DIARY FOR AUGUST.

1. Wed... *Lammas.*
5. SUN... *10th Sunday after Trinity.*
10. Friday *St. Lawrence.*
11. Satur. Articles, &c., to be left with Secretary Law Soc.
12. SUN... *11th Sunday after Trinity.*
15. Wed... Last day for service for County Court.
19. SUN... *12th Sunday after Trinity.*
21. Tues.. Long Vacation ends.
24. Friday *St. Bartholomew.*
25. Satur. Declare for County Court.
26. SUN... *13th Sunday after Trinity.*
27. Mon ... Trinity Term commences.
31. Friday Paper Day Queen's Bench. New Trial Day C. P.

The Local Courts' AND MUNICIPAL GAZETTE.

AUGUST, 1866.

THE NEW MUNICIPAL ACT.

The public prints will ere this have told our readers that a new Act has been passed during the Session of Parliament that has just closed for the purpose of amending and consolidating the Municipal Laws of Upper Canada. The main features of the bill will, we think, tend to raise the tone of our municipal institutions in general, and in cities in particular; though we do not altogether see the reason for some of the distinctions that are made between cities and towns. Mayors are to be elected by the council and not by the people, as under the old law; there is to be a reduction in the number of representatives, and the qualification for both voters and candidates is increased. Besides these salient, points there are others which we shall shortly endeavour to speak of.

Mr. Harrison has announced, we are glad to see, a new edition of his most valuable work, "The Municipal Manual," which will include not only the Act already spoken of but also the revised Assessment Act, with full notes and references to decided cases. This will be a great boon to all concerned, and which they will doubtless profit by.

A "VETERAN" BAILIFF.

The following sketch of the life of one of the oldest, if not the oldest, Division Court officer in Upper Canada, obtained from himself, will not be without interest to many of our readers. It is given in his own words :—

"I was born at sea on 9th August, 1783; my father was in the 26th Cameronian Regiment. I served as footman with the first Bishop of Quebec, with Governor Mills, Rev. Dr. Mountain, and Sir John Johnson's lady. I married in 1805, and went with my wife to Lochiel where her friends resided. I went as raftsman twenty-two trips to Quebec, and returned home on foot. In 1812 I volunteered in the militia, and was made a sergeant. Was at the attack at Salmon River, where we took a block-house and fifty prisoners, and at the attack at Ogdensburgh, under Col. Lethbridge, where we were repulsed; was afterwards employed building the fort at Prescott, and was made quarter master sergeant. I was at the attack at Goose Creek, and also at the taking of Ogdensburgh, the battle at Crysler's Farm, and at the breaking up of the enemy's camp at Malone. In the Fall of 1838 I volunteered in Col. Vankoughnet's Regiment, and in the rank of sergeant was at the taking of the brigands at Windmill Point. In 1836 I was appointed bailiff of the Commissioners' Court, and was afterwards appointed bailiff in the Division Court by Judge Jarvis, at its first formation. I have done all the duty on *foot*, and compute that I have travelled between sixty and seventy thousand miles on foot. My wife is still living, and we have had three sons, eight daughters, sixty-four grandchildren, and twenty great-grand children."

The signature of this octogenarian, by name William Wiseman, is written in a bold firm hand, that would do credit to many a man a quarter of his age. The truth of the above statement is certified by the judge under whom he serves, whose length of service and vigour nearly equal, by the way, those of his trusty officer.

"The old man still acts as bailiff," says the Judge, "and is the surest hand at serving a summons upon skulkers, even at his advanced age of 83 years. Perhaps his computation of mileage is too large, but he seems confident that upon an average he has travelled 60 miles a week. Ought not this man to have a pension?"

We think he ought.

MEETING OF BAILIFFS.

We have received the report of a meeting of Division Court Bailiffs' held at Guelph in June last with reference to subjects of considerable importance affecting the due administration of their office, and as to an increase of their fees in certain cases. We quite agree with these gentlemen in many things that were said on these subjects, which are however of too much importance to be treated in a summary manner; we shall therefore postpone the discussion of them to a future number

SELECTIONS.

A JURY RECOMMENDING A PRISONER TO "JUSTICE."

While everyone will feel the greatest satisfaction that the gang of swindlers who carried on the Cavendish Institution has had an effectual stoppage put upon its transactions, very few will, on consideration, think themselves justified in echoing the call for signal vengeance on the prisoner, which appears to have been issued by the jury before whom the conspirators were tried. To cheat the fatherless and to rob the poor is a device for improperly making money, the more easily carried into execution by reason of the poverty and comparative friendlessness of the victims; and, at the same time, the class of victims is one we are accustomed to look upon with feelings of peculiar commiseration. Hence it not unaturally follows that, to our ordinary hatred of cheating we add a good deal of indignant sympathy towards the victims of such a system of false pretence as the present, and that the perpetrators of such a fraud are sure to receive no pity at the hands of the public. We cannot be surprised, then, that when the jury found Smith and Wattey guilty of conspiracy to defraud, they should have considered that the severest sentence within the power of the judge would not be two much for the prisoners. It is, however, a matter of regret that twelve men, supposed to possess a certain quantum of intelligence, should deliberately depute their foreman to make himself ridiculous in their name and on their behalf by an interference with the discretion of the Court of a perfectly unprecedented description. We do not doubt that the learned Recorder was as anxious to inflict condign punishment on these nefarious conspirators as the jury could possibly be, but he could not lend himself to so unheard of a proceeding. The rebuke administered to the jury, though in the mildest words, was of a nature to check the exuberant excesses of their love of "justice." "I can only," said he, "listen to juries when they recommend prisoners to mercy—never when they recommend them to justice without mercy." Such a recommendation from a British jury, we will venture to assert, has never before been made, and we can but felicitate the public on the ready reply of the learned judge, and his true appreciation of the law. The prevention of crime is the sole object of the law in the punishment of criminals, and the idea of vengence or retaliation is altogether repungant to its teachings. The sympathies of juries have frequently been the subject of comment in the columns of this Journal, but they are so rarely exercised in the direction now indicated, that the present subject must be recognized as quite a new phase in our experience.—*Solicitors' Journal and Reporter.*

BRIBERY AT ELECTIONS.

Is there then no cure for bribery? Such will be the desponding exclamation on reading the debates in Lords and Commons, and the comments of the newspapers.

What can the law do more by way of punishment? Bribery has been made a crime punishable by imprisonment and by fine. That punishment is not inflicted, because it is looked upon as a crime; its most vehement denouncer does not, in his own mind, think that to sell a vote is as bad as to pick a pocket. Moveover, consience whispers that the blue ribbon that buys the peer, the baronetcy that buys the commoner, the silk gown that buys the lawyer, and the place for his son that buys the tradesman, may be fairly pleaded, as at once example and excuse, by the working man who takes a 10*l.* note for preferring Mr. A. B. C. to Mr. X. Y. Z., both of whom are good men, and one just as likely as the other to serve his country well.

An immense amount of hypocrisy is thrown about this question by all parties, and the difficulty in dealing with it results mainly from the fact that profession and practice do not agree. Speak of it as we think of it, and something may be done to check, if not suppress, a fast-growing evil.

Instead of treating it as a *crime*, treat it as a *malady*, and see if it will not be possible to *prevent* what we cannot cure.

So long as the poor man possesses something which the rich man wants and is willing to buy, the exchange will be made. The ingenuity of evasion will frustrate any law that may be devised. It has cynically been said that every man has his price, and it is only a difference of degree. There is not a reader of this, probably, who would not give his vote to A. instead of B., if by so doing he could ensure ten thousand pounds and secrecy. But ten pounds is as great a prize to the man who never before was owner of a piece of gold. Who, then may cast the first stone?

Bribery can, therefore, be checked (for it can never be abolished wholly) by taking away the inducement to give or to receive a bribe, and by eliminating the corrupt parts of the constituencies.

To remove the inducement to *take* bribes, we must abolish poverty and covetousness. As these are not likely to cease out of the land, we may look upon any attempt to prevent men from *accepting* bribes as time and thought thrown away.

But may not something be done to remove the inducement to *give* bribes?

We think it may, and it is in this direction alone that legislation can serviceably work.

Why do candidates bribe?

Not for the love of it; they detest it; they would gladly avoid it; they do it only because, if they do not, their opponents will. Virtue is not here its own reward; for the scrupulous man would be for ever excluded from Parliament, and the party that closed its purse would be in a perpetual minority.

Thus we have advanced one step towards the solution of the problem. B, bribes because C. bribes, or because, if he did not C. would.

To prevent bribery, therefore, we must remove the motive for it.

That motive is the desire of B. to beat C. If it can be so contrived that B. shall not beat C. by bribery, B. will not bribe.

Now, this is not merely practible, but we can make it the interest of B. not to bribe, by making his bribery not only worthless to himself, but actually a means by which C. may beat him.

The process is simple. If B bribes, let his election be avoided, and let C., if next upon the poll, take his place, unless he, too, has been guilty of bribery, in which case the third should be preferred, and so on.

This would, in the first place, insure at every election one pure candidate at the least, and the danger to the rest would be so extreme that they would be deterred from risking it.

And, to strengthen this inducement, subsidiary legislation should facilitate the detection of bribery. Confession should exonerate from consequences; all should be competent and compellable witnesses, and *ipso facto* discharged from punishment.

If, after this removal of inducement to give bribes, there should be found constituencies who will not vote without them, on a sufficient petition alleging this, let a commisioner go to the place and make inquisition judicially, and let all who are convicted of having taken bribes be *disfranchised for life*, but subjected to no other penalty. This is so appropriate to the offence that no person would hesitate to impose it.

Thus the corrupt elements would be gradually extirpated from the constituencies.

But we look with infinitely greater confidence to the removal of the inducement to give, by the knowledge that detection would not merely snatch away the prize, but hand it to the opponent.—*Law Times.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Larceny — Embezzlement. — A porter was employed by the vendor of goods to deliver them to the vendee, but had no authority to receive the money for them. The vendee, however, voluntarily and without solicitation paid the porter for the goods. The porter came back to the vendee and pointed out that he had been paid short, and received the balance. He subsequently converted the money to his own use.

Held, (Lefroy, C. J., dissentiente) that a conviction for larceny was not sustainable.—*Reg.* v. *Wheeler*, 14 W. R. 848.

Obstructions to Flow of Water—Municipal Corporation.—A city is not liable in an action at law for an injury to a private person by the obstruction of the flow of the water of a stream, caused by an increase of the surface wash from the streets into the same, if such increase is only the natural result of the growth of the city; or by the emptyings of the sewers into the same, if these are no greater than would otherwise have been carried in by surface washings. and are not sufficient to exert any appreciable effect on such person; or by a bridge constructed by a railroad corporation, under the authority of its charter; or by a bridge constructed by the city, if the bridge when built was sufficient to allow the free flow of the water as the stream then was, or with such changes as were likely to be produced by natural causes alone, although it has proved insufficient for this purpose, with such changes as have been produced by the exercise by a railroad corporation of its chartered rights, or by the wrongful acts of individuals: *Wheeler* v. *City of Worcester*, 10 Allen; 5 Am. Law Reg. 575.

Insolvency—Pleading—Administration.—A voluntary assignment to an official assignee under the Insolvent Act of 1864 (sec. 2), is not valid unless accepted by the assignee.

Every material allegation in a bill should be positive; and an allegation that, so far as the plaintiffs know, an assignee had not accepted the assignment executed by an insolvent, was held insufficient: *Yarrington* v. *Lyon*, 12 U. C. Chan. Rep. 308.

Bankruptcy Act, 1861, s. 86—Debtor's own Petition for Adjudication of Bankruptcy—No Assets.—The mere fact that a debtor has no assets is, in the absence of fraud, no reason against his obtaining an order of discharge upon his own petition.—*Ex parte Ensby*, 14 W. R. 849; 2 U. C. L. J., N. S.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Banker's Lien—Special Contract—Assignment of Marginal Receipts.—Where a bank, on discounting bills for a customer, places part of the money to a separate account, giving him "marginal receipts" for the money retained, and the customer afterwards assigns these marginal receipts to a third party, the bank are only entitled to a set-off for any sums actually due and payable to them up to the date of notice of

the assignment.—*Jeffryes* v. *The Agra and Masterman's Bank (Limited)*, 14 W. R. 889.

RAILWAY COMPANY — COMMUTATION TICKET. —Where a railroad company has issued a commutation ticket, by which the purchaser is entitled to ride for less than the usual legal fare, and the ticket contains a contract that the commuter shall show it to the conductor when requested, the company is entitled to enforce such contract strictly, and the loss of the ticket will deprive the commuter of his right to a free passage on the cars.—*Ripley* v. *New Jersey Railroad Company*, 5 Am. Law. Reg. 537.

MEASURE OF DAMAGES IN ACTION FOR NEGLIGENCE IN NOT PRESENTING A NOTE FOR PAYMENT AT ITS MATURITY.—In an action against bankers to recover damages for omitting to present a note for payment at maturity, and to charge the indorser, the judge left it to the jury to find so much damages as they would consider such a claim to be worth against "*such a man* as the indorser was shown to be." *Held* erroneous; and that the charge should have reference to the *pecuniary means* of the indorser: *Bridge* v. *Mason*, 45 Barb.

Held, also, that the amount of the note was *primâ facie* the rule of damages. But that the defendants could show, in mitigation of damages, that the indorser was insolvent, or not worth property enough to pay the debt; and that if this was shown, the defendants were entitled to a verdict: *Id.*

In such an action the plaintiffs are entitled to recover such damages only as they have sustained, having reference to the amount of property which it shall appear from the evidence that the indorser was possessed of as owner: *Id.* —5 Am. Law Reg. 565.

DAMAGES FOR INJURY TO CATTLE IN TRANSPORTING.—In an action against a carrier to recover damages for injuries sustained by a lot of cattle received for transportation, through the negligence of the carrier or its employees, the rule of damages is the difference in value between the cattle when placed in the carrier's charge and their condition when delivered: *Black* v. *The Camden and Amboy Railroad and Trans. Co.*, 45 Barb.—5 Am. Law Reg. 566.

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.—One who is injured by falling through a trap-door in a portion of a factory which is not open to the public, but is intended exclusively for workmen, and where the owner had held out no nvitation or allurement, express or implied, for him to enter, cannot recover damages therefor against the owner of the factory: *Zoebisch* v. *Tarbell and another*, 10 Allen —5 Am. Law Reg. 572.

DUTY TO KEEP A PRIVATE WAY IN SAFE CONDITION.—If there are two entrances to a store, and there is a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners, who occupy the lower stories, are bound to use the trap-door with reference to the safety of those who have a right to pass there; and if they neglect to exercise suitable and reasonable precautions to guard against accident while the trap-door is open, they may be held liable in damages to a person having lawful occasion to pass to the upper rooms, who, while in the use of due care, falls through the trap-door and sustains injury by reason of their negligence: *Elliott* v. *Pray et al.*, 10 Allen.

If the owners of a store, which is situated upon a public street, have let the upper stories thereof to a tenant, and an entrance, directly in front of the stairs which leads to the upper stories, is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to ascend the stairs, and there is a trap-door between it and the stairs, which is carelessly left open by them, they may be held liable in damages to one who, while in the use of due care, and having lawful occasion to ascend the stairs, is thereby induced to pass through that entrance, and falls through the trap-door and sustains injury by reason of their negligence: *Id.*—5 Am. Law Reg. 572.

PASSENGER LEAVING A TRAIN IMPROPERLY.—If a railroad train is stopped at night merely for the purpose of allowing a train which is expected from the opposite direction to pass by, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle-guard and receives a personal injury cannot maintain an action against the company to recover damages therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house supposed to have been reached by the train, or that the train was near a passenger station, which was not the place of his destination: *Frost* v. *Grand Trunk Railroad Company*, 10 Allen.—5 Am. Law Reg. 573.

FAILURE TO DELIVER GOODS.—If goods are sent by a carrier, and neither the bill of lading

nor the direction upon them enables him to deliver them to the purchaser, and they are lost in consequence, the purchaser may recover back the price paid by him to the vendor for the same; nor will he be presumed to have assented to or waived the vendor's omission, from proof that he received a copy of the imperfect bill of lading before the payment was made, that he thereafter made diligent enquiry to find the goods: *Finn* v. *Clark*, 10 Allen.—5 Am. Law Reg. 574.

DAMAGES FOR BREACH.—The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value, if it had been as warranted, is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty: *Brown* v. *Bigelow*, 10 Allen.

A bill of sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty: *Id.*—5 Am. Law Reg. 575.

UPPER CANADA REPORTS.

COMMON LAW CHAMBERS.

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

McKAY ET AL v. GOODSON.

Committal for default of payment pursuant to order of Division Court Judge—Insolvent Act of 1864—Protection under—Deputy Clerk of Crown—Privilege from arrest.

In 1864 a debtor in a Division Court was ordered to pay $5 per month, but made default. He was subsequently summoned to appear before the judge on 4th April, 1866, to show cause why he should not be committed for contempt in not obeying the order. On the day previous, however (3rd April), he made an assignment to an official assignee. He afterwards obtained the necessary consent of his creditors to his release under the Insolvent Act, but the judge nevertheless made an order committing the defendant for contempt. Upon an application for a prohibition to restrain all proceedings in the Division Court,
Held, that the defendant was not, under these circumstances, entitled to protection under the Insolvent Act.
Held, also, that the fact of the defendant being the Deputy Clerk of the Crown, &c., did not entitle him to any privilege from arrest under the order.

[Chambers, June 9, 12, 1866.]

The defendant is Deputy Clerk of the Crown and Pleas and Clerk of the County Court of the County of Brant.

The plaintiffs, on the 22nd of December, 1859, obtained a judgment against him in the first Division Court of the County of Brant for $39.90 debts, and $2.10 costs. On the 26th May, 1864, the defendant was examined before the judge of the court, under sec. 160 of the Division Court Act, and then ordered to pay $5 a month to the plaintiffs on the judgment. Before this he had paid the plaintiffs $19, and there was then due $37.53. On the 19th September, 1864, the defendants paid the plaintiffs sixteen dollars, but has paid nothing since.

On the 3rd of April, 1866, defendant made an assignment of his estate to Augustus W. Smith, official assignee for the County of Brant, but what the estate was, did not appear. Previous to this, he had been summoned to appear before the judge on the 4th of April, to show cause why he should not be committed for his contempt in not obeying the said order. On this occasion, he informed the judge that he had made the assignment and claimed that no further order could be made against him in respect of the first order. Thereupon the matter stood over till the 28th of the same month.

In the meantime, according to the defendant's statement, he, the defendant, obtained a consent in writing of the requisite number of his creditors, who represent the requisite proportion in value of his liabilities required by the Insolvent Act of 1864, and its amendments, to give validity to such consent to his discharge under the act. (His liabilities were stated $5542.32, but what his assets are, if any, did not appear.) That although the plaintiff and the judge were informed of all this, on the 28th of April, the judge made an order in this cause directing the defendant to be committed for contempt in not paying the said money according to the terms of the first order, but permitted the issuing the order to stand over for twenty days, to give time to pay the money or to take steps to relieve himself from the order.

On the 4th May last, the defendant obtained a summons in the court below, calling upon the plaintiffs to show cause why the last mentioned order should not be discharged, on the grounds that he had made an assignment and obtained the consent of his creditors to be released as before mentioned. On the return of this summons, on the 7th of May, the parties were heard, and on the 25th this summons was discharged, but directions were given to stay the issuing of the order for commitment for contempt, to give the defendant an opportunity of applying for a writ of prohibition here.

On the 31st of May, *Robert A. Harrison* obtained a summons at the instance of the defendant, calling upon the plaintiffs and the judge to show cause why a writ of prohibition should not issue to restrain all further proceeedings in the Division Court in the cause, on the ground that the defendant had obtained a discharge from his creditors under the Insolvent Act of 1864, and on the grounds that the defendant was privileged from arrest, being the deputy clerk of the Crown and clerk of the County Court for Brant, appointed under the great seal.

Moss shewed cause.

JOHN WILSON, J.—The defendant rests his application for the writ of prohibition on two grounds: first, his release under the Insolvent Act of 1864; and secondly, by reason of his privilege from arrest as an officer of the court, holding his office under the great seal.

It does not appear from anything before me here, that the defendant has complied with the provisions of the act, but as the case has rather been presented as an appeal from the judgment of the learned judge, who seems to have stayed the issuing of the order for committal until this appli-

cation was disposed of, I will assume that the provisions of the act have been complied with. He seems to have grounded his decision on the authority of *Abley* v. *Dale*, 11 C. B. 378; *George* v. *Somers*, 11 Exch. 202; and the same application in 16 C. B. 539; *Ex parte Christie*, 4 El. & B. 714. The defendant rests his case upon the authority of *Copeman* v. *Rose*, 7 El. & B. 679, and the cases which arose after the repeal of the 102 sec. of the English County Court Act, by the 2 sec. of the 19 & 20 Vic. cap. 108. But the 172 sec. of our Division Court Act is the same as the 102 sec. of the English Act, which was there repealed. The authority therefore upon which *Abley* v. *Dale* was decided still remains in force here.

I think, therefore, the learned judge was right in the view he took of the law.

The second point now raised here does not appear to have been made before him—that the defendant was privileged from arrest.

I am referred to the case of *Adams* v. *Achland*, 7 U. C. Q. B. 211, and of *Michie* v. *Allen*, 7 U. C. Q. B. 482, to show that a judge of a County Court or a Surrogate Court are not liable to arrest for debt; and to *Swan* v. *Dakins*, 16 C. B. 77, to show that one having privilege as a public officer is not liable to arrest for contempt of this kind charged upon the defendant, but on the analogy of *Henderson* v. *Dickson*, 19 U. C. Q. B. 592, I think the defendant is not entitled to the privilege he claims. The interests of the public service, it is to be feared, will suffer more from allowing gentlemen holding an office to set their creditors at defiance, on the ground of privilege, than by holding them responsible, as much as possible, for the consequences of that kind of imprudence which this case discloses.

The summons will be discharged with costs.

CHANCERY.

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

BRUMMELL V. WHARIN.

Injunction—Obstruction of view.

The owner of two adjoining shops leased one to the plaintiff and the other to the defendant. The plaintiff's shop window had been so constructed as to present a side view to persons coming down the street, the object being to attract their attention, and to obtain their custom for the wares displayed in the shop; and the privilege was shewn to be a very important one. The tenant of the adjoining shop having placed a show case in an open space or doorway of his shop, so as to intercept the view of the plaintiff's window, was restrained by injunction from continuing the obstruction.

This was a motion for an injunction to restrain the defendant from placing a certain show-case, or any other show-case or article of a similar nature or description, and from retaining the same, in such a position as to darken and obstruct the window of the shop occupied by the plaintiff, or as to prevent a full and uninterrupted view of said window by persons passing along the south side of the street on which the shop is situate, or from in any way depriving the plaintiff of the full use, benefit and advantage of the said window.

The plaintiff filed an affidavit stating that this window was of great use to him for the purpose of displaying to the public his goods, and that it was of the utmost importance to him that all persons passing along the street should have a full and uninterrupted view of the window, and of the goods and articles displayed and set out therein, the window being in part constructed in the manner it is, for the express purpose of presenting as large a space suitable for displaying goods as possible, and by that means attracting the attention of the public so passing along the street before and past the plaintiff's shop.

Other affidavits to the same effect were filed on behalf of the plaintiff.

The defendant filed several affidavits against the motion, but his cross-examination was held by the Vice-Chancellor to support the plaintiff's case as to the principal facts.

Blake, Q. C., and *Doyle*, for the plaintiff, cited *Riviere* v. *Bower*, Ky. & Mo. 24; *Curtis* v *Union Bank*, 2 Giff. 685.

Roaf, Q. C., and *Ince*, contra, cited, *Clark* v. *Clark*, 1 L. R. Ch. 16; *Smith* v. *Bowen*, Gale on Easements, 82; *Curriers' Company* v. *Corby*, 11 Jur. N. S. 719; *Suffield* v. *Brown*, 10 Jur., N. S. 1; *Radcliffe* v. *Duke of Portland* 3 Giff. 702; *Isenberg* v. *East India Company*, 10 Jur., N. S. 221; *Johnson* v. *Wilde*, 9 Jur., N. S. 1332; *Jackson* v. *Duke of Newcastle*, 10 Jur. N. S. 688; *Yates* v. *Jacke*, 13 Law T. N., S. 17; *Deverill* v. *Pritchard*, 12 Law T., N. S. 759; *S. C. an appeal.*

MOWAT, V. C.—This is a motion for an injunction. The plaintiff is a druggist, and the defendants are jewellers. They occupy adjoining shops in the principal street in Toronto. Both the shops belong to the same proprietor. The plaintiff's lease bears date the 24th of March, 1862, and the defendant's the 13th of April, 1864. The shops are each twelve feet wide, and the fronts have been constructed with a special view to affording the greatest possible advantages for displaying goods. With this object the door of each has been placed four feet back from the line of the street; and the plaintiff's window has been divided into three compartments, the westerly one forming an obtuse angle with the middle compartment, and extending from the line of the street to the partition wall between the two shops. It thus forms the easterly side of the defendant's doorway, and is valuable for attracting the attention of persons passing easterly, to the goods displayed in it. The plaintiff, and the previous tenants of the shop he occupies, had the free use of the window for this purpose, without obstruction, for ten years. Lately, however, the defendants, being desirous of attracting the attention of persons passing in the same direction, to their own wares, have procured a moveable show-case of suitable construction, which they place during the day on the easterly side of their doorway, and which to a considerable extent intercepts the view which passers-by would otherwise have of that compartment of the plaintiff's window. This show-case extends from the line of the street to the partition wall, viz.: about four feet. It is eleven inches deep, and three feet two inches high, and is placed on a stand thirty-two inches high, the height of both together being nearly six feet from the floor of the step.

The plaintiff complains that this show-case is an illegal interference with his rights, and is a serious injury to him in his business.

His lease demises to him the promises, "with the privileges and appurtenances thereunto belonging or used therewith;" and the evidence shews satisfactorily that the "privilege" of having this window free from obstruction, for the display of goods, is of great importance to him in his business. It was a privilege used and enjoyed with the shop at and before the time the plaintiff's lease was executed, and I know no ground on which I could hold that it did not pass with the lease.

Riviere v. *Bowan*, R. & Moody, 22, seems precisely in point as to the plaintiff's right of suit. That was an action on the case. The plaintiff was proprietor of a house which he divided into two tenements; one he retained in his own occupation, using it as a gunsmith's shop, with a window projecting so as to display his goods, by a side-view, to passengers going up and down the street. Afterwards he let the adjoining tenement to the defendant, who was a bookseller. The defendant was in the habit of fixing, by a screw to his door-post, a movable case containing books, which came so near to the plaintiff's window as to obstruct the view of the goods on one side of the window. *Abbott*, C. J., held, "that the action was maintainable against a person holding as tenant for an obstruction to a window existing in the land ord's house at the time of the demise, although of recent construction, and that although there should be no stipulation at the time of the demise against the obstruction."

The learned counsel for the defendants did not attempt to distinguish that case from the present, but contended that it had been overruled by the late case of *Smith* v. *Owen*, before Vice-Chancellor Wood. But the judgment, as given in the *Weekly Reporter*, Vol. 14, p. 422, contains nothing that would justify me in taking that view of the decision.

The learned counsel further contended that an injunction cannot be granted to restrain interference with a prospect or view, and that this is substantially what the plaintiff seeks.

Now it is clear that a party cannot claim, either at law or in equity, a right by prescription to a prospect or view, as he may to light or air; for it has been long ago held in reference to such a claim that "for a prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof," 9 Co. 58 *b*. "Why may I not build up a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light," *Knowles* v. *Richardson*, 1 Modern, 55. But I apprehend that it is equally clear, that if the owner of property contracts, expressly or by implication, not to erect upon the property any building that would obstruct another's view, such a contract is binding, and should, if necessary, be enforced by injunction. If on such a point any authority is necessary, it is sufficient to refer to *Attorney-General* v. *Doughty*, 2 Ves. Sen. 458, and *Piggott* v. *Stratton*, 1 DeG. F. & J. 33.

It was further argued, that the injury here is too small to be appreciable. But the defendan Wharin's deposition is of itself an unequivocal answer to that contention.

It is said also, that the plaintiff has been guilty of laches. This objection is not taken by the answer, and I think it is not sustained by the facts.

The defendant Wharin says he had no desire to injure the plaintiff by placing the show-case where it is; that he has had it so constructed as to interfere as little as possible with the view of the plaintiff's window; and that the show-case is of great service to the defendants in their business. I have no doubt as to the truth of these statements. But it is manifest, that if the plaintiff has a right to the view of his window free from obstruction, as I think it clear that he has, the defendants cannot be permitted to violate that right, though they do not do so in wantonness, but in order to make their own business more profitable.

The plaintiff being entitled to the window as a means of displaying and advertising his wares, I think the injunction must go as prayed.

Gordon v. Young.

Insolvent act—Preference.

The Insolvent Act of 1864 does not invalidate conveyances previously executed, and which were valid at the time of their execution.

A mortgage of chattels to a creditor by a person in insolvent circumstances, not made with the intent of giving such creditor a preference, but under pressure, and to obtain an extension of time, under the expectation of being thereby enabled to pay all his creditors in full—is not void under the enactments against preference—22 Vic. ch. 26, sec. 18.

Examination of witnesses and hearing, before Vice-Chancellor *Mowat*, at Goderich, in the Spring of 1866.

Toms for the plaintiff.

Blake, Q. C., for the defendant.

Mowat, V. C.—The plaintiff in this case is assignee under the Insolvent Act of the estate and effects of Thomas B. VanEvery and George Rumball, forwarders and produce dealers, and the object of the suit is to impeach two bills of sale, by way of mortgage, executed by VanEvery & Rumball, on the 29th of June, 1864, whereby they bargained and sold to the defendants Young & Law certain shares in two schooners, subject to redemption on payment of an antecedent debt due Young & Law, amounting to $24,563.55, and which was, by the terms of the mortgages, to be paid, with interest, at certain future dates therein specified.

The plaintiff charges, and the evidence, I think, establishes, that, at the time these instruments were executed, the debtors were in insolvent circumstances, and unable to pay their debts in full. I think it proved, also, that the mortgages were executed by them reluctantly, and under great pressure on the part of Young & Law; that Young & Law were at the time aware of the embarrassments of the debtors; but had reason to believe they were solvent, the debtors having taken the utmost pains to satisfy them that this was so. The evidence establishes, that the debtors expected they would be able, if allowed to go on with their business for 1864, to pay all their debts in full; that their object in consenting to give the mortgages was to secure the extension of time thereby given, so as to enable them to go on with their business; that they considered the transaction for the benefit of all their creditors; and that they had no desire to give a preferenee to Young & Law, if they could avoid it.

Relieved, by giving the mortgages, from the pressure of this large debt, they proceeded with their business, but the season proved a disastrous one to them. They met with heavy losses in

their business; their property became depreciated in value; and on the 31st of December they executed a voluntary assignment to the plaintiff under the Insolvency Act (1864.)

It is now contended on behalf of the plaintiff that the mortgages are void under this act. But it is admitted that they were executed before the act was passed; and I am clear that, if valid when executed, the statute has not the effect of destroying their validity.

The learned counsel for the plaintiff further contended, that the mortgages were void under the enactments against preferences by insolvent debtors, 22 Vic., ch 26, sec. 18. Conveyances of chattels by a person in insolvent circumstances, made "with intent of giving one or more of the creditors of such person a preference over his other creditors," are thereby declared void as against creditors. I think that, under this enactment, a mortgage made to a creditor without any such intent, and under the influence of pressure on the part of the creditor, is not void under the circumstances in evidence here, though the effect of the transaction may ultimately be to give a preference over the other creditors, see *Harrison* v. *Tucr*, 14 U. C. C. P. 449; *Gottwalls* v. *Mulholland*, 15 U. C. C. P. 63; *The Bank of Toronto* v. *McDougall*, Ib. 475; *The Bank of Australia* v. *Harris*, 8 Jur., N. S. 181; *Bills* v. *Smith*, 11 Jur., N. S. 155.

The bill must, therefore, be dismissed with costs.

ENGLISH REPORTS.

BATEMAN v. THE MID-WALES RAILWAY CO. THE NATIONAL DISCOUNT CO. v. THE SAME. OVERAND, GURNEY, & CO., v. THE SAME.

Railway company—Bill of Exchange—Power to accept—Form of acceptance—8 & 9 Vic. c. 16, s. 97—Pleading.

The plaintiffs, as indorsees, sued the defendants, a railway company, as acceptors of a bill of exchange.

Held, that the defendants had no power to accept a bill of exchange, and were not liable in this action, they being a corporation created for the purpose of making a railway, and the accepting of a bill of exchange not being incidental to the object for which they were incorporated.

Held, also, that the defence was properly raised by a plea denying the acceptance of the bill.

[14 W. R.—C. P., May 3, 7, 8, 1866.]

These were actions on bills of exchange accepted by the defendants and indorsed by the plaintiffs. The defendants traversed the acceptance of the bills, and at the trial verdicts were found for the plaintiffs in all three actions, leave being given to the defendants to move for a rule *nisi* to enter a verdict for the defendants or for a nonsuit.

On a former day *Karslake*, Q. C., on behalf of the defendants, had obtained a rule *nisi* accordingly, on the ground, 1st, that the defendants had no power to accept the bills. 2nd, That if they had, these acceptances were in such a form as not to bind the company.

The defendants were incorporated by a private Act 22 & 23 Vict. c. lxiii, which incorporated the Lands Clauses Consolidation Act, 1845; the Railway Clauses Consolidation Act, 1845; and the Companies Clauses Consolidation Act, 1845. The powers of the defendants were subsequently extended by several other private Acts, but none of these conferred on the defendants any express power of accepting bills of exchange.

Messrs. J. Watson & Co., had contracted with the defendants for the construction of certain works which the defendants were empowered by their Acts of Parliament to construct. The bills on which these actions were brought were accepted by the defendants on account of the debt they had incurred to J. Watson & Co. in the construction of these works; and were endorsed by J. Watson & Co. to the plaintiffs for value. The form of the acceptance was as follows:—

"Accepted by order of the board of Directors and payable at the Agra and Mastermans' Bank, Limited.

"JOHN WADE, Secretary."

The bills were also impressed with the seal of the company.

E. James, Q.C., and *Sir G. E. Honyman* now showed cause against the rule on behalf of Bateman and the National Discount Company.

1. The question is, has a railway company the right to accept bills of exchange? No doubt certain corporations have not that power, viz., those which are not incorporated for trading purposes. This company is incorporated to make a railway, and after that to act as carriers, for which it is necessary that they should trade by purchasing coal, carriages, &c., to be used for the purpose of their business. The true rule is stated in Storey on Bills of Exchange, s. 79. *Broughton* v. *Manchester Waterworks Company*, 3 B. & Ald. 1, is not in point, because it depended on the Bank Acts. No doubt the defendants could only accept for the purposes for which they were incorporated, but here it is not proved that these bills were accepted for any other purpose than that for which the defendants were incorporated. *Stark* v. *Highgate Archway Company*, 5 Taunt. 792. The rule is correctly stated in *East London Waterworks Company* v. *Bailey*, 4 Bing. 283, that where a company like the Bank of England, or the East India Company is incorporated for the purposes of trade, it seems to result from the very object of its being so incorporated, that it should have power to accept bills or notes. [BYLES J.—The Highgate Archway Company had an express power, and the Bank of England and the East India Company implied powers of accepting bills: *Murray* v. *East India Company*, 5 B. & Ald. 204.] No power was given to the East India Company to accept; they were only a trading company. The power of the bank to accept is regulated by 9 & 10 Will. 4, c. 44. It is admitted that the defendants were carriers and if so they would be traders, and would be liable to the Bankruptcy Act. [ERLE, C. J.—Carriers were brought within the Bankruptcy Act, *eo nomine*.] BYLES, J.—Lloyds' Bonds would have been unnecessary if the companies had no power of accepting bills.] Story on Partnerships, c. 7, s. 102. [KEATING, J., referred to 7 & 8 Vict. c. 85, s. 19.] That was passed for the purpose of preventing the issue of loan notes. 2. The defendants say that even if the company had the power of accepting these bills, these are not accepted in the proper form, and that they should be signed by two directors as directed by 8 & 9 Vict. c. 16, s. 87. But that Act was not intended to take away any power of contracting, which companies possessed at common law, and at common law the contract might have been made under seal. 3. This objection

could not be taken at *nisi prius*, but should have been raised by demurrer, inasmuch as if the defendants are right the declaration is insufficient.

Karslake, Q C., and *H. Holland*, for the defendants.—The fallacy of plaintiff's argument is, that if a corporation is authorised to do anything requiring money, that money is to be raised by a bill of exchange. The defendants have no express or implied power of accepting bills—their duty is first to construct the railway and then to act as carriers, and they are not a trading company. The distinction is between a company incorporated for the purpose of trading and one which only incidentally engages in trade. 1. The acceptance of a bill is *ultra vires*, and will not bind the defendants, even though under seal. Per Parke, B., in *South Yorkshire Railway and River Dun Company* v. *Great Northern Railway Company*, 9 Ex. 84; *Chambers* v. *The Manchester and Midland Railway Company*, 12 W. R. 980, 33 L. J. Q. B. 268; *Aggs* v. *Nicholson*, 4 W. R. 376, 25 L. J. Ex. 348; *Thompson* v. *The Universal Salvage Company*, 1 Ex. 694; *Bramah* v. *Roberts*, 3 Bing. N. C. 963; *Butt* v. *Morrell*, 12 Ad. & Ell. 745. Nor is this defect assisted by the general words in the defendants' Act? *Burmester* v. *Norris*, 6 Ex. 796. In some cases a partner cannot bind aonther by accepting a bill: *Dickinson* v. *Valpy*, 10 B & C. 128; *Steel* v. *Harmer*, 14 M. & W. 831. 2. A corporation can only contract by deed and though this bill is accepted under seal it is not a deed: *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815. The exceptions to this rule are correctly stated by Best, C.J., in the *East London Waterworks* v. *Bailey*, *suprâ*. [Byles, J.—You say that the defendants may be liable for goods sold and delivered, and for work done, but not upon a bill of exchange.] Yes; 7 & 8 Vict. c. 110, s. 45, points out what formalities are necessary when bills are accepted by joint stock companies; but this only applies when companies have express power to accept. At any rate the acceptance, to be binding at all, must be in the form pointed out by 8 & 9 Vict. c. 16, s. 97, which is incorporated in the defendants' private Act. *The Leominster Canal Navigation Company* v. *The Shrewsbury and Hereford Railway Company*, 26 L. J. Ch. 764; *Ernest* v. *Nichols*, 6 W. R. 24, 6 H. L. Cas. 401; *Halford* v. *Cameron's Steam Coal Company*, 16 Q. B. 442. 3. The defendants are entitled to take this objection now. If we had demurred to the declaration the plaintiff might have urged, in the argument on the demurrer that it did not appear that they had not the power to accept, and we had no power of raising the point until we proved the Acts by which they are incorporated: Byles on Bills, 62

Bovill, Q. C., and *J. C. Matthew*, for Overend, Gurney, & Co.—1. The bill is on the face of it binding; the defendants are not prohibited by any Act of Parliament from accepting bills, and it rests with them to show that this bill is not binding on them: *Scottish North Eastern Railway Company* v. *Stewart* 7 W. R. 458, 3 Macq. 382, where Lord Wensleydale says (p. 415), "*Primâ facie* all its contract are valid, and it lies on those who impeach any contracts to make out that it is avoided:" *Bostock* v. *North Staffordshire Railway Company*, 4 E. & B. 799; Maule, J., in *East Anglian Railway Company* v. *Eastern Counties Railway Company*, 11 C. B. 792. 2. It is admitted that a railway company may incur a liability, but it is said that they may not secure that liability by a bill: *Serrell Derbyshire Railway Company*, 19 L. J. C. B. 371. It was never doubted that a company could draw a cheque. 3. The form of the acceptance is sufficient; 7 & 8 Vict. c. 19, s. 97, is not imperative: *Wilson* v. *The Hartlepool Railway Company*, 13 W. R. 4, 34 L. J. Ch. 241.

Erle, C.J.—These were actions by the plaintiffs as indorsees against the defendants' company as the acceptor of certain bills of exchange; the defendants pleaded that they had not accepted the bills. It appeared that the defendants were incorporated for the purpose of making a railway, and possessed all the incidental powers for making one, given to them by their special Act, and by the general Acts affecting railways. The defendants company was a corporation for a distinct purpose distinctly defined in these statutes. I take it to be perfectly established in law that a corporation established for a distinct purpose cannot make a contract, as a corporation, distinct from that purpose. Such a contract does not bind because it is *ultra vires*; whether a contract binds or not when entered into by such a corporation depends on whether the contract is within the limits of the object of the corporation. The question here raised is whether a corporation created for the purpose of making a railway can bind the company by the acceptance of bills of exchange. I am of opinion that it cannot. A bill of exchange is a cause of action by itself, and a contract by itself. It binds the acceptor in the hands of any indorsee to whom it may come, and I consider it to be entirely contrary to the principles relating to bills of exchange to introduce the notion that bills of exchange may be valid or void according as the consideration for which they were given is valid or void, and whether the purpose for which they were given is in accordance with what the corporation was constituted to do or not; a portion of such bills might be valid because given for work done on the railway, and another portion of them, yet void if given for loans, and to raise money beyond the borrowing powers of the corporation given them by their statute. These were obviously circumstances not contemplated by the law as affecting bills of exchange, that one bill should be valid because given for work done, while another bill should be void because given for purposes not within the scope of the powers of the corporation. So much for the general tenour and bearing of the question. On authority I can find no case of an acceptance of a bill of exchange by a corporation of which the law enforced payment, with certain exceptions, and those exceptions prove the rule. In the *Highgate Archway case* the company were authorised by their Act to issue bills, and in the instances of the Bank of England and the East India Company referred to, the statutes creating those corporations gave them express powers to accept bills of exchange, and their acceptance of such bills was an Act within their powers, but I find no other cases in which this power was exercised. In the case of *Broughton* v. *the Manchester Waterworks Company*, Mr. Justice Bayley doubted whether the holders of a bill of exchange accepted by the company could sue

without proof but the company had power to accept such bills. I think both on principle and authority that the acceptances given by this railway company were not binding acceptances, and therefore that the plea that the company "did not accept" was established.

Byles, J.—I am of the same opinion. The case is one of great importance, both on account of the large sum at stake and also the position sought to be established by the plaintiff's counsel, that railway companies may accept bills of exchange. The counsel for the plaintiffs were unable to produce any precedent for us to act upon, and I feel that if we show any doubt on the matter, the market will be saturated with the bills of railway companies. This company was incorporated by statute. At common law it is clear that a corporation could not accept a bill. Three corporations have been referred to by the Chief Justice who have this power. 1. The The Bank of England who were incorporated for the express purpose of accepting bills. 2. The East India Company who had the power given to them by statute; and 3. The Highgate Archway Company, who also had express power given to them. With these exceptions no authority is to be found in favour of the plaintiffs. Then does it make any difference that the defendants were incorporated by statute? The Act of 22 & 23 Vict. gave them power to make and carry on the business of the railway, and if they might under this authority accept bills, the defendants in the case of *Broughton* v. *The Manchester Waterworks Company* might also have accepted them. The plaintiffs also say that the objection should have been taken by demurrer; but if so, it does not follow that the traverse of the acceptance will not raise the same question. This plea says "You (the directors) are not the agents of the company for the purpose of accepting bills," and that raises the question.

Keating, J.—I am of the same opinion. I think it unnecessary to go into the wider question raised by my brother Byles. I do not dissent from his judgment as to that. But the question is, can the railway company accept a bill? I say no; and I rest my judgment on the Act incorporating the company. That act guards carefully against the exercise of unlimited powers of raising money; and though it is true that the Act incorporates the general Acts, in none is any power conferred on a railway company of accepting a bill. One of the general Acts refers to the mode in which a railway company may contract; and even accepting the judgment in *The Leominster Canal Company* v. *The Shrewsbury and Hereford Railway Company* on this point as correct, still if the Legislature had intended to give this power to the defendants that intention would have been clearly expressed. It is said that a railway company are compelled to buy goods and incur debts, but it does not at all follow that they can accept a bill. It is quite a different thing to say that a company may spend its capital in necessary articles, and that they may accept a bill which passes into the hands of third persons. On the ground that the Legislature did not confer any power for this purpose, I am of opinion that the defendants could not accept these bills.

Smith, J.—I am of the same opinion. The plaintiffs are indorsees of these bills and not immediate parties to them, and they cannot recover in these actions unless the bills are good as negotiable instruments. The company was incorporated for the purpose of making and maintaining a railway, and their capital was limited. If they could accept these bills they might accept bills to any extent, or it would be necessary on every occasion when one of their bills was taken by a third person to inquire whether it was within their power to accept it. If they could accept the bill and judgment was obtained upon it, all their previous creditors would be postponed to the judgment creditor. No authority has been found in favour of the plaintiffs, though there are many where the Courts have held that this power did not exist. The first object of a railway company is to make the railway, and, incidentally, they may become carriers. No corporations, except those established for trading purposes, have the power of accepting bills, and even with them trade must be the primary object for which they are incorporated.

Rule absolute for a nonsuit.

Parsons v. Hind.

Fixtures—Hydraulic press—Mode of annexation—How much—Object and purpose of.

A hydraulic press was fixed by means of bricks and mortar to the floor of a factory. The press in question was not essential to the carrying on of the works at the factory, but merely a convenience.

Held, that such a press remained a chattel, and did not become part of the freehold.

[Q. B., June 21, 1866; 14 W. R. 860.]

This was a rule *nisi*, obtained by *O'Brien*, Serjt., calling on the plaintiff to show cause why the damages given on the verdict obtained should not be reduced by the sum of £50, pursuant to leave reserved, on the ground that the property in the hydraulic press never vested in the plaintiff, but continued in the defendants until the time of the removal.

The declaration charged the defendants with breaking and entering the plaintiff's premises, and with the conversion of plaintiff's goods.

Verdict for the plaintiff: £3 damages, for the breaking and entering; £50 damages, for the conversion.

The facts of the case were as follows:—The plaintiff, the owner of a factory in Nottingham, on July 28, 1863, contracted to sell it to two persons, by name King & Ellis, respectively. King & Ellis entered into possession of the factory, but there was no conveyance and no payment of the purchase money. On June 5, 1865, King & Ellis were adjudicated bankrupts. The assignees elected not to adopt the contract of King & Ellis to purchase the factory. The effects of King & Ellis were, by order of the assignees, sold by auction; but a hydraulic press, which is the subject of the present action, was not sold. Subsequently to the auction, Henry Hind, one of the defendants, bought the press of the auctioneers for £35. The plaintiff refused to allow the press to be removed, on the ground that it was so fixed as to be a part of the freehold, and that the property in it had never vested in the assignees in bankruptcy. The three defendants thereupon broke into the factory, and removed the press.

Wills (*Digby Seymour*, Q. C., with him), now showed cause. He cited *Weeton* v. *Woodcock*, 7 M. & W. 14; *Walmsley* v. *Milne*, 8 W. R. 138, 29 L. J. C. P. 97.

O'Brien, Serjt., and *L. Cave*, in support of rule, cited *Hellawell* v. *Eastwood*, 6 Ex. 295; *Lancaster* v. *Eve*, 7 W. R. 260, 5 C. B. N. S. 717; *Martin* v. *Roe*, 5 W. R. 263, 7 E. & B., 248.

Blackburn, J.—This rule must be made absolute. The rule is to reduce the damages by £50, and it must be made absolute on the ground that the press never was a part of the freehold, but always a mere chattel. Whether or no a thing remains a chattel, or becomes a part of the freeheld, is often difficult to decide, turning as it does on a question of more or less. We think, however, that the press in question was clearly a chattel. In the case of things built into the wall of the freehold, it is often doubtful whether or no they become a part of the freehold. It is certain, of course, that bricks and such like things, which are brought on a wall and there fixed, become a part of the freehold. It is equally certain that mere moveables which are fixed to the freehold for convenience do not become a part of the freehold. But there are also the intermediate cases, which are not so clear, and about which the distinction is often fine. There are generally three classes—first, those cases where a chattel still remains a chattel, being mereiy fixed for convenience, like the clock in court, which, though firmly fixed, and though, probably, it could not be moved without disturbing the plaster, yet no one could doubt that it remains a chattel, and does not become a part of the freehold. Then there is another class where chattels are fixed for the better enjoyment of the freehold, but subject to a right to remove them. These are what are generally called fixtures. Then there is a third class where chattels are fixed to the freehold, and which cannot be removed. The second class must be removed in a reasonable time; and unless we had thought that the press in question belonged to the first class, we should have had to have decided whether the reasonable time for removal had not elapsed, but we do think that the press remains a mere chattel. *Hellawell* v. *Eastwood* gives the two guiding points to determine whether or no the article remains a chattel. Nevertheless the question must always be one of more or less. The guiding points in *Hellawell* v. *Eastwood* are these—1. The mode of annexation, and how much; 2. The object and purpose of the annexation. Under the second point the question is whether the chattel is annexed *perpetui usûs causâ*, for the improvement of the freehold, or whether the annexation is merely for the sake of the better enjoyment of the chattel? The second point is of almost as great importance as the first point, viz., the degree of fastening. I find that in the case of *Lancaster* v. *Eve*, 7 W. R. 260, 5 C. B. N. S. 717, where certain piles had been fixed in a navigable river, Mr. Justice Williams says, "No doubt the maxim '*Quicquid plantatur solo solo cedit*,' is well established, the only question is, What is meant by it? It is clear the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil." The language here would seem to show (and the learned judge was always very accurate in the use of his language) that it is of very great importance, where a thing is planted in the soil so that it becomes part of it, to see what is the object with which the thing has been so attached to the soil. If it is attached to improve the soil, then even if there is a right to remove it, it becomes a part of the premises. So in *Reg.* v. *Lee* most of the things in question were necessary for the gas-works. The object was to improve the premises, and there was the intention to incorporate the things with the freehold. Again, in *Martin* v. *Roe*, 5 W. R. 263, 7 E. & B. 248, Lord Campbell applies the same test of intention, he says, "When, however, the cases between executor of tenants for life and remaindermen are looked into, they will be found to turn each on its peculiar circumstances—the character, the use, the mode of attachment, the facility of severance, the injury to the freehold by severance. In regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached seem of very great consequence in determining whether there was any intention to separate it permanently and irrevocably from the personal estate. Here there is an erection in itself purely a matter of luxury and ornament, which the testator might have pulled down, but which he probably wished to enjoy as long as he lived, and therefore did not remove. To this, and for the purpose of completing that luxurious and ornamental creation, a chattel is so attached that it may be detached without injury to the freehold. We think that the inference is, that it never ceased to be a chattel during the testator's life, and that it continued to be so at the moment of his death, and therefore passed, as part of the personal estate, to the executors." Lord Campbell, therefore, in considering whether the mortar made the chattel a part of the freehold, looks at the object with which the chattel was fixed with mortar. Could one reasonably infer, as Williams, J., says in *Lancaster* v. *Eve*, an intention to incorporate the chattel with the freehold. Now, apply the rule laid down in these cases to the present case. It appears that there was some fixing with mortar, but not much The press itself was great and bulky; hence, whether or no it was mortared down, the joists would have had to be removed in order to apply machinery sufficiently strong to move it, so the removal of the joists is not very important; and we have seen mere annexation is not enough; but after it has been seen how much annexation there is, we must see what is the object of the annexation. Now the object, it seems to us, was not to improve the premises, nor was the press in question essential to the carrying on of the factory-works, like most of the things in the gas-work case, *Reg.* v. *Lee*, nor was it a thing like a fire-place, but a machine brought into the factory for convenience, just like an ordinary table. Therefore we think the mortaring did not make the press a part of the factory. It was not a part of the freehold, therefore we think the mortaring did not make the press a part of the factory. It was not a part of the freehold, therefore the property of the press was in the assignees, and the plaintiff can recover no damages for the seizure of the press, though he can for the wrongful entry.

MELLOR, J.—I am of the same opinion. I think that the press in question was a chattel, and not a part of the freehold. From the evidence given at the trial the press appears to have been just one of those chattels which require steadying, and for that purpose are fixed to the freehold: and then on the facts it appears that the press, being so far attached for the purpose of steadying it, was by the defendants removed, without doing any real damage to the inheritance. If one could see, as in the gas-works case, an intention that the chattel should remain fixed to the factory so long as the factory remained a factory, then we might think the press to be sufficiently fixed to become a part of th- freehold, but here bere we see no such intention. The press here was a mere additional convene ience brought into the factory for temporary uses, and not changing or affecting the character of the building. Therefore, though at one time I doubted, from the insufficient evidence before us, as to the nature of the factory, and the purposes for which the press was used, I am clearly of opinion that the press did not become part of the freehold, but remained a chattel

SHEE, J.—I am of the same opinion, neither of the tests makes out that this press is a fixture. It was not brought in to add to the value of the inheritance; it was fixed for the more convenient use of it. It was a chattel, moreover, which could be used in many other businesses than that carried on in the factory in question. The evidence showed that such presses were constantly sold second-hand. It could be removed without damage to the freehold.

Rule absolute.

ENGLAND V. MARSDEN.

Money paid for defendant's use—Possession under bill of sale —Paying out distress for rent.

The defendant, having given to the plaintiff a bill of sale on the goods in his public-house, became insolvent and went to prison. The plaintiff took possession of the goods under the bill of sale and carried on the business. At this time no rent was due to the landlord, but a quarter's rent subsequently accrued due while the plaintiff was still in possession. The landlord seized the goods on which the bill of sale had been given as a distress for his rent and the plaintiff paid him out. In an action by the plain' tiff to recover the amount so paid to the landlord as money paid for the use of the defendant.

Held, that as the plaintiff kept the goods on the premises for his own benefit, and not at all for that of the defendant, he had not been compelled to pay what the defendant was legally compellable to pay, and that, therefore, there was no implied promise on the part of the defendant to reimburse him.

To a declaration on the common counts for money lent, money paid, interest, and money due on accounts stated, the defendant pleaded, 1st, never indebted; 2nd, that before action he satisfied the plaintiff's claim by assigning to him by deed certain goods, chattels, and effects, and covenanting by the said deed with the plaintiff to pay him the said claim, which assignment and covenant the plaintiff then accepted in satisfaction and discharge; and 3rd, a discharge under the Insolvent Act 1 & 2 Vict. c. 110.

At the trial at the Middlesex sittings after last Michaelmas term before Montague Smith, J., the following facts were proved :—

The defendant, who was then the occupier of the Gospel Oak Tavern, had, in the year 1860, various money transactions with the plaintiff, to whom he gave, by way of security, a bill of sale for £180 on his furniture, stock in trade, &c. This bill of sale was dated the 2nd of June, 1862, and was conditioned to be void on repayment of the £180 by instalments of £3 10s. a-week, the payment of such instalments to commence on Monday, the 4th of June; and if default were made in the payment of the £180, or any part thereof, when and as the same should become due and payable, the whole amount of the money secured by the bill of sale was to become immediately due, and the plaintiff might take possession of the said household furniture, &c., and hold and enjoy it to his own use, and also sell the same.

On the 9th of July the defendant was arrested and lodged in the debtors' prison in Whitecross-street, and on the 11th he petitioned the Court for the Relief of Insolvent Debtors, and obtained the usual vesting order.

On the 10th of July the plaintiff took possession of the furniture, &c., at the Gospel Oak under his bill of sale, and carried on the business of the house as usual. At this time no rent was due to the landlord, but a quarter's rent became due on the 29th of September, a few days before which the defendant's lease had been given up to the assignees. Meanwhile the defendant remained in prison, but his wife and family, by the permission of the plaintiff, continued to live at the Gospel Oak, and assisted in carrying on the business. On the 23rd of October the landlord took the goods comprised in the bill of sale as a distress for the rent which accrued due at Michaelmas; the plaintiff paid this rent and released his goods.

The plaintiff now sought to recover from the defendant, *inter alia*, the sum he had so paid to the landlord as money paid for the defendant's use. The jury found a verdict for £8 4s. 6d., there being no plea of payment to meet that part of the claim; and they also found that the plaintiff had paid £42 7s. for rent due to the landlord, and for expenses incurred in protecting his interest under the bill of sale, but that the defendant had given no express authority for such payment.

M. Chambers, Q. C., obtained a rule, pursuant to leave reserved, to increase the verdict by £42 9s., as money paid for the use of the defendant, on the ground that there was an implied authority or request of the defendant to make such payment.

Cole showed cause.—The question is whether the payment by the pl intiff to the landlord was voluntary, or whether it was such a payment as that the law would imply from it a promise on the part of the defendant to reimburse him. The plaintiff had no right to stay in possession till the rent became due, and then pay it; for he took the bill of sale for what it was worth, and the moment he acted on it he was bound to realise. *Exall* v. *Partridge*, 8 T. R. 308, which will be relied on in support of the rule, is distinguishable, because here the plaintiff kept his goods on the premises while the rent accrued due entirely for his own convenience.

M Chambers, Q C., and *Butt*, in support of the rule.—The plaintiff was in occupation by permission of the defendant, the rent was owed

by the defendant, and the plaintiff paid it on compulsion, and therefore can recover it: *Exall* v. *Partridge*, *suprà*; *Rodgers* v. *Maw*, 15 M. & N. 444.

Erle, C.J.—I am of opinion that this rule should be discharged. The facts were, that the plaintiff, having taken the goods under a bill of sale, let them remain on premises belonging to the defendant till the 29th of September, on which day the rent accrued due, and then the landlord took them as a distress for that rent, and afterwards the goods were cleared from the rent so due by the payment of the plaintiff. Where that is done under compulsion, and the debt is due from the defendant, the law will imply a promise by him to repay. But *Exall* v. *Partridge* in a different case from this. There the plaintiff put his carriage upon the defendant's premises and under his care, and the landlord took it as a distress for rent due from the defendant, and the plaintiff was obliged to pay the rent to redeem his carriage; so that he paid for the benefit of the defendant, who was afterwards called on to repay the amount, and it was held that he was liable. But these goods were on the premises of the defendant for the benefit of the plaintiff, the owner of them, and without any interest that I can see on the part of the defendant. They had become absolutely the property of the plaintiff, and he had a right to take them away; but as it was he left them on the premises for his own purpose till he should be able to sell them better, and not for the benefit of the defendant, and he may be taken to have put them there without his leave.

Byles, J.—The case differs from *Exall* v. *Partridge*, because what was done here was exclusively for the plaintiff's advantage, and not at all for the advantage of the defendant. There was not the slightest evidence that it was done at his request, and it was not on that ground that the plaintiff brought the action.

Keating, J.—I am of the same opinion. *Exall* v. *Partridge* was merely an illustration of the rule of law that where one man is compelled to pay the debt which another man is legally compelled to pay, the law will imply a promise by the latter to repay the former. But the plaintiff here was not compelled to pay within the meaning of that rule; but for his own advantage he allowed the goods to remain on the premises while the rent accrued due; and therefore we do not at all infringe on the established rule in holding that the defendant is not liable.

Montagu Smith, J.—I am of the same opinion. The facts are altogether distinguishable from those in *Exall* v. *Partridge*. There was no request, express or implied, on the part of the defendant that the plaintiff should put his goods there. The plaintiff, no doubt, thought it better to wait till somebody took the house before disposing of them, and he kept them there well knowing the liability to which they would be subject. The jury have found that the defendant gave no authority; and if he had been asked to let the goods stay on the premises, he would have said, "They may stay there at your risk, as you know I have no money."

UNITED STATES REPORTS.

SUPERIOR COURT OF CINCINNATI.

Dumont v. Williamson.

The meaning and purpose of an indorsement without recourse, examined and adjudged.

When a note is sold in market, the vendor and vendee being upon equal terms, having each the same knowledge of the parties to the instrument, and there is no concealment or misrepresentation by the vendor, who endorses it "without recourse," he is not liable to the vendee, if the name of one of the parties is forged.

He is not liable on any supposed contract growing out of his indorsement, as it is but a transfer of the note, without the usual guaranty: nor can he be held at all unless fraud, concealment, or misrepresentation is proved, or the note is given in payment of a prior indebtedness.

[5 Am. Law Reg. 330.]

The opinion of the court was delivered by

Storer, J.—This case is reserved from special term for the opinion of all the judges upon the legal questions arising on demurrer.

The plaintiff's petition states, "that on the 12th day of May 1860, at Cincinnati, Henry Essman made his promissory note to William Wolfe, or order, for $500, value received, five months after date, which note purported to be endorsed by said Wolf, and afterwards came to the hands of the defendant Williamson, who afterwards indorsed and delivered the same to the plaintiff, *but without recourse on him*." A copy of the note is made a part of the petition, with the indorsement thus restricted and qualified. It is further alleged, "that the defendant by such indorsement thereby warranted the signature of said William Wolfe was genuine and made by him, when, in truth and in fact, it was not, but the same was and is a forgery;" by reason whereof the note was of no value, the said Essman, the maker, being wholly insolvent. There is also the usual averment of demand and notice, and a claim to recover the amount of the note.

The demurrer admitting all the facts properly pleaded and their legal implications, the question is directly presented for our decision, what was the legal effect of defendant's indorsement "without recourse."

We find no English cases where the point has been adjudicated, though qualified indorsements are often made in Great Britain upon bills and notes. Mr. Chitty says, in his work on Bills, p. 235, this mode of indorsing is allowed in France and America, and states the object to be "to transfer the interest in the bill to the indorsee, to enable him to sue thereon, without rendering the indorser personally liable for its payment." In ch. 6, p. 224, 225, he has placed in his text the forms of indorsement applicable to various cases, and in class four, where he describes a qualified indorsement, he illustrates his meaning by using the words "James Atkins, sans recours," or James Atkins with intent only to transfer my interest and not to be subject to any liability, in case of non-acceptance or non-payment."

Judge Story adopts this definition with the additional remark, that a qualified indorsement without recourse, though it saves the indorser from liability, does not restrain its negotiability: Prom. Notes, § 146; *Richardson* v. *Lincoln*, 5 Metcalf 201.

An absolute transfer by indorsement imposes upon the party making it, in contemplation of

law. 1. That the instrument is genuine, as well as all the attendant signatures; 2. That the indorser has a good title to the instrument; 3. That he is competent to bind himself as indorser; 4. That the maker is able to pay the note, and will do so upon due presentment at muturity; 5. If not paid when thus presented that upon notice to the indorser he will discharge it: Story on Prom. Notes, § 135.

It must follow, then, that when an indorsement is made and taken without recourse in the qualified form, as it appears upon the note in controversy, every liability, that would otherwise exist, is excluded, and no action can be maintained upon the defendant's transfer thus restricted.

For every practical purpose, such a restricted indorsement may be placed upon the same footing as a note payable to bearer, or transferred by delivery. In the latter case, the person making the transfer does not thereby become a party, nor does he incur the obligation or responsibility belonging to an indorser.

This doctrine was settled by Lord Holt in *Gov. and Co. Bank of England* v. *Newman*, 1 Lord Raym. 442, and is adopted by all the late text writers.

It has been attempted, however, to create a liability, not in virtue of any contract contained in the indorsement or delivery of the instrument, but upon a legal implication that there is in every such case a warranty that the instrument is genuine, and should it prove a forgery, he who has transferred it must refund to the proper party the money he may have received.

This assumption places notes and bills on the same footing with merchandise or any other commodity that may have been the subject of sale, and requires him who may have received an equivalent for an instrument subsequently proved to be worthless, to place the party to whom it has been delivered in "*statu quo*."

Now it is not to every case, even between vendor and vendee, that the rule, thus ascertained, can apply; for an article of merchandise, sold without warranty, where the buyer and seller have equal opportunity to inspect it, and both are equally ignorant of inherent defects, there can be no complaint if a defect is afterwards discovered. It is only when there is concealment, misrepresentation, or fraud, that the seller becomes responsible to the buyer.

We are not surprised at the apparent confusion which exists in the statement of the question by some modern writers upon commercial law; and in the adjudications even of courts who have followed their dicta without careful examination. The difficulty in part, is found in the fact that many of these treatises, when first published, were unpretending volumes, briefly, yet clearly, stating legal principles, and referring to decisions equally brief: but edition after edition has been multiplied until the points once settled have become obscured by redundant language, announcing a former doctrine merely in a new form, and the courts have too often been content with quoting cases without tracing the principles to its origin.

They would seem to have forgotten the maxim: "*Melius est petere fontes, quam sectari rivulos.*"

And thus it is we find in the discussion of the point we are about to determine, such a variety of views; positive assertions afterwards qualified on the same page, while they impress upon the reader no definite idea of what the law is; or the statement is so broadly made, that it partakes rather of assumption than of matured opinion.

We feel at liberty, therefore, to exercise our own judgment, and we think the conclusion to which we have arrived is fully sustained upon legal principles.

There is no averment in the plaintiff's petition of the manner in which he became the owner of the note, nor yet that he paid value, or gave anything as an equivalent. We may fairly presume, then, he purchased it in the ordinary way in market, no representation being made by the defendant other than the implication that legally follows his qualified indorsement. There is no fact before us which imputes unfair dealing or fraud to the indorser; his liability is claimed simply upon the ground that his assignment was a virtual warranty of the genuineness of the note.

It is then the ordinary case of the owner of a bill sending it into the market for sale, or offering it himself to a purchaser, acting meanwhile in good faith, not concealing any knowledge he may have, proper for the buyer to know, giving no verbal opinion even that the instrument is valid.

A similar case in principle is found in *Fenn* v. *Harrison*, 3 T. R. 759, where Lord Kenyon said: "It is extremely clear that if the holder of a bill of exchange send it to market, without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter in circulation to impose upon the world instead of the current coin."

So it was held in *Parker* v. *Kennedy*, 2 Bay S. C. 392, "that a bare assignment implies no warranty, but only an agreement to permit the assignee to receive the debt to his own use." So in *Cummings* v. *Lynn*, 1 Dallas 449, and in *Robertson* v. *Vogle*, Id. 155, where Judge Shippen decided, that an indorsement at common law amounts only to an assignment of all the property in the bill or note without making the assignor responsible.

A sale of the note, therefore, as of any other commodity, imposes no liability upon the vendor, simply by the act of sale. It is a purchase by the buyer without warranty, and the rule of "*caveat emptor*" will apply.

If, however, a note is given with a restricted indorsement, in payment of a precedent debt, the better opinion is, if the instrument is afterwards ascertained to be forged, the party receiving it shall not be the loser; he is still to be remunerated for the sum originally due. The thing received having proved to be valueless, the original claim revives.

Not so where the note is disposed of by sale. "While it may be claimed," says Judge Story, Prom. Notes, § 118, "that he who transfers a note by delivery, warrants in like manner that the instrument is genuine and not forged or fictitious, unless where it is sold as other goods and effects by delivery merely, without indorsement, in which case it has been decided that the law in respect to the sale of goods is applicable, and there is no implied warranty."

So in Chitty on Bills 246, "Where a transfer by mere *delivery* is made only by way of *sale* of the bill or note, as sometimes occurs, or in exchange for other bills, or *by way of discount*, and not as a *security* for money lent, or when the assignee expressly agrees to take it in payment, and run all risks; he has, in general, no right of action against the assignor, if the bill turns out to be of no value."

This view of the question relieves it of all real difficulty, and places the liability of the indorser or assignor upon a satisfactory ground. And we thus find the law determined in the very thoroughly considered case of *Baxter* v. *Durand*, 29 Maine 434, where Judge Shepley, giving the opinion of the whole court, held that "One who sells a promissory note, by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise to refund the money received therefor, if he sold the same as property and not in payment of a precedent debt, and did not know of the forgery." The learned Chief Justice carefully examined the conflicting cases, and distinguishes very clearly the real question in controversy. He admits the authority of *Jones* v. *Ryde*, 5 Taunt. 488; *Fuller* v. *Smith*, 1 Car. and Payne 197; *Cammidge* v. *Allenby*, 6 B. & C. 373; *Collyer* v. *Brigham*, 1 Metc. 546; but properly confines them to the case of payment for a previously subsisting debt.

This case is quoted with approbation by Judge Story, Prom. Notes, § 188, and relied on as the leading authority by Judge Eccleston, in the case of *Rinenan* v. *Fisher*, 12 Maryland 197, where the same point is directly decided, following out not only the ruling of Judge Shepley, but adopting the greater part of his argument. It is also referred to by Professor Parsons, in his late work on Bills and Notes, vol. 2, 589, 590, to support the same doctrine, which is stated in the text of his work very fully and without any reservation.

In a former part of the same volume, page 38, in a note, it is said, the distinction taken in the case in Maine does not seem to have been well founded; but whether the author is responsible for this note or not, we cannot say; we should rather believe his unqualified approval of the same case, after he had composed nearly six hundred pages in addition to what he then had written, expresses his true opinion, more especially as he again reiterates the doctrine in the same volume, page 601. The case *Wheeler* v. *Fowle*, 2 Hardy, 149, decided by our late brother Spencer, does not conflict with the rule we find so well established; it was determined upon its peculiar circumstances, the whole evidence being heard, from which a representation, other than the sale and delivery of the note, might have been inferred.

We are all of opinion that the pleadings in this case present no cause of action against the defendant, upon his indorsement. There is no fraud alleged in the transfer; no prior debt existing, for which the note was taken; no representation made beyond the fact of indorsement, without which we hold there could be no recovery by the plaintiff.

The demurrer will be sustained, and the cause remanded.

(Note by Editor of *American Law Register*)

The importance of the question involved in the foregoing case, and the want of entire uniformity in the decisions in regard to it, seem to justify the space which we have devoted to the very able and carefully reasoned opinion of the learned judge and we should not feel called to add anything more, if we did not consider that the tendency in regard to the subject which the case encourages was in the wrong direction.

The weight of authority still is, unquestionably, in favor of the early doctrine of the books, that one who passes a note or bill by mere delivery assumes an implied obligation, in all cases, unless there is something to show a different purpose, that the same is genuine and what it purports to be upon its face, and that he has the legal right to transfer the title to the instrument. This is nothing more than the vendor of goods, without express warranty, assumes, by implication of law.

It is distinctly affirmed in the case of *Gurney* v. *Womersley*, 28 Eng. L. & Eq. 256, s. c. 4 Ell. & Bl. 132, that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and, if it turns out that the name of one of the parties is forged, and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. In this case the name of the acceptor upon whose credit the bill was discounted by the plaintiffs proved to have been forged by the drawer, the defendant having procured the discount, but declined to give any guarantee in regard to the bill, but had no knowledge of the defect in the bill.

The same, or a similar, question is discussed in *Gamperts* v. *Bartlett*, 24 Eng. L. & Eq. 156, where the bill purported to be a foreign bill, and was unstamped. It proved to have been made in London, and was therefore void, for want of a stamp. The Court of Queen's Bench held, that the vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports to be on its face, and that the vendee might recover back the price of the bill, as upon a failure of consideration.

These decisions were made as late as 1854, and have never been questioned in England, as far as we know. There is no question, we think, that they are in strict analogy with other portions of the law of contracts applicable to sales of personal property and of choses in action, and that they will be maintained in England. There should therefore, as it seems to us, be some very persuasive reason to justify a departure from them and establishing a different rule in this country. The main current of American authority seems to be strong in the same direction.

It is so declared by the most approved text-writers. Mr. Justice STORY, Promissory Notes, § 118, says: "In the next place he (the vendor of a note, without express guaranty) warrants in the like manner, that the instrument is genuine, and not forged or fictitious," citing Bayley on Bills, ch. 5, § 3, p. 179, 5th ed.; Chitty on Bills, 269-271; Id. ch. 6, p. 244, 9th ed.; Id. p. 364, 336; and many decisions, English and American. The law is stated in the same terms in Parsons on Notes and Bills, vol. 2, p. 37.

The learned judge in the principal case seems to infer that, because the case of *Baxter* v. *Duren*, 29 Me. Rep. 434, is referred to by these text-writers, that he may fairly count upon the weight of their testimony in favor of the soundness of that case. But Mr. Justice STORY deceased many years before the date of that decision; and Professor Parsons does not attempt to settle the law upon the point, but contents himself, as most text-writers do, by giving the present state of the authority, which is sufficiently illustrated by the learned judge in the principle case. Professor Parsons did as we should have done; he gave all the decisions, and then gave his adherence to the preponderating side.

The question is examined in *Cabot Bank* v. *Morton*, 4 Gray 156, by a learned jurist, to the weight of whose authority we have all been long accustomed to refer with unhesitating confidence. This distinguished judge states the rule much in the same terms before quoted from Mr. Justice STORY: "It seems to fall under a general rule of law, that, in every sale of personal property, the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it."

The rule is stated by an eminent jurist in Connecticut, Mr. Justice ELLSWORTH, in *Terry* v. *Bissell*, 26 Conn. Rep. 23, much in the same terms, quoting the very language of Chief Justice SHAW, as stated above.

In *Thrall* v. *Newell*. 19 Vermont Rep. 202, the rule is laid down in much the same terms by Judge HALL.

And in *Aldrich* v. *Jackson*, 5 R. I. Rep. 218, Chief Justice AMES says: "The vendor of a bill or note, by the very act of sale, impliedly warrants the genuineness of the signatures of the parties to it."

And in New York, since the early case of *Markle* v. *Hatfield*, 2 Johns. 455, it seems to have been regarded as settled, that a payment in forged paper is no payment, upon the ground of an implied warranty of genuineness. But in the

REVIEW.

The Upper Canada Law List. By J. Rordans, Law Stationer. Toronto: W. C. Chewett & Co.

A fifth edition of this useful little book has come to hand, and is a welcome addition to the "furniture" of a lawyer's office.

The alterations from time to time in the officers of courts, and the residences, agents, &c., of practising attorneys and solicitors, require some such chronicle as this, whilst at the same time it contains much other useful information in an accessible shape. The book is now so well known to the profession that further comment is unnecessary. In arrangement and appearance it is similar to the former editions.

APPOINTMENTS TO OFFICE.

NOTARY PUBLIC.

JAMES HOLDEN, of the Town of Whitby, Esquire, to be a Notary Public for Upper C6nada.

MICHAEL JOSEPH MACNAMARA, of Napanee, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.

SMITH CORBYN BLANCHARD DEAN, of Millbrook, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted July 7, 1866.)

JOHN C. McMULLEN, of Orillia, Esquire, to be a Notary Public for Upper Canada. (Gazetted July 14, 1866.)

SAMUEL GLYN McCAUGHEY, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.

WILLIAM HARVIE, of the village of Caledonia, Esquire, to be a Notary Public for Upper Canada. (Gazetted July 28, 1866.

CORONERS.

CARMEN MAGNES GOULD, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham. Gazetted July 7, 1866.)

LEVI J. WEATHERBY, of Dunnville, Esquire, to be an Associate Coroner for the County of Haldimand. (Gazetted July 14, 1866.)

DONALD McMILLAN, of the village of Alexandria, Esquire, to be an Associated Coroner for the United Counties of Stormont, Dundas and Glengary. (Gazetted July 28, 1866.

The mis-signed Cheque.—Late one afternoon, about 1810, a lad entered a City banking house with a cheque, which he presented. He had been sent by his master, who in the hurry of business had forgotten to sign the document. The defect was immediately discovered on its presentation. "Take that back, my boy," said a benevolent but very business-like old gentleman, "and get it signed;" looking at the boy as though every word were a lesson to him for life. But to the inexperienced mind of the boy, who had just entered on his first place, and who was as guileless as he was untutored in finance, this seemed very unnecessary trouble; besides which he had been told to make haste, and he knew that his going back would prevent his master having the money that day. So, looking up innocently at the beaming face of the venerable gentleman, whose eyes twinkled over his spectacles, he asked "Can't I sign it for him, sir?" The whilom genial face flushed with horror at the thought, and transfixing the boy with a look, "If you want to be hanged you can!" he said, in a tone which our French neighbours would call decidedly pronounced. Those were hanging days for forgery, and as the little fellow (who throughout a long and honourable commercial career never forgot the abrupt but kindly hint of the banker) had no desire to be hanged, he chose the lesser evil.—*Bankers' Magazine.*

late case of *Ketchum* v. *Bank of Commerce*, 19 N. Y. Court of Appeals 499, it was held, by a divided court, that, if the forged paper was sold, there was no implied warranty of genuineness. This seems to be substantially the distinction upon which all the exceptional cases have attempted to stand. It is found, or the germ of it, in the early case of *Ellis* v. *Wild*, 6 Mass. Rep. 321, where merchandise was sold and a promissory note, which proved to be a forgery, taken for it. Parsons, C. J., held, in delivering the opinion of the full court, that if the note were, by the intention of the parties, sold and payment accepted in "rum," the defendant was not responsible as for an implied warranty of the genuineness of the notes. "But if the plaintiff intended to sell the rum for money, and the defendant intended to buy rum, and the payment by the notes was not a part o the original stipulation, but an accommodation to the defen dant; then he has not paid for the rum, and the action is maintainable."

Now we think it fair to say, that when one exchanges rum for promissory notes of a third party, or what purports to be such, and gives no express warranty, the implied warranty is the same on the party as of the other. And if the rum proves to be something else, as a preparation of a deadly character, of no value for any purpose, or if it proves not to have been the property of the vendor, but of another who reclaims it, or if the note proves to be a forgery, or stolen under such circumstances that no title is conveyed by the vendor, either party will be liable to make good the loss to the other, upon the implied warranty of the thing being what it purports to be, and that the vendor had good right to sell as he did. And it is idle to attempt to escape from the question fairly presented, by asking a jury to conjecture whether it was a sale of the note, and accepting payment in rum, "for the accommodation of the purchaser," or a sale of rum, and accepting payment in the note, for like accommodation. And it seems to us, that if such a distinction had been first stated, by some judge or writer, less known to fame than the distinguished Chief Justice of Massachussets, whose word went for law in his time, it would scarcely have been taken up and acted upon by so many eminent courts as this already has been. It is, in fact, however much it may have been indorsed, nothing more than a refinement, too nice for common apprehension.

But it is proper to say that this whole doctrine of the existence of any such distinction being maintainable is entirely repudiated in a very recent case in Massachusetts, *Merriam* v. *Wolcott*, 3 Allen 258. And we cannot, more to our own mind, express the want of foundation for any such distinction, than by quoting the language of the very able and learned judge, Mr. Justice Chapman, who gave the opinion of the court in the case last cited: "There are two cases which state a distinction in regard to this implied warranty that is not recognised in the other cases," citing *Ellis* v. *Wild*, *supra*, and *Baxter* v. *Duren*, *supra*, to which may now be added *Fisher* v. *Lieman*, 13 Md. Rep. 497, and the principal case. Mr. Justice Chapman continues: "If this is the law of this Commonwealth, then the plaintiff cannot recover * *; but it is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment for the forged paper, the injury is the same to him. There is in both cases a failure of consideration, growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is in both cases the same. And we think that the authorities, which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract;" citing the earlier cases of *Cabot Bank* v. *Morton*, *supra*, and *Lobdell* v. *Baker*, 1 Met. 193, as having already virtually overruled *Ellis* v. *Wild*.

I. F. R.