ordinances of the Church of England, that obedience would have had to be enforced. But it was held that the commands of the bishop in that case were not in accordance with the discipline of the Church, and therefore Mr. Long was justified in resisting them. His Lordship also referred to *Dr. Warren's case*, where the Court, having ascertained that a religious society had agreed to be bound by Wesleyan ordinances, inquired no further, but decided that they must be held bound by the judgment of a Wesleyan conference and could not appeal to any other tribunal.

The result of the decision in the Privy Council as to the jurisdiction of the colonial bishops was not to decide that they had no jurisdiction and no tribunal, but merely that such jurisdiction was really consensual, and their tribunal a *forum*

domesticum, not a State tribunal as in the United Kingdom, where the Crown appointed bishops in pursuance of Act of Parliament. Hence the bishops of the English Church in South Africa could have no such irresponsible tribunal as the bishops of the Church at home had, but must be subject to the decisions of the civil tribunal. And he was of opinion that this necessity for the colonial Church to refer its disputes to the civil tribunals was very valuable as a means of securing the uniformity of doctrine and discipline which was an important safeguard of the Church of England, for if in every case of a dispute in a colonial church the result were to be dependent on the decision of a *forum domesticum*, merely in union and communion with the English Church, the decisions might easily vary according to the opinions of different bishops, a result which was avoided by making the Queen in Council the ultimate arbiter of all such disputes.

The course of legislation on this subject plainly showed that no bishop could be nominated or appointed except by the Sovereign, nor could any person be legally consecrated except by order of the Crown. In 1786, after the severance of our American colonies, an Act of Parliament for consecrating bishops in those colonies provided that the license of the Crown must in each case be obtained. This principle was also plainly to be found throughout the various statutes by which bishoprics were created in places, not under the immediate jurisdiction of the Crown, especially in 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 15 & 16 Vict. c. 52.

His Lordship held, therefore, that in every respect the plaintiff was validly ordained a bishop of the English Church, the power of orders was fully given to him at his consecration, the power of jurisdiction was his, only limited and qualified by the necessity of the case, because the Crown could no more establish a see or diocese in the colonies, with jurisdiction analogous to that of a see in England with coercive jurisdiction over all the inhabitants of the colony, without the authority of the colonial Legislature, than it could appoint an English or Irish bishop without the authority of Parliament; and, referring to the judgment in *Re Bishop of Natal*, he said that the Lord Chancellor had not there said that the Ceown has no power to assign a colonial bishop a diocese in the colonies, but only that the Crown cannot assign him a diocese there with a coercive jurisdiction. But it was not the coercive jurisdiction which constituted the diocese. He was therefore of opinion that the plaintiff was regally in possession of a see or diocese, and the defendants' argument that there was no legal identity between the colonial bishops and the bishops of England Wales and Ireland fell to the ground, and indeed he had come to the contrary conclusion, viz.: that if the colonial bishops had been decided to have a jurisdiction independent of the colonial civil tribunals, the identity which at present existed would soon cease to exist.

In respect of his *status*, then, the plaintiff was legally and validly constituted Bishop of Natal, and was entitled to his salary.

As regarded the argument from the intention of the contributors to the Colonial Bishopric Fund, his Lordship said that their intention, so far as was made plain to him, appeared to him to be rather furthered than prevented by the decision he had given Their intention appeared to be to secure uniformity of doctrine and discipline in the colonial churches, to the support of which they contributed; and also that the clergy and bishops of those churches should exercise and be subject to an effective jurisdiction.

These contibutors had expressed an opinion that the jurisdiction at present exercised by and over the bishops in the colonies was not *effective*, but such opinion was, he believed, founded on the misapprehension, he had been endeavouring to meet The jurisdiction in question was effective, provided it was legally exercised and administered according to the doctrine and discipline of the Church and the principles of justice. If so administered it would be carried into effect by the civil courts; if not, it was a nullity. He could not consider that the object of the contributors was to elevate the Church over the Sovereign, they must be taken to know the law that the Queen is the head of the Church. It might be doubted how far a lay tribunal was qualified to understand and fully appreciate the bearing and importance of religious questions, but he could not relieve the defendants from their contract on the ground that their ignorance that "the Sovereign is at the head of all causes ecclesiastical as well as civil."

Another reason for deciding in the plaintiff's favour was that it would be impossible now to restore the plaintiff to the position held by him in 1853, and the Court of Chancery would not annul a contract unless it was possible to restore all parties to their original situations. This would not apply to the next person who might be appointed Bishop of Natal, with whom a fresh contract would have to be made, the terms of which, express or implied, would bind the parties to it, but that had nothing to do with the plaintiff.

The result was that he must hold the plaintiff to be Bishop of Natal in every sense of the word, duly appointed and duly consecrated, and that he would remain bishop until he died or resigned, or until the letters patent appointing him were revoked, or until he should be in some manner lawfully deprived of his see. He did not mean to imply that that the plaintiff could not by any means be lawfully deprived of his see without the revocation of his letters patent; no doubt if he did not perform his part of the contract, viz., by performing the duties of a bishop by law established, such as teaching and superintending his flock, he could not compel payment of his salary; but the question whether the plaintiff had acted inconsisteutly with his duties, in short whether he had so far renounced the doctrines of the English Church as to have broken his side of the contract (for he would not affect to be ignorant that the charge of heresy against the plaintiff was the real reason for the institution of these proceedings); this question had not been raised, had it been raised he must have tried it if no other Court could have been found to do so by *scire facias* at common law or petition to the Sovereign, but as it was he had been compelled to consider the case on the assumption that the plaintiff was, as regarded moral charac-

ter and religious opinions, perfectly qualified to be Bishop of Natal.

The decree must be in accordance with the prayer of the bill, with costs against the defendants. The plaintiff must pay the costs of the Attorney-General, and add them to his costs against the defendants.

REVIEW.

Reprints of the British Quarterly Reviews, and Blackwood's Magazine, by the Leonard Scott Publishing Co., 38 Walker St., New York.

The person that is supplied with the *Edinburgh*, the *North British*, the *London Quarterly*, and the *Westminster Reviews*, and *Blackwood's Magazine*, may rest assured that he is possessed of a mine of literary wealth that can in no other way be obtained, without immense research, and without much greater expenditure of time, thought and money than, in one way or another, most men are capable of.

A sketch of the rise and position of these most valuable periodicals will be of interest to those unacquainted with the following particulars—such we copy from a cotemporary:—

"The political parties in Great Britain attach a great importance to the power of the press. The Whigs in the early days of Lord Jeffrey commenced the *Edinburgh Review*, in order that by its tremendous cannonade, it might batter down the fortress of Toryism. So also, when its force was felt, the opposing party had recourse to a similar expedient; and thus, under the auspices of the Tories, arose the *Quarterly Review*. The late Wm. Blackwood, of Edinburgh, a shrewd, clear-headed, and intelligent publisher, annoyed by the assumption of his Whig neighbors, and believing that "The Blue and Yellow"—the colors of the Edinburgh—should be assailed in its chosen home, resolved to establish a magazine. He objected to a Quarterly, as his object was, by a monthly periodical, varied, racy, and trenchant in its character, to appear three times before the public for every single appearance of the *Review*. The world now knows the energy and remarkable judgment combined with great liberality which have characterized that periodical. Abroad, the editorship was attributed to Professor Wilson, Professor Aytoun, and others, but really they were only contributors, and from the beginning, and during all its history, the members of the firm have been the responsible managers. William Blackwood, senior, and his son, John, have mainly ruled the destiny of the magazine, their principle being simply to select the best writers, pay the highest prices, and take no articles from any one, no matter how elevated, how learned, how wealthy, or how famed, without remuneration.

Thus the Edinburgh, the Quarterly, and Blackwood arose. In process of time, the English Radicals felt the need of a journal and they likewise started a Review. At the same time, the educated classes in England desirous to become intimately acquainted with continental literature, commenced a similar enterprise; but divided counsels and continued strife led to the publication of two journals instead of one. In process of time these Quarterlies combined, and finally a union took place with the radical political journal, and thus the reading public were provided with the present *Westminster Review*.

The immense success of these reprints is only exceeded by their usefulness and cheapness. The facilities given for the formation of clubs, etc., reduces the price to a mere nothing. We have the greatest pleasure in again calling the attention of our readers to the advertisement which in another column gives all necessary information.

APPOINTMENTS TO OFFICE.

COUNTY JUDGES.

ALEXANDER FORSYTH SCOTT, of Osgoode Hall, Esq. Barrister-at-Law, to be Judge of the County Court in and for the County of Peel. (Gazetted December 8, 1866.)

JOHN BOYD, of Osgoode Hall, Esquire, Barrister at law, to be Junior Judge in and for the County of York. (Gazetted December 8, 1866.)

SHERIFFS.

ROBERT BRODDY, Esquire, to be Sheriff in and for the County of Peel. (Gazetted December 8, 1866.)

WILLIAM FREDERICK POWELL, Esquire, to be Sheriff in and for the County of Carleton, in the room of Simon Fraser, deceased. (Gazetted December 15, 1866.)

COUNTY ATTORNEYS.

GEORGE GREEN, of Osgoode Hall, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney in and for the County of Peel. (Gazetted December 8, 1866.)

HENRY WILLIAM PETERSON, of Osgoode Hall, Esq. Barrister at-Law, to be County Crown Attorney in and for the County of Wellington, in the room of John Duchereau Kingsmill, deceased. (Gazetted December 8, 1866.)

CLERK OF THE COUNTY COURT.

JAMES AUGUSTUS AUSTIN, Esquire, to be Clerk of the County Court in and for the County of Peel. (Gazetted December 8, 1866.)

POLICE MAGISTRATES.

THOMAS BURNS, Esquire, to be Police Magistrate in and for the Town of St Catharines. (Gazetted December 29, 1866.)

THOMAS WILLCOCKS SAUNDERS, Esquire, to be Police Magistrate for the Town of Guelph. (Gazetted December 29, 1866.)

CORONERS.

JOHN BARNHART, Esquire, M.D., and BEAUMONT W. DIXIE, Esquire, M.D., to be Coroners in and for the County of Peel. (Gazetted December 8, 1866.)

HERBERT FELLOWS TUCK, of Drayton, Esquire, M.D. to be Associate Coroner for the County of Wellington. (Gazetted December 22, 1866.)

ANDREW CLOBINE LLOYD, of Stouffville, Esquire M.D., to be Associate Coroner for the United Counties of York and Peel, and also for the County of Ontario. (Gazetted December 22, 1866.)

NOTARIES PUBLIC.

ASHTON FLETCHER, of Woodstock, Barrister-at-law, to be a Notary Public for Upper Canada. (Gazetted December 22, 1866.)

THOMAS WELLS, of Ingersoll, Esquire, Attorney-at law to be a Notary Public for Upper Canada. (Gazetted December 22, 1866.)