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DIARY FOR AUGUST.

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

THE

Upper Canada Law Journal.

AUGUST, 1866.

SUGGESTIONS FROM THE BENCH.

We occasionally hear suggestions from judges as to the propriety of amendments in the laws. These hints are particularly valuable, as they are not the result of the one-sided feelings of a suitor, smarting under the sense of a supposed defect in the law, or what may indeed be, in his individual case, an actual defect. Nor are they the crude, ill-digested notions of a would-be law reformer, but they are the judicially weighed and carefully expressed opinions of men responsible for their words, and free from any taint of partiality or personal interest in the matter upon which they are called upon to abjudicate.

Our attention has been drawn to this by the remarks that lately fell from the bench upon two points; one with reference to taking evidence under commissions to examine witnesses, and the other as to relieving parties from mistakes of arbitrators upon compulsory references.

We refer to the judgment of the Court of Common Pleas in *Muckle v. Ludlow*, 16 U. C. C. P. 420, as regards the first of these points. The learned judge who delivered the judgment, after stating the exceptions taken to the mode of executing the commission, which was alleged to be defective, said: "It is very perplexing to the judge at the trial, and afterwards to the court, to decide what may be for the time the whole merits of the cause upon such strictly formal objections; and it is a very serious matter for the party, who may have gone to an enormous expense and trouble to procure the testimony which he has produced, to have it all nullified, and his rights involved in the litigation, perhaps, very seriously prejudiced by the rejection of his commission, for a cause which every one feels ought not to be allowed to prevail. While amendments are made so liberally in all cases criminal and civil, it might, at least, be left discretionary with the judge or court, notwithstanding the non-observance of some of the statutable formalities, to receive the commission and the evidence taken under it if there be no reason to believe that the commission, or any of the proceedings connected with it, has or have been improperly dealt with. This may introduce some laxity of practice in the execution of commissions; but it is no argument against the relaxation of the strict law, for all amendments may be equally condemned, and the law is full of provisions for relief against inevitable error."

There are few lawyers of any experience who have not at some time or other felt the difficulties here mentioned, and it is certainly strange that, in these days of law reform, no aspiring legislator of our profession has taken such an obvious way of doing good service to his brethren and the public as is here pointed out.

The other matter alluded to is also one of great importance and well worthy of consideration. As our readers are aware, it is only of comparatively late years that compulsory references to arbitration in certain cases have been introduced. There is a manifest difference between references by consent and these compulsory arbitrations which must not be lost sight of. There was a certain show of reason in the law which prevented any appeal from mistakes in an award made by arbitrators voluntarily chosen by the parties themselves when the award bore no error on its face, and whether the mistake were one of law or of fact. But where the arbitrator is not the choice of the parties, the reason, if any, for holding the reference binding, notwithstanding the mistake of law or fact, fails. And yet in this respect it is now held there is no difference between the two kinds of reference as to the effect of the reference. The Court of Common Pleas in at least two cases during last term, pointed out that some alterations of the existing law are necessary to enable them to do substantial justice between parties who have been compelled to leave their disputes to the unsatisfactory tribunal of arbitration.

The theory appears to be that the arbitrator stands in the place of a jury, or in some cases of a judge and jury; but the difficulty lies in this, that there is not the same means of setting aside an incorrect, unjust or illegal award of an arbitrator, as there is of a similar verdict of a jury. That this has not entirely escaped the attention of the Legislature is evident from the provisions respecting arbitration in the Municipal Act. Sec. 358 of that Act (sub-sec. 13), after directing any arbitrator appointed under the act to take full notes of the evidence adduced before him, and file the same for inspection by all parties interested, by sub-sec. 14 provides, that "the court shall consider, not only the legality of the award but the merits as they appear from the proceedings so filed as aforesaid, and may call for additional evidence to be taken in any manner the court directs, and may, either without taking such evidence or after taking such evidence, set aside the award, or remit the matters referred or any of them from time to time to the consideration and determination of the same arbitrators, or to any other person or persons whom the court may appoint as prescribed in the Common Law Procedure Act, and fix the time within which such further or new award shall be made, or the court may itself increase or diminish the amount awarded or otherwise modify the award, as the justice of the case may seem to the court to require."

This, certainly, does not admit the infallibility of arbitrators; and it is some such enactment as this, of general applicability, which, as it appears to us, is necessary to advance the interests of justice in the premises.

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, wh we took a block-house and fifty prisoners, and the attack at Ogdensburgh, under Col. Lethbrid where we were repulsed; was afterwards e ployed building the fort at Prescott, and w made quarter master sergeant. I was at t attack at Goose Creek, and also at the taking Ogdensburgh, the battle at Crysler's Farm, and the breaking up of the enemy's camp at Malo In the Fall of 1838 . . anteered in Col. V koughnet's Regiment, and in the rank of serge was at the taking of the brigands at Windm Point. In 1836 I was appointed bailiff of t Commissioners' Court, and was afterwards a pointed bailiff in the Division Court by Jud Jarvis, at its first formation. I have done t the duty on *foot*, and compute that I have trav led between sixty and seventy thousand miles foot. My wife is still living, and we have h three sons, eight daughters, sixty-four gra children, and twenty great-grand children."

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

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

We think he ought.

THE MUNICIPAL MANUAL.

We are glad to be able to announce at this particular juncture, in view of the Act respecting the Municipal institutions of Upper Canada, and the revised Assessment Act, which will shortly become law, that Mr. Robert A. Harrison is engaged in the preparation of a new edition of his most valuable Manual, embracing in it the above Acts. The numerous decisions on various points arising under the municipal laws renders it essential that we should have a careful and complete review of them. The great success which attended the publication of the former Manual is a sure guarantee of the welcome that will be accorded to its successor.

SELECTIONS.

OF THE LAW OF FIXTURES, AS BETWEEN THE HEIR AND EXECUTOR.*

(*From the American Law Register.*)

1. The rule now depends mainly upon the intention of the party in affixing the article to the soil.
2. Most writers upon the subject treat it with reference to the relations out of which such questions are likely to arise.
   (1.) As between landlord and tenant the construction favors removal by the tenant, where that was the evident intention.
   (2.) As between executor and heir, vendor and vendee, all erections and fixtures, intended for permanent use on the land, go with the land.
   (3.) As between the executor of the tenant for life and the remainder-man.
3. The later English cases seem to settle the matter in that country. Cases stated.
4. Statement of some of the American cases. They seem not to follow any clear principle.
5. Enumeration of classes of cases where the decisions have been conflicting.
6. The mode of attaching personalty to the freehold sometimes decides its character, as a fixture.
7. Illustrations drawn from the reported cases upon different subjects connected with fixtures.
8. Instances illustrating the question among the recent decisions.
9. A late English case between mortgagor and mortgagee.
10. The English courts now regard the question as one of intention mainly.
11. The subject of ornamental furniture, attached to the walls and foundation, considered.
12. The devisee will take the fixtures, the same as the heir, and more extensively, in some cases.
13. The tests which are to determine cases of fixture.
   (1.) The character and use of the article will settle most cases.
   (2.) When that leaves the case doubtful, custom and usage control.
   (3.) If there is still doubt, the argument, expectation, or understanding of the parties may be restored to.

1. The full discussion of this topic would carry as much beyond the limits allowable in such a treatise as the present. The inquiry in every case of the kind is, whether the article is attached to the freehold in such a manner, as that it is fairly presumable that it was not intended to be ever separated by the person who placed it there. Hence, in determining what articles are to be regarded as fixtures and what are not, the customs of business, of husbandry, and the general usages of country in regard to the subject-matter, will have great influence in the decision, more than the particular mode in which the article is affixed to the soil or freehold.* So that the old rule of *quicquid plantatur solo, solo cedit*, will now be of but slight weight. And the old case of *Culling* v. *Tuffnal*, where it was held that a barn erected upon pattens or blocks, might be removed, but that if it had been let into the soil it could not have been, would now be regarded as resting on no sound distinction: Bull. N. P. 34.

2. Some writers have sub-divided the question of fixtures into the relations out of which the question ordinarily arises.

(1.) As between landlord and tenant, where the construction is made most favorable to the tenant, for the advancement of good husbandry. But it was said in the early cases, *Elwes* v. *Maw*, 3 East 38, s. c. 2 Smith Lead. Cas. 99; *Horn* v. *Baker*, 9 East 215, s. c. 2 Smith Lead. Cas. 122,† that there appears to be a distinction between annexations to the freehold, for the purposes of trade, and those made for the purposes of agriculture, and better enjoying of the immediate profits of the land, in regard to the tenant's right to remove the same. But that distinction is not much regarded, of late, in the English courts; and seems never to have gained much foothold in this country, where agriculture is regarded as one of the most important public interests. In the case of *Elwes* v. *Maw*, Lord Ellenborough, Ch. J., considered that the law at that time, as indicated by the prior cases, *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Warde*, Ambler 113; *Lawton* v. *Salmon*, 1 H. Black. 259, note (*b*), came to this,—"That where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty." But this, like many other rules upon the subject, will afford but slight aid in deciding the multiplicity of questions arising in the relation of landlord and tenant. The true rule, as between landlord and tenant, seems to be, that all annexations and erections made by the tenant for temporary convenience of enjoying the premises, and with the evident

*The following article is from the forthcoming work of Judge Redfield upon Devises, Legacies and the Duties of Executors and other Testamentary Trustees, which may be expected in a short time.

*This may be well illustrated by different articles. An ordinary grindstone may be placed upon stakes driven firmly into the ground, for convenience of use. So a carpet is firmly nailed to the floor, for the same reason But no one would ever regard either of these articles as fixtures. On the other hand, some kinds of fence are made to slide upon the land, resting upon a frame; and grates and fireplaces are often laid into the chimney, and removable without the use of force, as are also window-blinds, and doors even. Yet no one would regard them as any the less a part of the reality.

†In the former of these cases, which is still regarded as a leading case upon the subject, it was decided, as between landlord and tenant, that where the tenant erected, at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled and let into the ground, he could not remove the same even during his term, and although he thereby left the premises in the same state as when he entered.

purpose of removal, may be disannexed during the term, where that can be done without sensible injury to the other erections, and where the removal is consistent with the known usages of the business.

(2.) In regard to the law of fixtures, between the heir and the executor, the construction has always been more strict in favor of the inheritance. In this relation it seems that nothing which was erected for the permanent use and advantage of the land, and which, at the time of its erection, was intended to remain permanently upon, or attached to, the soil, can ever be removed by the executor. And the same rule, substantially, obtains between grantor and grantee, or vendor or vendee; and equally between mortgagor and mortgagee.

(3.) The third case named by the judges and text-writers, as between the executor of the tenant for life and the remainder-man, will rest much upon the same ground as that between landlord and tenant. For the tenant for life should at least have the same right, which any other tenant has, to hold anything of a personal nature, temporarily affixed to the freehold, which was not designed by him to constitute a permanent fixture, and which could be removed without essential injury to the permanent structures upon the land.

3. But to return from a consideration of these different classes to the general question, it seems to be now reasonably well settled in the English courts, the matter having received a very thorough discussion in the House of Lords in a somewhat recent case: *Fisher* v. *Dixon*, 12 Cl. & Fin. 412. It was here held, that where the owner of the land in fee, for the purpose of better enjoyment of the land, erected upon and annexed to the freehold certain machinery, such as is in use in working coal and iron mines, the purpose for which this was erected, it will go to the heir as part of the real estate. And it was further held, that if the corpus of the machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and of being used in such detached state, to a greater or less extent, must, nevertheless, be considered as belonging to the heir. And in a still later case, *Mather* v. *Fraser*, 2 Kay & Johns. 536, this question is carefully considered by Vice-Chancellor Wood, in regard to the machinery in use in a copper-roller manufacturer's works. It is here decided, that even in regard to manufactures, all articles fixed to the freehold, whether by screws, solder, or by any other permanent means, or by being let into the soil, partake of the nature of the soil, and will descend to the heir, or pass by conveyance of the land; that the rule of law by which fixtures are held less strictly, when erected for manufacturing purposes, has no application to fixtures erected by the owner of the land in fee; that machinery standing merely by its own weight does not become a fixture. But when part of a machine is a fixture, and another and essential part of it is moveable, the latter also shall be considered a fixture: *The Met. Co. Society* v. *Brown*, 26 Beav. 454.

4. There is no great uniformity in the decisions in the different American states. In some of the states almost all kinds of machines which are complete in themselves, and which are susceptible of use in one place as well as another, and which do not have to be fitted or accomodated to the building where used, and which are fixed to the building to give the machinery steadiness, are held to be personalty. Of this character are carding machines, looms, and other machinery used in manufacturing cloth. *Tobias* v. *Francis*, 3 Vt. Rep. 425; *Gale* v. *Ward*, 14 Mass, Rep. 352.* But there are many other American cases by which any kind of machine permanently attached to or erected in a building for manufacturing purposes has been treated as a fixture, and not removable, either by the vendor or mortgagor, or by the executor of the owner in fee. *Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306, 314; *Richardson* v. *Copeland*, 6 Gray 536; *Baker* v. *Davis*, 19 N. H. R. 325; *Murdock* v. *Harris*, 20 Barb. 536; *Rice* v. *Adams*, 4 Harr. 322. There are, unquestionably, numerous cases, both English and American, where, as between landlord and tenant, the latter has been allowed to remove almost any kind of machinery, erected by himself with intention to remove the same. Although, under ordinary circumstances, the same kind of machinery, in the same situation, if placed there by the owner in fee, would have been regarded as constituting a permanent fixture. Thus it has been held, that an engine, put in a sawmill by the mortgagee in possession, who is but a trustee, did not thereby become a fixture: *Cope* v. *Romeyne*, 4 McLean 384. But it seems to have been held in an early case, that where the agent of the owner of a grist-mill placed his own mill-stone and mill-irons in the mill, they thus became the property of the owner of the mill, as part of the freehold, and could not be again separated therefrom, without the consent of the owner: *Goddard* v. *Bolster*, 6 Greenl. 427.

5. There are a considerable number of subjects, in regard to which the cases are by no means in agreement with each other. Thus, boilers and large kettles set in brick and mortar, and indispensible to the permanent use of the building and machinery with which they are connected, at least for present purposes,

*The same principle is strenuously maintained, with great learning and ingenuity, in the later cases in Vermont: *Hal* v. *Wentworth*, 28 Vt. R. 428; *Fullam* v. *Stearns*, 30 Vt. R. 443. But in Massachusetts the tendency seems to be somewhat more in the direction of the English cases: *Yale* v. *Seely*, 15 Vt. 24. See *Preston* v. *Briggs*, 16 Id. 124; *Leland Admr.* v. *Gassett*, 17 Id. 403; *Powers* v. *Dennison*, 86 Id. 752. A personal chattel becomes a fixture, so as to form part of the real estate, when it is so affixed to it as not to be removable without injury thereto; whether the annexation were for use, or for ornament, or from caprice: *Providence Gas Co.* v. *Thurber*, 2 R. I. 15.

have nevertheless been regarded as mere personality: *Wetherby* v. *Foster*, 5 Vermont 136; s. p. *Hill* v. *Wentworth*, 28 Vermont, 428. But this view is generally dissented from in the American states (*Union Bank* v. *Emerson*, 15 Mass. 159), although it has been said other cases confirm the rule as first declared in *Wetherby* v. *Foster*: *Reynolds* v. *Shuler*, 5 Cow. 323; *Raymond* v. *White*, 7 Id. 319. But we cannot believe there is any just ground to question that kettles and boilers fastened in brickwork for permanent use, and which cannot be removed without removing the masonry, must be, as between the executor and the heir, treated as fixtures.

6. There are, no doubt, a large number of cases in regard to machinery and other personalty, where the question of fixture or not has been determined, to a great extent, by the manner in which it was attached or fastened to the freehold. And it has been often said, that machinery, neither fastened nor adapted to the freehold, does not become a fixture: *Ante*, pl. ?, and note. But this feature must be regarded as rather accidental than decisive in the case; and especially, as is often the case, where the fastening of the machinery to the building is done to give it greater steadiness, and is therefore no indication of a purpose of attaching it permanently to the freehold. When the fastening is of the latter character, it may properly enough be regarded as indicative of an intention to thereby attach it permanently to the reality, but this is not the ordinary case.

7. There has been considerable controversy, first and last, in regard to many articles, like stoves and furnaces, which are indispensable to the use of dwellings, in high latitudes, and which are obtained and intended for permanent use in the places where found, and which would therefore, upon general principles, be justly enough regarded as fixtures; and that is the more common rule in regard to furnaces, even where they are portable, and in no way permanently attached to the reality. But in regard to stoves the rule is now entirely well settled, that they are to be regarded as mere personalty, unless laid in brick and mortar, or in some other way permanently attached to the freehold: *Squire* v. *Magee*, 1 Wms. Exrs. 655; *Blethen* v. *Towle*, 40 Maine 310.*

8. There are a considerable number of late English decisions upon the general question of fixtures, but we are not aware that any new principle is involved in them. Green-houses, built in a garden, and constructed of wooden frames fixed by mortar to foundation walls of brickwork, were held to be fixtures, and not removable by the occupier who built them: *Jenkins* v. *Gething*, 2 Johns. & Hem 520. A boiler, too, built into the masonry of the green-house, becomes immovable; but the pipes of a heating apparatus connected with the boiler with screws are removable: Id. And it has been held that green-houses, forcing-pits, and hotbed-frames, erected by nursery gardeners for the purpose of their trade, may, so far as not consisting of brickwork, be removed by them at the expiration of their lease: *Syme* v. *Harvey*, 24 Sc. Sess. Cas. 202; s. c. 8 Jur. N. S.; Dig. 79. And upon the demise of a music-hall, chandeliers and seats attached by the lessee by screws are removable: *Dumergue* v. *Ramsay*, 10 W. R. 844.†

9. In a recent case (*Walmsley* v. *Milne*, 7 C. B. N. S. 115; s. c. 6 Jur. N. S. 125) in the Common Pleas, where it appeared that the owner of the inheritance annexed thereto fixtures (which would, in the ordinary case of landlord and tenant, be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, it was held they will become part of the free-

* And a cistern standing on blocks in the cellar, although in some sense a fixture, may be removed by the tenant, if placed there for his own temporary convenience, and with the purpose of removing the same at the end of his term: *Wall* v. *Hinds*, 4 Gray 256. Indeed there are many things, such as gas-fittings, pumps, and sinks, and the like, which if put into a tenement at the beginning of the term by the landlord, will remain his at the end of the term, and will pass by deed or mortgage. But if placed there by the tenant, during his term, they may be removed by him at the end of it. The same has been held in regard to a knocker upon the door, and a crane in the chimney. See *Grymes* v. *Bowcren*, 6 Bing. 437; *Elliott* v *Bishop*, 10 Exch. 512. And manure in heaps belongs to the executor, or to the tenant, and is no part of the realty: *Higgon* v. *Mortimer*, 6 Car. & P. 616; 1 Wms. Exrs 650. But if it be spread upon the land it becomes realty, of course, and even where laid in heaps upon the land for spreading: *Fay* v. *Muzzey*, 13 Gray 53. Some things merely resting upon the soil will no doubt be regarded as fixtures, from the nature of their use, such as troughs for watering cattle. But it was held, that a large wooden box, heavy and lined with zinc, which was erected in the room of a tavern for an ice-chest, and which was incapable of being removed from the same without being taken to pieces, was nevertheless personalty, and did not pass by deed of the premises: *Park* v. *Barker*, 7 Allen 78. But the New York Court of Appeals, in *Snedeker* v. *Warring*, 2 Kernan 170, held that a statue, erected as an ornament to grounds, may pass by deed of the realty, although not fastened to the base upon which it rested. So also in the same case, it was held, that a sundial, erected upon a permanent foundation of stone, without being in any way fastened to it, was a part of the real estate, although removable without difficulty. And although there is an early case where it was decided that a cider-mill might be removed as personalty, that has not been followed; *Wadleigh* v. *Janvrin*, 41 N. H. R. 503; and the same rule is applied to the fixtures in a barn, such as the stanchion-blocks, chains, &c., which had been taken out for the convenience of repairing the barn, but were nevertheless held not divested of their character of fixtures. So also in another late case in New Hampshire (*Burnside* v. *Twitchell*, 43 N. H. R. 390), where it was held, that saw-mill saws, purchased by the owner of the mill for use therein, and attached to the mill and in use there, without any intention of removing them at the time, became parts of the realty, and pass by a conveyance of the land. And the same was here declared, in regard to leather belting in use in the mill, and indispensable to connect the machinery with the motive power. But it was here held, that the fact that the owner of the mill had purchased saws, with the purpose of using them in the mill, and had kept them in the mill for a long time with that intent, if not actually attached to the mill, would not change their character or personality. We might multiply cases upon this subject, from the American reports, almost indefinitely: but that would not be desirable in a book of this character.

† But is was held in the Exchequer Chamber, where the judgment was reversed, that where the lease contained a condition, that the fixtures to be put in by the tenant should not be removed during the term, and that if any writ of execution should be levied upon the premises it should be lawful for the lessor to re-enter, and seize and retain for her own, all fixtures, whether tenant's or otherwise; that this condition defeated the right of the execution-creditor of the lessee to levy upon tenant's fixtures: *Dumergue* v. *Ramsay*, 10 Jur. N. S. 155.

hold. In this case the owner of the fee mortgaged it, and afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an inn-keeper, brewer, and bath proprietor, he affixed a steam engine and boiler, a hay-cutter, malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way, and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or floors for the purpose of steadying them, but were all capable of being removed without injury, either to themselves or the premises. The engines were used also to supply water to the baths, and to put the other machines in motion; and the whole subservient to the business carried on by the mortgagor; and it was held that these erections became fixtures, and passed with the land to the assignee of the mortgagee.

10. In a somewhat recent case (*Lancaster* v. *Eve*, 5 C. B. N. S. 717; 5 Jur. N. S. 683) the Court of Common Pleas held, that it was a question of evidence depending on circumstances, and the intention of the parties, whether A.'s chattel, fixed on B.'s soil, becomes part of the soil, or remains the chattel of A.

11. It has sometimes been made a question how far pier-glasses and other mirrors, pictures, and matters of that character could be removed, where they have been let into and formed a portion of the wainscoting, and this was done by the owner of the fee, at the time of making the erections. In *Beck* v. *Rebow*, 1 Peere Wms. 94, it was said by Lord Keeper Cowper, that hangings and looking-glasses were only matters of ornament and furniture, and not to be taken as part of the house or freehold. But it was suggested by Mr. Williams (1 Executors 657) that where such articles of furniture are so framed into the house as to take the place of panels, they shall go to their heir, because they could not be removed by the executor without disfiguring the house. But it seems entirely well settled, that marble chimney-pieces, or any other pieces of ornamental furniture, which are placed in a dwelling by a tenant by way of ornament, may be removed by him during the term: *Dudley* v. *Warde*, Amb. 113. And hangings, tapestry, and iron backs of chimneys have been held removable by the executor (*Harvey* v. *Harvey*, 2 Strange 1141) as not belonging to the heir.

12. There seems no question that the devisee of real estate will take it with all fixtures fairly belonging to it, the same as the heir. And there are some cases in the books where, from the language of the will and the surrounding circumstance, where books for carrying on mechanical or manufacturing business are devised, that a clear intendment will sometimes arise, that it must have been the purpose of the testator to have the machinery and tools, indispensable to carrying on the business, go with the realty: *Wood* v. *Gaynon*, 1 Amb. 395.

13. In conclusion, without going more into detail, it may be safely said, that in determining whether a particular article is to be regarded as a fixture or not, a few general considerations may commonly be regarded as decisive.

(1.) The character and use of the article will commonly indicate, with more or less clearness, whether, according to the general custom of the country, it is to be regarded as a fixture.

(2.) As to those classes of articles where there is fair ground for debate, it should first be inquired, what is the general practice and usage of the country. This will generally be found of a controlling character.

(3.) If neither of the foregoing rules afford any clear indication in regard to the matter, resort must be had to the time and purpose of the erection, and the expectation or understanding of the parties interested in opposite directions at the time of the erection of the structure, or the attachment of the article to the freehold. There will commonly arise out of this inquiry some clear guide to the solving of all doubt. But it should always be borne in mind, that this latter mode of solving the question is only to be restored to where the former ones fail to afford any satisfactory solution. For the practice which has obtained in some of the American states, of allowing houses and barns and mills to be treated as mere personalty, although built in the ordinary mode, upon the ground of some oral contract, expectation, or understanding among the parties interested therein, cannot fail to prove in the end of evil consequence and tendency, and cannot be too decidedly repudiated by all lovers of good order and sound law: *Leland* v. *Gassett*, 2 Wash. Dig. Vt. Rep. 335, 336; s. c. 17 Vt. Rep. (on another trial) 405; *Preston* v. *Briggs*, 16 Id. 124; *Van Ness* v. *Pacard*, 2 Peters's S. C. Rep. 137.†

* In the case of *Walmsley* v. *Milne*, supra, the question of fixtures and the cases are considerably discussed, and the following proposition maintained: That assuming the fixtures in question to be removable, as between tenant for years and landlord yet assuming them to be trade fixtures, they were not removable by the mortgagor, in the absence of all evidence of such an expectation and understanding, between the mortgagor and the owner of the mortgage.

† But such an article as a pump, as before intimated, if erected by the owner of the land, will go with the land by deed, or mortgage, or descent, or devise. But if placed there by a tenant it is removable: *McCracken* v. *Hall*, 7 Ind. 30. So in regard to other doubtful cases, the contract of the parties is of great weight: *Brearley* v. *Cox*, 4 Zab. 287.

BRIBERY AT ELECTIONS.

Is there then no cure for bribery? Such will be the despondingexclamation 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. Moreover, 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.*

LORD CRANWORTH.

The Great Seal will pass to-day for the second time from the hands of Lord Cranworth to those of Lord Chelmsford and as no man of seventy-five can look forward to the reversion of a laborious office, we may regard the career of the present Lord Chancellor as virtually closed. If it has not been an eminently brilliant, it has been an eminently fortunate and honourable career. Lord Cranworth has not only proved himself *par negotiis*, but has earned the respect of the Bar and the public in more various capacities than any one of his legal contemporaries. It is now exactly fifty years since he was first called to the Bar, and thirty two since he became Solicitor-Gen-

eral under Lord Melbourne's Government—a post which he resumed after the short administration of Sir Robert Peel, and held until he was made a baron of the Court of Exchequer in 1839. Although his practice had been confined to the Courts of Chancery, Baron Rolfe acquired a high reputation as a common law judge, and the manner in which he conducted the famous trial of Rush has been remembered ever since as a signal proof of his judicial ability. Upon the resignation of Lord Cottenham, in June 1850, he was one of the commissioners of the Great Seal, and in the same year succeeded Sir Lancelot Shadwell as Vice-Chancellor, and was raised to the peerage. In Oct. 1851 he became one of the Lords Justices of Appeal in Chancery, and at the end of 1855 he accepted the Chancellorship, vacated by Lord St. Leonards. This office he retained for more than five years, under Lord Aberdeen and Lord Palmerston successively; nor was it until Feb. 1858, that he gave place to Lord Chelmsford. During this period it was Lord Cranworth's misfortune to be unequally yoked, for many official purposes, with an Attorney-General whose rare intellectual vigour and zealous advocacy of Law Reform contrasted with his own slower and more cautious temperament. His patience, however, his honesty of purpose, and his conciliatory disposition here stood him in good stead, and he carried with him the goodwill of the Chancery Bar when he quitted the woolsack. Upon the return of Lord Palmerston to power in 1859, Lord Campbell was made Lord Chancellor, and was followed by Lord Westbury; but after the memorable fall of the latter, about this time last year, Lord Palmerston, who could ill spare the services of Sir Roundell Palmer in the House of Commons, again offered the Chancellorship to Lord Cranworth, who has filled it with credit ever since.

No one would venture to claim for the retiring Chancellor such fame as has been won by some of his predecessors, two of whom, and not the least illustrious, are still living at a very advanced age. In depth of learning he cannot be compared with Lord St. Leonards, nor in versatility of genius with Lord Brougham. Neither learning nor versatility, however, nor both combined, are sufficient to constitute a model Lord Chancellor, and Lord Cranworth has manifested some other qualifications, less remarkable, indeed, but hardly less essential. In the first place, he possesses a sound and adequate knowledge of both our legal systems—that is, of common law and equity. This is no small or ordinary attainment for an English lawyer. Lord Brougham when he was intrusted with the Great Seal by Lord Grey, was chiefly known as an eloquent advocate at Nisi Prius and a powerful debater in the House of Commons; and though his marvellous talents and industry enabled him to master the principles of equity, and even to apply them as no other man could with so little experience, yet his judgments could not and do not command the same authority as those of less gifted Chancellors. On the other hand, Lord St. Leonards, though profoundly versed in the mysteries of real property law had little, if any, practical acquaintance with common law. Lord Cranworth before he became Lord Chancellor, had occupied a seat for some years on both judicial benches, and earned the confidence of both branches of the legal Profession. It is to this circumstance, too, as well as to his unblemished personal character, that he owes his influence in the House of Lords. Since his accession to office he seems to have experienced no difficulty in presiding over that Assembly which Lord Westbury sometimes found so unruly. The secret of this, no doubt, is that Lord Cranworth has made no enemies; but his opinion on certain questions, such as those affecting criminal justice, is naturally received with the greater attention because he is known to be familiar with the duties of a common law judge.

The weak point in Lord Cranworth's public life is his want of sympathy with reforms of law. It is by no means an uncommon failing with those who are plunged early into the details of business, with the prospect of success and wealth if they will but make the best of the existing system, with the risk, approaching to a certainty, of failure if they insist on broaching "crotchets" in the hope of amending it. The reason why so few successful lawyers are reformers is, that until they have succeeded no one cares to listen to their suggestions, and after they have succeeded their own interests are concerned in keeping things as they are; while, had they managed to gain a hearing sooner, they would probably not have succeeded at all. The only two men of our own times who have conspicuously risen superior to these anti-reforming tendencies, or retained energy enough to use the vantage ground of a great position for the sake of initiating organic changes, are Lord Brougham and Lord Westbury; and this a merit which in the eyes of posterity, will cover a multitude of sins. It would be ungrateful not to recognize the leading part which Lord Cranworth took in passing the Charitable Trusts Act, whence an important reform in the management of these vast endowment may hereafter be dated On most other proposals for improving our legal system he has adopted what is called "the safe side," and has done little to realize the vast designs bequeathed to him by Lord Westbury in his valedictory address to the House of Lords. Those designs, involving the formation of a complete digest as the proper basis for a future code, yet remain to be carried out. It would be too much to expect of the new Lord Chancellor that he should devote himself to the execution of a project which originated with a political opponent, and the honour of accomplishing it will probably be still reserved, as it should be, for a Liberal Government.—*The Times.*

CHIEF BARON POLLOCK.

The judges are probably the best known of our public men. A great politician addresses the House of Commons a certain number of times in the course of a session, but to the public at large he is but a name, representing particular political opinions. Even when he addresses a public meeting or makes an after-dinner speech, he is more or less of an actor. A judge, on the other hand, transacts all his business in public. He is one of the shows not only of London, but of every country town, and is constantly brought into direct personal relations not only with every member of a large and most active profession, but with men in all ranks of life and on every sort of subject. He is, moreover, perfectly independent of those with whom he has to deal. His position is as secure as law and public feeling can make it. If he is ill-tempered, lazy, tyrannical, or even merely disobliging, he can indulge his feelings without any special risk. No man can with perfect impunity give so much offence or do so many and such deadly injuries as an ill-disposed judge, nor is any man so continually on his trial. It is pleasant to reflect that under these circumstances the fifteen judges are, with hardly an exception, exceedingly popular not only with the Profession to which they belong, but with the public at large, and we shall doubt whether any ever took with him into retirement a larger share of hearty affectionate admiration than the kind old man who, after presiding over the Court of Exchequer for nearly a quarter of a century, retires into private life full of freshness and vigour, and surrounded as closely as ever man was by all that should accompany old age. No doubt the Chief Baron had his failings. He had been so consummate an advocate at the Bar that he never quite threw off his old habits. He belonged to that class of judges who distinctly take a side in the course of a case, and make no mystery to the jury of the opinion which they have formed. It may admit of a good deal of argument whether this habit does or does not favour substantial justice.

To hit the exact line between fairly directing and unduly pleading from the bench is very difficult. Certainly, the attempt to be scrupulously neutral often ends in puzzling the jury, and in suggesting doubts to them upon points which in reality are quite plain. Whether or no the Chief Baron always hit the golden mean, no one could possibly doubt of the goodness of the motives by which he was actuated. He may sometimes have been a little too much of an advocate, but he was always an advocate for what appeared to him the cause of justice, truth, and good morals, and of these he was no bad judge. There were two characteristics about his behaviour on the bench which no one could mistake—his extraordinary gifts, and the extreme kindiness, and even tenderness, of his nature. When fairly roused in a case which put him on his mettle, he would speak with a vivacity, a choice of language, and a dignity and power of manner which recalled the old leader of the Northern Circuit in its best days to those who had known him before he was a judge. His lighter gifts were singularly winning. He was full of humor. The solemn orations which he used to make on Lord Mayor's day—a distinct and separate oration for each new Lord Mayor—were as good as a play, and will long form a pleasant tradition in Westminister-hall. His knack of committing innocent forgeries was another specimen of the general adroitness and dexterity of mind and body which distinguished all that he did. He once directed a letter to a barrister in a hand so exactly like that of the barrister himself (and a wretchedly bad hand it was) that his correspondent supposed that he must have left at his chambers an envelope addressed to himself. His talents, however, were not the most characteristic points about him.

We should doubt whether after all his long career he had an enemy in the world, or even a casual acquaintance who did not feel towards him as a friend. Every tone of his voice, every expression that he used, when the occasion required it, was full of good nature and warmth of heart, though without a trace of weakness. He belonged to a race and generation which is hardly being renewed, but the felicity of his career will always be exceptional. A man who is distinguished from one end of life to the other—who, from being senior wrangler, developes rapidly into being the leader of the Northern Circuit, Attorney-General, and Chief Baron—is, as the phrase goes "commoner in fiction than in real life."

Those who had the opportunity of seeing from day to day how very pleasant such a reality may be, learnt something from it which they are not likely to forget.—*Pall-Mall Gazette.*

UPPER CANADA REPORTS.

PRACTICE COURT.

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

Jones v. Prentice.

Arbitration—Award—Verbal consent to enlarge time for making award.

Held, that a verbal consent to an enlargement of the time for making an award is sufficient under C. L. P. Act, sec. 171.

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

In Hilary Term last, *M C. Cameron*, Q C obtained a rule calling on the plaintiff to shew cause why the award made herein should not be set aside on the following grounds:

1. Because the award was made when more than three months had elapsed after the order of reference [which was silent as to time] and after the arbitrator had entered on the reference

2 Because the arbitrator improperly received

a witness who was directly interested in the result of the action.

3 On the ground of error and mistake because the evidence proved the result of the finding should have been different.

During Easter Term following, *Beverly Jones* shewed cause

The 171 sec. of the C. L. P. Act is the one which relates to the first objection, it is an objection in fact, that the defendant did not consent in writing to enlarge the time under that section. A judge could have enlarged the time for making the award after the time had elapsed, and he may enlarge the time still, although the award has been made, but the defendant is estopped from objecting to the want of a formal writing of enlargement, as he consented to the arbitrator making his award notwithstanding the time had expired, and the award was made within one month after such consent was given. *Tyerman* v. *Smith*, 6 E & B. 719 Russell on Awards, 141 Ed. 1854. *Brown* v. *Collyer*, 20 L. J., Q. B., 426; 15 Jur. 881; *Ward* v. *Secretary of War*, 32 L. J. Q. B. 53, 11 W. R. 88; *Andrews* v. *Elliott*, 5 E. & B. 502 (affirmed in Exch. Ch., 6 E. & B. 338.) The award, however, cannot be treated as wholly invalid, for it may be sustained as having been made on a binding parol submission, *Watson* v. *Bennett*, 29 L. J. Exch. 357, 5 H. & N. 831. See also *Palmer* v. *Metropolitan R. Co.*, 31 L. J., Q B. 259; Russell on Awards, 138 9.

It is not shewn that the witness objected to was a party named on the record, nor that the action has been brought on his immediate and individual behalf, but no such objection could properly be entertained even if it did appear; Russell, 193, 448; *Hodge* v. *Burgess*, 3 H. & N. 293; *Hagger* v. *Baker*, 14 M. & W. 9; *Northern P. Co.* v. *Patton*, 15 U C. C. P. 332. As to the alleged mistake, it does not exist in fact, but if it did the Court will not, even in such a case, set aside the award. *Read* v. *Weir*, 20 U. C. Q B. 544; *Saulter* v. *Carruthers*, *ib.*, 560; *McDonald* v *McDonald*, 7 U C. L. J. 297. Russell on Awards, 293-4; *Hodgkinson* v. *Fernie*, 3 C B. N. S. 189; *Severn* v. *Cosgrave*, 2 U. C. L J., N S. 11.

McCarthy supported the rule.

The defendant feeling that great injustice has been done to him on the merits, relies upon the most formal exceptions for the purpose of getting that relief which is practically denied to parties on all arbitrations compulsory as well voluntary.

An affidavit of the arbitrator was filed to the effect that a day or two before he made the award he was doubtful whether or not it was necessary to enlarge the time for making it, that the plaintiff's attorney consented verbally to enlarge the time; and the deponent wrote to the defendant's attorney on the subject, that an hour or two after he had received the letter, he met the defendant's attorney, and he, the arbitrator, told the attorney of his having written, and that he thought it better to have the time enlarged; the attorney, as the deponent states, "said to me, that that was all right when I told him I should make the award in a day or two, and I regarded what passed with the attorney as quite final." This statement was not denied.

Adam Wilson, J.—I think the rule must be discharged, the authorities referred to on the argument fully sustaining the arguments they were cited to support.

I think the grounds of motion have altogether failed on the merits as well as on the ground of exception. Rule discharged with costs.

In re McLean v. Jones.

Arbitration—Award directing a plaintiff to enter satisfaction on the roll as to one of two defendants—Co-surety—Contribution.

G. recovered a judgment against M. and C., upon a note made by them. One J. was also said to have been interested with them, and liable for the debt it represented, though not actually a party to it. It was also said that he was in effect a partner with G. in the transaction. M. made large payments on the judgment, but C. paid nothing. Upon a reference of certain matters in dispute between J. and M., it was left to the arbitrator, amongst other things, to determine whether or not, M. or J., or which of them, was liable, or to what extent, in respect of the judgment or the promissory note whereon the judgment was recovered, and to make any orders which the arbitrator should think proper to settle the liabilities of the said parties in respect thereof. The arbitrator awarded—that J., as between him and M., was liable to pay all the balance of monies still unpaid upon the judgment, and that J. should pay and satisfy the same within one calendar month, and should cause the said judgment and writs of execution to be satisfied and discharged, *and satisfaction to be entered on the roll of the said judgment.*

Held, that the latter part of the award (that which was objected to) was not an excess of the arbitrator's authority.

Semble 1 That any defendant or co-surety cannot compel an assignment to be made to him of the judgment by the plaintiff, unless such defendant or surety has paid the whole of the debt.

Semble 2. That upon performing the award, and paying more than his share, J. might sue C. for contribution as for money paid on account of the judgment.

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

In Hilary Term last, *C. S Patterson*, on behalf of E. C Jones, taking exception to the last part of the award above referred to, obtained a rule calling on A. N. McLean, to shew cause why the award made herein, should not be set aside on the ground that the arbitrator had exceeded his authority in awarding that Jones should cause satisfaction to be entered on the judgment roll in the suit of *Gladstone* v. *McLean and Cameron*, the said Cameron being no party to the reference, or why the award should not be referred back to the arbitrator to amend the same by striking out the direction complained of.

In the following Easter Term, *Read*, Q.C. shewed cause. McLean is entitled to have this satisfaction although Cameron be interested as a debtor in the judgment. It does not, however, avoid the award; it may be separated from the other parts of it. Proceedings are, in fact, now being taken against Mr. McLean on the judgment by persons claiming to be the assignees under English Bankruptcy proceedings against these judgment plaintiffs

He cited: 1 Saund. 324, n. (1); *Snook* v. *Hellyer*, 2 Ch. 43; *Bradsey* v. *Clyfton*, Cro. Car. 541; *Perry* v. *Nicholson*, 1 Beav. 278.

C S. Patterson, supported the rule and referred to *Edmonds* v. *S. B.*, 3 F. & F. 962; *Batchelor* v *Lawrence*, 9 C. B. N. S. 543; *Phillips* v. *Dixon*, 29 L. J. C. P. 223; *Brown* v. *Gossage*, 15 U. C. C. P. 20

A judgment was recovered in the Queen's Bench, in which John Gladstone and Alexander Morrison were plaintiffs, and the defendant Mr. McLean and one Cameron were defendants; and it was part of a submission to arbitration of certain matters between said Jones and Mc-

Lean, that the arbitrators should have full power to determine whether or not, McLean or Jones was liable, or to what extent each or either of them was liable in respect of the judgment and the execution issued thereon, and in respect of the promissory note whereon the judgment was recovered, and to make or give any orders and regulations, or directions which the arbitrator should think proper to settle the liabilities of the said parties in respect thereof. And upon this part of the submission the arbitrator awarded—that Jones, as between him and McLean, was liable to pay all the remainder or balance of monies still unpaid upon the said judgment, and that Jones should pay and satisfy the same within one calendar month from the date of the award, and that Jones should within the time aforesaid at his own proper costs and charges, cause the said judgment and writs of execution to be satisfied and discharged, *and satisfaction to be entered on the roll of the said judgment.*

Adam Wilson, J.—The dispute appears to have been, that while the promissory note on which the judgment was recovered was, as admitted by all parties, given by McLean and Cameron, Jones was interested with them in it, and upon it, although not appearing as a party to it, and he was also, it is said, a partner with the plaintiffs in that judgment; and so it was alleged he was substantially the plaintiff, and the party enforcing it against McLean while he was really liable for the debt upon which it had been recovered.

It appears also that McLean has made sundry payments in respect of his one third share of the judgment, and that Cameron had paid no part of his share, and that the result of the award is, that Jones shall, as regards McLean, pay the remainder of the judgment and acquit McLean from all liability upon it and enter up satisfaction.

The objection to this direction is, that Cameron having paid no part of his share of the debt, is still liable for it upon the judgment; and if the plaintiffs or Jones discharge the judgment entirely, they will lose their remedy against Cameron altogether, for neither the plaintiff nor Jones will be able to sue him again, and that the remedy ought to remain against him, at any rate, upon the judgment.

None of the cases cited, throw any light on this case; those cited for the rule shew that a co-defendant or co-surety paying a judgment is entitled to the assignment of it, and to enforce it for his own benefit, and those cited against the rule, shew that payment may be directed to a stranger if the other party to the submission has any interest, or is shewn to have interest in his money being so applied. If Jones were actually a defendant in this judgment with McLean and Cameron, he might, by paying the whole debt, become entitled to an assignment from the plaintiffs, and enforce it for his own benefit to the amount of his just share against the other co-defendant, but he might, by submitting to a reference, place it in the power of the arbitrator to deprive him of this right as against McLean, and if necessary, for the purpose of giving McLean the benefit of this direction, that the judgment should be satisfied; as to Cameron also, it would be nothing more than what the former state of the law was, and Jones could recover contribution against Cameron, notwithstanding the satisfaction.

I am not satisfied either, that any defendant or co-surety can compel an assignment to be made to him of the judgment by the plaintiff unless such defendant or surety has paid the whole of the debt. Now it is admitted here, that McLean has paid a very considerable portion of it, although not the whole of it.

In either view of the case I see no objection, assuming Jones to have been a co-defendant, to his entering or being ordered to enter satisfaction on the roll; his rights may be enforced as against Cameron under the old law. And I see no hardship in the direction that Jones shall enforce his rights in this manner for the purpose of acquitting McLean at once from all further liability or trouble, not anything necessarily beyond the arbitrator's power so to award.

There is still less objection to this being directed if Jones be treated as a mere stranger or third party to the judgment, but obliged properly by the award to do this act for McLean's benefit.

The only difficulty is in the event of Jones being in fact or being afterwards considered to have been a partner of the plaintiffs when the note was given, or when the judgment was obtained; it may then be considered that after an entry of satisfaction by him upon this roll, he can never after proceed against Cameron, nor can the plaintiffs sue in a second action for the same debt.

If Jones were to sue Cameron for contribution, it would be for money paid for him on account of this judgment, and I am not at all satisfied that any effectual defence could be set up to such an action, for as a fact, Jones is not a judgment plaintiff, and as a fact, he was a joint debtor with Cameron; and upon Jones paying more than his share, I do not see what there is to prevent him from recovering contribution. As I am not satisfied that the arbitrator has exceeded his authority, I must decline to set aside the award on this ground.

The rule will therefore be discharged with costs.

Van Norman v. McLennan.

Ejectment—Appearance—Notice of title and appearance.

The time for appearance to a writ of ejectment expired on the 2nd May; on that day plaintiff searched for appearance but found none. The next day an appearance was entered with a notice of title, which notice of title was served on plaintiff on 7th May; on 14th May plaintiff made affidavit of the search of 2nd May, but suppressed part of the facts, upon which an *ex parte* order under Rule 92 was made.

Held, that this order must be set aside, as the appearance could not be treated as a *nullity*, and as the order was made *ex parte* without all the facts having been made known or considered.

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

In Easter Term *J. A. Boyd* obtained a rule calling on the plaintiff to shew cause why the order of the Chief Justice of Upper Canada, directing judgment to be signed and the judgment signed, and all proceedings had upon the order and judgment respectively, or some or one of them should not be set aside with costs for irregularity and otherwise, on the grounds—

1. That the judgment purports to be entered for want of appearance, whereas an appearance was entered for the defendant before the order was obtained and judgment signed.

2. That notice of the defendant's title having been served on the plaintiff or his agent, before the order was obtained and judgment signed, the plaintiff must be taken to have had notice of such appearance, or at all events, to have been put upon enquiry.

3. That the plaintiff was not justified in treating the appearance as a nullity, and did not make sufficient search for an appearance before making application for the said order, and the same was granted *ex parte* improvidently, and upon an incorrect statement of facts as to the time for entering appearance.

4 That the affidavit filed on signing judgment is insufficient in relying upon a search for appearance made on the 2nd of May [the defendant having the whole of that day to appear] and on relying upon the want of a notice of appearance having been served thereafter, no such notice being required, and is void or irregular because containing no sufficient addition of the party, and as stating that the name of the attorney was endorsed, whereas the plaintiff sues in person;

And why, if necessary, an order should not be made to restore possession of the premises herein, and a writ of restitution awarded in that behalf, upon reading the affidavits and papers filed herein, and on the application for the said order and now refiled, and in the meantime all further proceedings were stayed.

McMichael showed cause.

J. A. Boyd supported the rule.

The question is, whether in ejectment the defendant, who appears after the time for appearing has elapsed, is bound to give notice of his appearance to the plaintiff. He must give notice of his title, and this was done, but there is no provision for giving notice of the appearance in ejectment. Sec. 51 of the C. L. P. act does not apply to ejectment. *Swanton* v. *Gould*, 9 Ir. Ch. R. 254; *Martin* v. *McCharles*, 25 U. C. Q. B. 279; and the ejectment act makes no provision for such a notice. The appearance in such an action is a plea as well as an appearance, *Bishop of Toronto* v. *Cantwell*, 11 U. C. C. P. 373, and a plea filed but not served is an irregularity only not a nullity, *McKinnon* v. *Johnson*, 3 O. S. 169; *Moore* v. *McIlroy*, 13 Ir. Ch. R. App. 49; *Watkins* v. *Fenton*, 8 U. C. C. P. 289. The service on an agent is a service on the principal, *Patterson* v *Attrill*, 4 U. C. Q. B. 395; *Withers* v. *Parker*, 5 H. & N. 725.

The defendant had 16 days after service within which to appear, and as the service was made on the 16th April, the time for the appearance had not gone by till after the 2nd of May, the defendant having the whole of that day to appear, *Scott* v. *Dickson*, 1 U C. Prac Rep. 366; *Montgomery* v *Brown*, 2 U. C. L J. N. S. 72; *Stanton* v. *Brittle*, 1 F. & F. 468.

Adam Wilson, J.—The service of the writ of summons having been made on the 16th of April, and the defendant having the right to appear within sixteen days after the service of it, the last of these 16 days did not, in my opinion, expire until the end of the 2nd of May following, and an appearance at any time on that day would therefore have been in time.

No appearance was entered on that day, but one was filed on the 3rd of May, with a notice of the defendants title, and a copy of this notice of title was served on the plaintiff, who sued out the writ in person on the 7th of May.

On the 14th May an affidavit was made that search had been made in the office on the 2nd of May for an appearance, but no appearance was filed. Upon the production of this affidavit, the Chief Justice made the usual *ex parte* order under Rule 92, as personal service of the writ had not been effected. There can be no doubt he would not have done so if it had been brought to his attention that the defendant had the whole of the 2nd of May on which to enter his appearance, for it may have been quite true that a search was made on the 2nd, and no appearance then found entered, and yet, as upon the same day, an appearance might have been duly entered, the affidavit produced to the Chief Justice did not in fact show a default by the tenant to appear.

As an appearance and notice of title were in fact entered and filed on the 3rd May, and long before the application was made for leave to sign judgment, I think, upon the cases referred to, that even if service were necessary, under the 132nd rule the appearance filed could not be treated as a nullity, and judgment signed as for want of an appearance. The *ex parte* order which was made without such facts having been communicated to or considered by the Chief Justice, will not authorise or maintain the judgment.

I am not at all satisfied that the plaintiff communicated to the Chief Justice all the facts he knew when he applied for this order; it has been sworn that the plaintiff was personally served with the notice of title on the 7th May, a week before he applied for the order, yet he did not state that fact in his affidavit, nor does he appear to have searched in the office in consequence of this service upon him, to see whether an appearance had really been entered or not, or if he did he did not state that fact, and he makes no kind of explanation now of these matters.

I think he should have searched more nearly to the time when he made the affidavit for an appearance than the 2nd May, and that he should have communicated to the Chief Justice the fact of the service upon him of the defendant's notice of title, or he should have stated on this application why he did or did not make any further search for an appearance after the service of such notice of title.

The order that was made was founded on insufficient and incorrect information, and, under the circumstances stated, it should not have been an *ex parte* order.

I have spoken to the Chief Justice of this case, and he has consented that I shall deal with his order as I may think it should be dealt with, and he is also of opinion that it should be set aside.

The rule will therefore be absolute, setting aside the order and judgment, and all proceedings thereon, and directing a writ of restitution to issue with costs, to be paid by the plaintiff to the defendant.

MARTYN v. DICKSON.

Arbitration—Verdict subject to award—Extent of Arbitrator's authority—Costs.

A verdict was taken for plaintiff, subject to be reduced, increased, or set aside, and a verdict or non-suit to be entered for defendant under the provisions of the C. L. P. Act. The award directed that the plaintiff's verdict should be set aside and a verdict entered for defendant; and it further awarded a sum of money as due and owing from plaintiff to defendant on a set-off; on a motion to set this award aside it was *held* that it did not in terms direct a verdict for defendant for any sum of money, but even that if it did such an award would be proper under the terms of the reference.

Costs of the award ordered to abide the event, cannot be divided between the parties.

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

The declaration contained several counts, and was to the following effect:—

1. That plaintiff was tenant to defendant of a mill under an agreement by which the defendant engaged to keep the dam in proper repair, but did not do so. 2. That plaintiff was possessed of a mill, as tenant to defendant, and was entitled to the water of the river Otonabee from a dam higher up on the river, and defendant hindered the plaintiff from having and using the water for six months, whereby the plaintiff suffered special damage. 3. That defendant distrained for rent where no rent was due. 4. That defendant converted to his own use flour of the plaintiff. 5. Common money counts.

The pleas were:—1. Traverse of 1st count. 2. Not guilty as to 2nd count. 3. Leave and license to 2nd count. 4. Not guilty to 3rd count by statute. 5. Not guilty to 4th count. 6. To 5th count never indebted. 7. To same count payment. 8. To same count set off—Joinder.

In the particulars of set off the defendant deducted from the set off the amount of rent for periods during which the dam was broken down, &c., but he carried out no sum to be deducted.

At the trial at *nisi prius* it was agreed that a verdict should be taken for the plaintiffs for £500, to be reduced, increased or set aside, and a verdict or nonsuit entered for the defendant by the award of Thomas Fortye and John Ludgate, and such third person as they should appoint, or any two of them, who should have all the powers conferred by the C. L. P. Act, and that the costs of the cause and costs of the award should abide the event of the award, and an order of reference was drawn up accordingly.

The award was made by Thomas Fortye and Wm. Ogilvy, the latter of whom it is said in the award was duly appointed the third arbitrator; the direction was, that the verdict for the plaintiff should be set aside and a verdict be entered for the defendant on all the issues joined, and they further award against the plaintiff on the third issue of the fifth and subsequent counts of the declaration (that is on the set off to the common counts) $329.17, as due and owing from the plaintiff to the defendant, and they fixed the fees of the arbitrators on the reference, and their charges for this award at $55, to be paid by the plaintiff and defendant in equal portions, and if either party pay the whole, the other should repay to him one moiety thereof.

In Easter Term *Beaty* obtained a rule calling on the defendant to show cause why this award should not be set aside on the following grounds:

1. That the arbitrators exceeded their authority by ordering a verdict to be entered in favour of the defendant for $329.07, when they were only authorised to enter a verdict for the defendant, without awarding any sum of money to him.

2. That the submission directed the costs of the cause and of the award to abide the event, while the award ascertained the fees and charges of the award and reference at $55, and directs each party to pay his moiety thereof.

3. That the arbitrators did not allow the plaintiff certain items of his claim, which are specified in the rule.

4. That the arbitrators did not take an item of $408.31 into consideration and allow same to plaintiff, as admitted by the defendant at the reference, and in his particulars of set off.

5. That it does not appear that Ludgate, one of the arbitrators, consented to the appointment of Ogilvy as third arbitrator.

6. And on grounds in papers and affidavits filed.

7. Or why the matters should not be referred back to the arbitrators.

Read, Q. C., showed cause, referring to *Donlan* v. *Brett*, 2 A. & E. 344; *Cartwright* v. *Blackworth*, 1 Dowl. 489; *Hayward* v. *Phillips*, 6 A. & E 119; *Hutchinson* v. *Blackwell*, 8 Bing. 331.

The arbitrators can only direct a verdict to be entered for a party where it is agreed they may do so; here the arbitrators had power to order it for either party, and the power to award a certain sum to which the party is entitled upon the verdict must be incident to the power to award a verdict, C. L. P. Act., sec. 104.

The costs of the award mentioned in the reference mean no more and just the same as the costs of the award; if this part be objectionable, it may be rejected: 29 Vic. cap. 32; *Rose* v. *Redfern*, 10 W. R. 91; *Wood* v. *O'Kelly*, 9 East 436; Russell on awards, 365-8.

On the merits the award final; *Severn* v. *Cosgrave*, 2 U. C. L. J., N. S. 11.

Beaty in support of the rule.

As to the set off in this case, referred to Mayne on Damages, 46.

As to the extent of arbitrators' authority, Russell on awards, 251; *In re Haley and others*, 1 U. C. Pr. Rep. 173; *Creighton* v. *Brown*, 1 U. C. Pr. Rep. 331.

As to the costs of the award and reference, Russell on award, 256; *In re Brown & Overholt*, 2 U. C. Pr. Rep. 9.

As to referring back to arbitrators, *Fowler* v. *Port Hope R. Co.*, 6 U. C. L. J. 12.

The plaintiff is entitled to relief on the merits, because the arbitrators have not taken into consideration and awarded upon all of the plaintiff's claim.

ADAM WILSON, J.—It is well settled that an arbitrator cannot, without express authority given to him, direct a verdict to be entered for either party; nor can he increase the verdict which has been taken without the like authority, *Prentice* v. *Reed*, 1 Taunt. 151; *Bonner* v. *Charlton*, 5 East 139.

Here the arbitrators had power to order a verdict to be entered for the defendant, and they have done so; then the award proceeds, and they further award against the plaintiff, on the third issue $329.17, as due and owing from the plaintiff to the defendant. This is not in law-

gauge ordering a verdict to be entered for the defendant for $329.17, and therefore, if the arbitrator had no power to order the same to be recovered by verdict, they have not so expressed their finding, that I am obliged to say, that they have made such an order.

But I think they had the power on the issue on the set off not only to find a sum in the defendants favour, but under the submission to order a verdict to be entered for it It is not like the case of ordering a verdict to be entered where there is no power to do so, or to increase the verdict where one has been already taken for a fixed sum, and power has not been conferred upon them to add to it. It is a reference expressly under the C L P. Act, and of the cause only, and as under our law, if on a plea of set off the jury find a larger sum proved to be due from the plaintiff to the defendant than is proved to be due from the defendant to the plaintiff, a verdict shall pass for the defendant for the balance remaining due to him, and he shall have judgment to recover such balance and his costs of suit: so I think, on the reference of a cause, the arbitrators, if they had the power to order a verdict to be for either party, have the right, if moneys were also in question, to direct that such verdict should be entered for—or to recover—the sum of money which they find in the successful parties favour; if the jury had intended to have found such a sum for the defendant, and had omitted to do so, a new trial or *venire de novo* would be awarded, in order that they might award it—the arbitrators have avoided any such error here.

I do not think it would be an objection if the award had been as the plaintiff has assumed it to be, a verdict for $329.17; but as it is not so in express language, it will be for the defendant to proceed in this respect as he may be advised. As to the costs, the arbitrators had no power over them at all, the cost of the cause and of the award were to abide the event. They have not assumed to award upon the costs of the reference, the finding is, that they fix the fees of the arbitrators on the reference and their charges for the award at $55, and the fees of the arbitrators and their charges for the award are costs of the award and not of the reference, therefore the finding of these costs is quite correct; but the direction that each party shall pay them equally is erroneous, for they had no power to do this, as they were to abide the event, and thus they fall entirely on the plaintiff.

As to the merits, I have read over the whole of the affidavits and papers filed, and I am of opinion from these, that the award is correct and just; the plaintiff asserts he has not been allowed his proper demand, and the defendant says the arbitrators have deducted from his amount more than $300 than the plaintiff was entitled to. If I could interfere at all upon the merits, this is not a case in which I could properly do so, as every ground of complaint that has been made by the plaintiff has been answered by the defendant satisfactorily.

The rule will therefore be discharged with costs.

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, inst., 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 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 proceedings 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 application 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*, 1 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. 432, 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.

Campbell v. Pettit.

Amendment of writ by plaintiff—Notice.

Held, that where a plaintiff obtains an order to amend his writ of summons the defendant is entitled to notice of the amendment having been made, and probably to a copy of the amended proceedings, before he can be required to appear; and the plaintiff is not bound to amend but may abandon his order.

[Chambers, 23rd June, 1866.]

On the 16th May last, *J. A. Boyd* obtained a judge's summons, calling on the plaintiff to show cause why the judgment, the præcipe for, and the writ of possession, and all proceedings had under the writ or judgment, should not, or some or one of them, be set aside with costs for irregularity, on the following grounds:—

1. That no notice of the proceedings herein having been amended under the order made in that behalf was given to the said defendant or his attorney, and no amended copy of the writ of summons herein was served upon the said defendant or his attorney, and the copy of the summons served was not amended before signing judgment.

2. That the judgment signed herein declares that the said plaintiff, and one Charles Smith Ross, are entitled to recover possession of the premises in question.

3. That the writ of *hab. fac. poss.* does not follow said judgment, in that it recites that the said plaintiff is alone entitled to recover possession of the said premises, and orders delivery thereof to him alone.

4. That it appears from the proceedings herein, and the plaintiff's notice of claim, that he claims only an undivided half of the premises in question herein, whereas he has signed judgment as aforesaid for the whole, and has ejected the said defendant entirely from the whole of said premises.

5. That there is no sufficient affidavit of service filed herein to warrant judgment being signed, as the writ is nor therein stated to have been served on the tenant in possession, and the said affidavit is in fact vitiated by the subsequent erasure or striking out of the names of one of the original plaintiffs.

Atkinson showed cause.

Boyd supported the summons, and cited *Levy* v. *Drew*, 5 D. & L. 307; *Knight* v. *Pocock*, 17 C. B. 177, to show that when the writ of summons was served, an amended copy should have been served.

That the plaintiff being entitled to only a portion of the land, could not eject the defendant wholly from the possession, *Doe dem Hellyer* v. *King*, 6 Exch. 791; *Alcock* v. *Wilshaw*, 2 El. & B. 633; *Roe on demise of Saul* v. *Dawson*, 3 Wils. 49.

And as to the effect of altering the affidavit by the amendment made to the writ, *Wright* v. *Skinner*, 5 Dowl. 92; *Fumerty* v. *Smith*, 1 B. & C. 649.

The facts of the case fully appear in the judgment of

Adam Wilson, J.—The writ of summons in ejectment was sued out on the 7th of April, 1866, for the E. ½ of the S. ½ of No. 9, in the 6th con. of Woodhouse, containing 50 acres, more or less.

The notice of the plaintiff's title stated that he claimed as the purchaser of an undivided half of the premises from Douglass Prentice, who was the purchaser of the whole thereof from Richard Hay, heir of John Hay, who was the heir of Henry Hay, the grantee of the crown.

The writ was served on the 9th of April, and judgment for want of an appearance was signed on the 12th of May, upon which day a writ of possession issued to the sheriff to deliver possession (according to the copy produced) of the south half of No. 9, in the 6th con., and the defendant was ejected on the 14th May.

It appears that the writ of summons was originally sued out and served in the names of Mr. Campbell, the present plaintiff, and of Charles Smith Ross, administrator of the estate of the late Douglass Prentiss, deceased, and the name of Ross was also in the notice of claim; and upon the 28th of April a judge's order was made on the plaintiff's application to strike out Ross' name from the writ and notice of claim and all proceedings had, upon payment of costs—the defendant to have two days to enter an appearance after such amendment.

Mr. Foley, the defendant's attorney, says, that on the 30th of April the plaintiff's attorney tendered to him a copy of the writ of summons as amended under the order, but that he the defendant's attorney refused to take it, as the costs had not been paid; that the plaintiff's attorney a few days after took the copy of summons away again, on the express understanding that he was to re-serve it after the costs were paid.

The defendant swears he has not been served with any other papers than with the writ of summons served on him, as the same was originally entitled.

Mr. Jackson, a clerk in the office of the defendant's attorney, says, that on receiving word the costs had been paid, he went to the plaintiff's attorney, and told him the defendant's attorney would now accept service of any papers for the defendant; that the plaintiff's attorney asked for the original order to file when he went to make the amendment; that the deponent afterwards gave the order to the plaintiff's attorney, and he believed, and was led to believe, by the plaintiff's attorney, that the plaintiff's attorney would serve the defendant's attorney with a copy of the amended writ of summons and notice of title; that no such amended proceedings have been served; that the amendment, he believes, was made by the plaintiff's attorney on the 9th of May; that the copy of summons served on defendant was never amended; that the first notice the defendant's attorney had of the writ having been amended was, on searching in the deputy's office, upon the defendant informing him, he, the defendant, had been turned out of possession.

The plaintiff's attorney makes affidavit that on the 8th May he had the conversation with Mr. Jackson, above alluded to, about the order, but he says he has no recollection of Jackson saying Mr. Foley would now accept service of any papers in the cause, and he does not think Jackson made any such statement.

That on the 9th of May he called and got from Jackson the order; that he is satisfied Jackson perfectly understood the deponent was going to amend; that Jackson may have supposed the deponent would serve Mr. Foley or the defendant with a copy of the amended writ and notice, but the deponent never stated nor promised directly or indirectly to do so.

That on the 17th May, Jackson said he was first going to search if the amendment had been made, when the defendant came in and said he had been ejected, and that search would have been made sooner but for the assize business.

From the affidavits and papers filed, I think the defendant has no merits, although he has lost possession for the last three years.

I see nothing satisfactory in the practice as to what the plaintiff in such a case is bound to do, in order to compel the defendant to appear to the amended writ or to entitle him to sign judgment for want of an appearance to it.

I think from the cases to which I have referred, that the defendant or his attorney was entitled to notice that the amendment had been made, and probably to a new copy of the amended proceedings, before he could be required to appear and plead, for the two days further time allowed to him to plead are to be computed from the time of the amendment made, and he is not obliged to watch for weeks, day by day, when and whether the plaintiff will amend or not, *Davies* v. *Stanley*, 8 Dowl. 433; and notwithstanding this order, the plaintiff was not obliged to amend, but might have abandoned it without the payment of costs at all, *Black* v. *Sangster*, 3 Dowl. 206; *Lavis* v. *Baker*, 14 U. C. C. P. 336. The defendant could not therefore tell whether the plaintiff intended to act upon the order or not, or when he would act upon it, and therefore he was not obliged to do anything until he had notice at any rate that the amendment was made. The judgment is, I think, irregular, and must be set aside. The writ could not properly have been executed for an undivided share of the land, by turning the tenant out of the whole of the land. The plaintiff is not and was not entitled to the whole lot, and if it had been material, I should have ordered the defendant to be restored to the land, leaving to the plaintiff his full undivided moiety, but no more.

As the judgment is set aside altogether, this part becomes immaterial; the possession taken from the defendant must be restored to him. I think, however, without further notice or service of any kind, he must enter an appearance and plea, on or before the 2nd July next, otherwise judgment may be signed against him by default.

Order for setting aside judgment, with costs fixed at $8; defendant to appear and plead, on or before 2nd July next.

CHANCERY.

(Reported by Alex. Grant, Esq., *Barrister at Law, Reporter to the Court.)*

Knaggs v. Ledyard.

Sale of lands for taxes—Sheriff.

At a sale for taxes, where less than the whole lot is sold the sheriff should designate in some way the portion sold or offered for sale, so that bidders may know what portion they are bidding for.

Where a sheriff sold 185 acres out of 200 for taxes, and gave a certificate merely describing the land sold as the west part of the lot, comprising 185 acres, and no further intimation was given by the sheriff of the portion of the lot he was to convey until the deed was executed, the sale was held invalid.

This cause came on for the examination of witnesses and hearing, before Vice-Chancellor *Mowat*, at the sittings of the Court, held at London, in the Spring of 1866.

Blake, Q. C., for the plaintiff.

Roaf, Q. C., for the defendant.

MOWAT, V. C.—This cause was heard before me in London, on the 18th April, 1866.

The bill in the cause was filed on the 25th of May, 1865, and relates to a parcel of land in Enniskillen, which was sold for taxes, on or about the 27th of October, 1863, and conveyed to the defendant as the purchaser on the 16th February, 1865. The purchase money was $144.73. This, I may observe, was not a sixth part of the value of the property at the time, as appears from the defendant's own deposition. Afterwards, and before he got his deed, he appears to have valued the land at more than twelve times what he had paid, and within two months after getting his deed he admits having valued it at twenty-five times its cost. The plaintiff's have entered into no other evidence as to value. The bill states that the lot belonged to one William Knaggs, of Etobicoke; that he died intestate in 1858; that the plaintiffs are his heirs; and that they had no notice of the sale until after the sheriff's deed was executed. The title of the plaintiffs' is for the present purpose admitted on the part of the defendant. The lot is a wild lot, of which no one is in actual possession. The object of the suit is to set aside the sale as invalid.

The bill insists on several grounds of objection to the sale. As to most of these there was no evidence on either side, each party insisting that the onus of proof was on the other; and if the case had turned on these objections, I think it would be my duty to give to the party whom I should decide to be in default, an opportunity (on payment of costs) of supplying the necessary evidence on a new hearing of the cause, or in some other way. But my opinion being in favour of the plaintiffs on an objection in regard to which the evidence is full and clear, I shall pass by the other objections without further observation.

The sale was of 185 acres, part of a lot of 200 acres, the taxes in arrears being in respect of the whole lot; and the bill alleges that the sheriff, in making the sale, did not designate what particular part of the lot he offered for sale; that, at the time of the defendant being declared the purchaser, it was not ascertained where the parcel of 185 acres was situated, or how the same should be known or described; and that the sheriff's certificate did not properly describe the portion sold. The truth of these statements is established by the defendant's depositions and the production of the sheriff's certificate given to the defendant at the time of the sale.

The defendant says in his deposition: "The sheriff did not specify what part of these lots was being sold. I first learned what part of the lot I was getting when I got my deed. * * * Nothing whatever was said at the sale as to the part of this lot I had purchased. I left it to the sheriff to give what part he thought fit." The certificate merely says, "the west part of lot No. 31, in the second concession of the township of Enniskillen, that is to say, 185 acres thereof."

Now there was plainly no sale, and could be no sale, of any particular part until that part was designated; and as it is confessed that this was not done until long after the alleged sale, an element essential to the validity of the transaction was wanting, see *Templeton* v. *Lovell*, 10 Gr. 216.

I must presume that the intention of the legislature was, that a theriff should let bidders know what part he is selling and they are buying. This is the reasonable course; and I find in the statute no trace whatever of an opposite course having been contemplated.

The 137th section of the act, 22 Vic., ch. 55, provides, that "the sheriff shall sell by public auction so much of the land as may be sufficient to discharge the taxes, &c., selling in preference such part as he may consider it most for the advantage of the owner to sell first." To sell so many acres, to be thereafter selected by the sheriff, cannot be supposed to have been the intention of this enactment. Formerly a uniform method was prescribed by statute as to the portion to be sold, leaving the sheriff no discretion in the matter. The direction to the sheriff was then as follows: "He shall begin at the front angle on that side from whence the lots are numbered, and measure backward, taking a proportion of the width corresponding in quantity with the proportion of each particular lot in regard to its length and breadth, according to the quantity required to make the sum demanded," 6 Geo. IV. ch. 7, sec. 13. This method can only be applicable where but a small part of the lot is sold. To set off in this manner 185 acres out of 200 would be absurd: the possibility of selling so disproportionate a part, I presume, was not in the mind of the legislature at that early period. In some cases the old method may still be the best; and whenever the sheriff considers that it would be more for the advantage of the owner that some other part of the lot should be sold, he is now authorized and required to sell that other portion. But if he makes no announcement at all of the part he is selling, he seems clearly to fail in the duty which belongs to the conduct of such sales.

The 140th section of the present act, Con. Stat. U. C. ch. 155, provides that the sheriff shall give a certificate to the purchaser, "stating distinctly what part of the land and what interest therein have been so sold (or stating that the whole lot or estate has been sold), and describing the same, and also stating the quantity of the land, the sum for which it has been sold, and the expenses of the sale;" see also 16 Victoria, ch. 182, secs. 59, 60. Now, merely stating that the parcel sold is the west part is certainly very far from "stating distinctly what part of the land was sold," or from "describing the same," within the meaning of this clause.

The 141st section affords further express evidence in favour of the same construction. That section provides that "the purchaser shall, on receipt of the sheriff's certificate of sale, become the owner of the land, so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste," and that "he may use the land, without deteriorating its value." He cannot exercise these powers if the part he has purchased is not designated, or cannot exercise them without interfering with the owner's rights in the remainder of the lot.

If the express evidence afforded by these sections of the statute had been less strong than it is, the general principles of courts of equity in regard to trustees and agents for sheriff's sale would, I think, be sufficient to reach the case. It is well settled that those principles apply to public officers as well as to private trustees and agents.

I think an objection like this is not removed by the statute of 1863, ch. 59, sec. 11.

The sale must be set aside on the terms prayed. The plaintiffs having in vain before suit endeavoured to induce the defendant to settle without a suit, I think that under all the circumstances of the case they should have their costs.

Holland v. Moore.

Registry act—Unpatented lands.

The only instruments executed before patent which can be registered in the County Registry Office are such as create a mortgage, lien or incumbrance on the land.

A bargained with B, the locatee of the crown, for the purchase of an unpatented lot free from encumbrances, and obtained a bond for a deed, and paid B. the full consideration. B afterwards borrowed money on the security of the lot from C, who took out the patent, and conveyed the lot to B, and received from him a mortgage without notice of A's claim. After the loan had been agreed to, but before it was carried out, A registered his bond in the Registry Office of the county where the land was situate. A bill by A against C for specific performance of the contract was dismissed with costs.

This cause came on for examination of witnesses and hearing at Goderich, before Vice Chancellor *Mowat,* at the sittings in April, 1866.

Toms for the plaintiff.

Blake, Q. C., for defendant Watson. The bill was taken *pro confesso* against the defendant Moore.

Mowat, V. C.—This is a suit for a specific performance of a contract, entered into between the plaintiff and the defendant Moore, and set forth in a bond executed by Moore in favour of the plaintiff on the 29th December, 1862. The plaintiff's part of the contract has been performed. What the defendant, on his part, undertook to do, was to convey the land in question to the plaintiff, free from incumbrances, and to pay the plaintiff $500 in money. He did neither.

Moore was locatee of the land, and entitled to a patent on paying the purchase money. Some months after making his bargain with the plaintiff, he applied to the other defendant Watson for a loan of money on the security of the lot. Watson agreed to advance the money applied for; and it was arranged that Moore should assign the lot to Watson to enable the latter to obtain the patent in his own name; that Watson should pay, out of the promised loan, the amount due to the government, and, on receiving the patent, should convey the lot to Moore, and pay him the balance of the money, receiving at the same time a mortgage on the lot to secure the loan. All this was done before Watson had any notice of the plaintiff's claim.

The plaintiff did not register, or attempt to register, his bond in the Crown Lands Office, but registered it in the Registry Office of the County of Huron in the interval between the agreement for the loan and the carrying it out. He now contends that his claim to the lot, being first in point of date, has priority over Watson's mortgage; and this is the question I have to decide.

Against Moore the bill has been taken *pro confesso.* Watson has answered, setting up amongst other defences that he is, as mortgagee, a purchaser *pro tanto* without notice of the plaintiff's claim, and that this court will therefore give no relief against him.

The learned counsel for the plaintiff contended that there was nothing in the statute cutting out his claim to the property. But it is not necessary for the defence that there should be any such enactment. It rests on the general doctrine of equity in favour of purchasers or mortgagees without notice, and it is for the plaintiff to find some statutory enactment that deprives the defendant of this defence.

The learned counsel referred to the 24th section of the U. C. Consolidated Statute, ch. 80, as establishing the plaintiff's priority. That section refers to transactions in respect of unpatented land, and enacts that if any person through whom the patentee derived his title had, before the issuing of the letters patent, granted any mortgage, incumbrance, or lien on the land, the registration of the instrument shall have the same effect as if the patent had issued before such instrument was executed. But the plaintiff's claim is not of the description provided for by this enactment. He claims to be entitled to the whole estate, and not merely to a "mortgage, incumbrance, or lien" upon it. The legislature has seen fit to allow registration in the county where land lies, of any instruments affecting the land in law or equity when executed *after* the granting of the patent 22 Vic. ch. 89, s. 17, and to give effect to such registered instruments as against subsequent transactions, though the parties claiming under the subsequent transactions had no notice of the registered instruments, and dealt in ignorance of them, 22 Vic. ch. 89, s. 44 and s. 47. But in regard to instruments executed *before* patent, parliament has expressly confined registration in the County Registry Office to mortgages, incumbrances, and liens; and I have no power to extend the effect of such registration to other cases.

The learned counsel for the plaintiff referred also to the 18th section of the act 22 Vic. ch. 2, as shewing that the only assignments which can be registered in the Crown Lands Office are unconditional assignments; and it was argued that the plaintiff held no such assignment; and that, being therefore in no default for not registering, he cannot be deprived of his priority by the omission to register. But the defence of a purchase for value without notice, when well founded in fact, excludes all prior equitable claims whether incapable of registration or capable of registration but not registered.

The plaintiff does not seek to redeem the mortgage, and the bill must therefore be dismissed with costs.

Latch v. Furlong.

Mortgage—Power of sale.

It is the settled rule of equity, that a mortgagee in exercising a power of sale must take reasonable means of preventing a sacrifice of the property; hence, where a mortgagee took no means whatever for that purpose, and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside.

This case came on for examination of witnesses and hearing, at the sittings of the court in the Spring of 1866, before Vice-Chancellor *Mowat,* at Woodstock.

Roaf, Q. C., for the plaintiff.

Blake, Q. C., for the defendant Joy.

Barrett, for the defendant Furlong.

Mowat, V. C.—This is a bill by a mortgagor to set aside a sale by a mortgagee under a power

of sale contained in the mortgage. The mortgage bears date the 30th of September, 1863, and is made between the plaintiff of the one part, and the defendant Furlong of the other part, to secure $300 and interest, payable in three annual instalments of $100 each, the first payment to be made on the 1st of October, 1864. The property mortgaged is fifty acres of land in South Norwich, County of Oxford. By the power of sale, as appears from the pleadings, it was declared and agreed that in case the plaintiff made default in paying any of the instalments, and one calendar month should elapse thereafter, the said Furlong should be at liberty to enter into possession, and, whether in or out of possession, to sell and dispose of the land in such way and manner as to him should seem proper, and that he should convey the same when so sold, to the purchaser, and should stand possessed of the purchase moneys on trust, (1) to pay expenses, (2) to pay and retain for himself the mortgage money and interest, and (3) to pay the surplus to the plaintiff.

The plaintiff did not pay the first instalment when it became due, and the mortgagee, after making unsuccessful attempts to sell the mortgage, offered sheriff Ross to sell the mortgaged property, saying that "all he wanted was to get the money due him, and he would let the property go." On the 7th January, 1865, the sale was made to the defendant Joy, through Ross, who says he acted in the matter for both parties; and the price accepted by Furlong was $300.

The bill charges the mortgagee with fraud in making this sale, calls it a pretended sale, and alleges that he colluded therein with Joy, for the purpose of making and realizing for himself a large profit. I have no doubt that these charges are entirely groundless. But the bill also alleges, that the price accepted was grossly inadequate, and that the mortgagee did not before selling make the reasonable exertions he was bound to make in order to maintain the fair value of the property, or in fact make any exertions whatever; and these charges are established beyond doubt or reasonable controversy.

Indeed the only evidence which the defendants have offered as to value, is that of the sheriff, who frankly says, "he does not think $300 was enough for the property in question," and that he thinks "the reasonable cash value of the property was $500." But I have no doubt, from the whole evidence, that the cash value must be taken to be over $600. The defendant Joy, who had previously an interest in the adjoining fifty acres, refused after his purchase to take less than $1000 for the land in question. The price accepted was therefore half, or less than half, the cash value of the property.

The defendants do not claim that the mortgagee made any exertions whatever to get a better price for the land. He himself admits, in his cross-examination, that he never advertised the property; see *Marriott* v. *The Anchor Reversionary Company*, 7 Jur., N. S. 155; Sug. V. & P., 14th ed., p. 66, chap. 1, sec. 5, pl. 30; and never tried to sell it to any one except to Joy, who made him, he says, an offer which he accepted. No intimation of the intention to exercise the power of sale was given to the plaintiff, see Anon., 6 Madd. 10; Sug. V. & P. p. 62, 14th ed., ch. 1, sec. 5, pl. 13, or to his relative who was in possession of the property under him. This person is said to have a reputation that created difficulties in the way of selling the property advantageously. This is a very vague assertion, and no application was made to him for the possession, or for his concurrence in the sale, so as to remove any difficulty that his alleged reputation might create in obtaining a sufficient price.

There is upon the evidence no room whatever for doubting, that, if proper steps had been taken by the mortgagee to obtain a fair price, $600 cash, or more, would have been obtained for the property; and under these circumstances it is impossible to hold the transaction valid, so far as relates to the mortgagee. For "it is well settled that, though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it was given. A mortgagee, with such a power, stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor, of any surplus that may remain," *Jenkins* v. *Jones*, 2 Giff. 108. See *Mathie* v. *Edwards*, 2 Coll. 465; S. C. on appeal. 11 Jur. 761; and cases referred to *post*. Here the mortgagee was satisfied, as he told Mr. Ross, if he got what was due him. "All he wanted was to get the money due him, and he would let the property go." He thus avowed, to the common agent of himself and the purchaser, a purpose of acting in entire disregard of the interest of the mortgagor, or of the value of the property, and to be satisfied with such a price as would secure himself. This conduct has often been reprobated, whether on the part of trustees for sale, *Harper* v. *Hayes*, 2 Giff. 216; *Ord* v. *Noel*, 5 Madd. 438, or of mortgagees with a power of sale, *Faulkener* v. *The Equitable Reversionary Society*, 4 Drew. 355; *Richmond* v. *Evans*, 6 Gr. 508; for such trustees and mortgagees stand on the same footing, see cases *supra*. Sug. V. & P., pp. 60, 65, 14th ed., ch. 1, sec. 5, pl. 1 & 26.

I think I must hold the purchase void as respects the purchaser, as well as a breach of duty by the mortgagee. Lord Justice Turner observed in *Davy* v *Durrant*, 1 DeG. & J. 558, that he could not "go the length of holding that, in the absence of fraud or collusion, a purchaser from a mortgagee with a power of sale, is bound to inquire what steps have been antecedently taken for the purpose of promoting the sale;" but the learned judge observed in the same case, that "of course he could not maintain a purchase at a fraudulent undervalue." Now I presume, that by a "fraudulent undervalue," in this connection, is meant a gross undervalue, such as shews either actual and intentional fraud, or gross negligence, constituting in the view of equity, a fraud on the mortgagor, see *Oliver* v. *Court*, 8 Pri. 165; *Crawford* v. *Meldrum*, 3 U. C. Appeal, 113, and cases there cited; and I think that the undervalue which is established in the present case is, under the circumstances, abundantly sufficient for this purpose, see *Oliver* v. *Court*, 8 Price, 165. Had the mortgagee used any exertions, or, in the absence of such exertions, had there been any contrariety in the evidence as to the fairness of the price, I might have found reason to hesitate before avoiding the purchase; but under the actual circumstances, I see no room for hesitation.

A good deal of evidence was given to shew that Mr Furlong's position was one of hardship, and that he was guilty of no intentional wrong in the matter. It is not necessary to allude to this evidence further than to say, that it has satisfied me of his innocence in this respect. But the absence of intentional wrong is no excuse for having neglected, to the prejudice of the plaintiff, the plain duty which the law imposes on a mortgagee in the exercise of the rights which a power of sale confers upon him. The mortgagee's error may have been one of judgment, and from not having had his attention called to the propriety or the obligation of any other course than that which he pursued. But the rule is justly imperative—a mortgagee in these matters *must* act as a provident owner would; and *ignorantia juris non excusat*. What he is not familiar with, he must learn by taking counsel from those who can inform him. But as the plaintiff has failed to establish the fraudulent purpose which the bill alleges, the defendants may be excused from paying his costs of the suit up to the hearing. *Richmond* v. *Evans*, 8 Gr. 508; *Harper* v. *Hayes*, 2 Giff. 229.

Declare, that the sale to the defendant Joy is invalid, and should be set aside. Usual redemption decree. Plaintiff to pay costs subsequent to hearing.

INSOLVENCY CASE.

(*Before* Alex. Logie, Esq., *County Judge of Wentworth.*)

In the matter of John Fair and Andrew Buist, *Insolvents.*

Insolvent act of 1864—*Execution creditor—Priority.*

A stay of proceedings was given to a sheriff on a writ of execution in his hands by the attorney for the execution creditors. *Held*, that the execution, under which the execution plaintiffs claimed priority over an official assignee, had not been *placed in sheriff's hands for execution* until too late to give them a right to priority as regarded the balance due thereon, the assignment having been made within 30 days after the time the writ was given to the sheriff for execution. But that the execution creditors were entitled to their costs of suit to be proved as a privileged claim.

[Hamilton, July 2, 1866.]

John Birrell and John B. Laing presented a petition setting out that on 23rd January, 1866, they recovered judgment against the insolvents; that on 30th January, 1866, a *fi. fa.* was issued thereon, which was placed in the hands of the sheriff of the United Counties of Huron and Bruce, on 2nd February, 1866; that the writ has remained in the sheriff's hands in full force and virtue; that on 2nd May, 1866, the insolvents made an assignment under the act; that part of the debt has been paid, but by reason of the assignment, the petitioners were unable to enforce the *fi. fa.* against the goods of the insolvents for the balance due.

The statements in the petition were verified by the affidavits of the execution creditors, Birrell & Laing.

A summons was thereupon granted by the learned judge of the County Court, calling upon the assignee to shew cause why he should not pay the plaintiffs Birrell & Laing the balance due upon their judgment, or why the sheriff should not be ordered to proceed and make the balance out of the goods of the insolvents.

Burton, Q. C., shewed cause. He filed the affidavit of the sheriff's clerk, stating that on 6th February last the sheriff received a notice, of which the following is a copy:—

"In Q. B. or C. P."

"Birrell & Laing *vs.* Fair & Buist." } "Mr Sheriff McDonald, "Please stay all proceedings on the *fi. fa.* until "further orders.

"Yours, &c.

(Signed) "John Birrell & Co.
"Scatcherd & Meredith,
"*Attorneys.*"

"London, "5th Feb., 1866."

And that on 26th April last, the sheriff received a telegraph, of which the following is a copy:—

"By telegraph from London."
"Birrell against Fair."
"Seize and advertise at once—give credit for "$1178.
"Scatcherd & Meredith"

Mr. Burton contended that the stay of proceedings was equivalent to a withdrawal of the writ, and that as during the stay the writ was not in the sheriff's hands to be executed, it was no lien upon the goods of the insolvents until the stay was removed, and that it was in the same position as if it had been placed in the sheriff's hands for the first time, on the 26th April. He cited *Hunt* v. *Hooper*, 12 M. & W, 670, and *Samuel* v. *Duke*, 3 M. & W. 622.

Craigie, for the execution plaintiffs, referred to sec. 13 of the act of last session to amend the act of 1864, and contended that the lien on the goods of the debtors took effect from the delivery of the writ to the sheriff, and was not destroyed by the stay of proceedings.

Logie, Co. J.—The case of *Hunt* v. *Hooper* is a leading case, as to the effect of staying proceedings on a *fi. fa.* in the sheriff's hands. It was there held that the notice not to execute the writ until further order, was equivalent to a withdrawal of the writ, which during the stay could not be considered as in the hands of the sheriff to be executed. *Hunt* v. *Hooper* has since been recognized as settling the law on that point, and has been followed in our own courts in several cases (see *Foster et al.* v. *Smith*, 13 U. C. Q B. 243; *Rowe* v. *Jarvis*, 13 U. C. C. P. 495; *Bank of Montreal* v. *Munro*, 23 U. C. Q B 414.) In the case of *Hunt* v. *Hooper*, the money was claimed by a subsequent execution creditor. In *Foster* v. *Smith*, the question was, whether a purchase of the goods from the debtor during the stay was good as against the execution creditor, and it was held that it was. *Burns*, J., says, in giving judgment,—"From the time the directions are "given to proceed upon the writ, whether that "is with the delivery of it to the sheriff, or at a "subsequent time, it is an execution in his hands "to be executed. The delivery for that purpose "is to be considered when it is to be acted "upon."

In this case the execution cannot be considered as in the sheriff's hands to be executed until 26th April, when the stay was removed and the sheriff ordered to proceed. No lien on the goods was therefore created until the 26th, and as the assignment under the act was made within 30

days thereafter, the execution plaintiffs are not entitled to payment of the balance of their judgment debt. They are entitled however to their costs of suit, which they should prove as a privileged claim before the assignee. The balance of the judgment debt they can prove in the ordinary way, and rank for it along with the other creditors.*

ENGLISH REPORTS.

QUEEN'S BENCH.

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 freehold, 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 merely 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,

* From this decision the execution creditors appealed to the judge in chambers; but, as might have been expected, the above judgment was sustained.—Eds. L. J.

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*, 6 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 the freehold, but here here we see no such intention. The press here was a mere additional convenience 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 secondhand. It could be removed without damage to the freehold.

Rule absolute.

EX PARTE PEPPERCORN.

23 & 24 Vic. c. 127, s. 10—*Admission of Attorneys—Certificate of Examiners.*

A stewardship of manor is an office within section 10 of 23 & 24 Vic. c. 127.

[Q. B., April 17—14 W. R. 606]

R. E. Turner moved for an order to the examiners appointed to examine persons desirous to be admitted attorneys to grant a certificate to the applicant, Walter Peppercorn,

The facts of the case were as follows:—Mr. Peppercorn was, in the year 1861, articled as clerk to a firm of attorneys. Shortly after he was so articled, his father, a gentleman occupying the office of steward of the manor of Headington, died. Upon the death of the father the son succeeded him as steward of the manor. The manor belonged to one of Mr. Peppercorn's family, and the office of steward had always been held by some one of the family. Mr. Peppercorn appointed a deputy to act for him as steward, and was only absent from his mater's office three times for the purpose of his office as steward, The fees of the manor court were divided between Mr. Peppercorn and the deputy.

23 & 24 Vict. c. 127, s. 10, requires that no person bound by articles of clerkship to any attorney shall hold any office other than that of clerk to such attorney, during the term of service mentioned in such articles, and before admission he must prove he has not done so by affidavit.

The examiners, upon the above circumstances, refused to grant their certificate, although they found Mr. Peppercorn fit and capable to act as an attorney.

COCKBURN, C. J.—I do not see how we can make this order. Mr. Peppercorn has clearly held an office within the meaning of the word of

he statute. The statute gives us no discretionry power We sympathize with Mr. Peppercorn. is is a hard case, and one probably never conemplated by the Legislature.

Blackburn, Lush. and Shee, JJ., concurred.

Order refused

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 maturity; 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 turn 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 *Parad*, 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 very 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, 588, 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. *Foule*, 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 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 of the original stipulation, but an accommodation to the defendant: 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 notes, 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.

GENERAL CORRESPONDENCE.

Act of 1865 *amending Insolvent Act of* 1864 *—Schedule of creditors.*

To the Editors of the U. C. Law Journal.

Gentlemen,—Would you be so good as to inform me in the next issue of your valuable *Journal*, whether, under the amended Insolvent Act of 1864, it is necessary for an insolvent, when making an assignment of his estate and effects under said Act to the official assignee, to attach a schedule of his creditors to such deed of assignment.

And oblige, truly yours,

T. Theobald.

Woodville, July 11, 1866.

[There appears to be some doubt upon this point. Sec. 2 of the amending act says, that a voluntary assignment may be made "without the performance of any of the formalities or the publication of any of the notices required by sub-sections one, two, three and four of sec. two of said Act," of 1864. Sub-section one here alluded to, amongst other things, requires a schedule of creditors to be prepared and exhibited at the meeting called by advertisement; and sub-section 6 of same section, which is not referred to in the amending Act, provides for the execution of the assignment, and that "a copy of the list of creditors *produced at the first meeting of creditors*, shall be appended to it." Hence the difficulty.

It might reasonably be argued that where a list of creditors is produced at such meeting, which meeting even did not in fact take place, no copy of such document could be appended. And in furtherance of this view it may be urged, that the object of the amending act is to simplify and expedite the steps necessary to place the property of an insolvent in such a position as to be equitably divided amongst all his creditors; whilst on the other hand it is doing no great violence to the language used to interpret the words of sub-sec. 6 to mean "a list of the creditors of the insolvent shall be appended to it;" and besides this the amending act makes no reference in terms to this 6th sub-sec. of sec. 2 of the act of 1864." The result is, that while we cannot say the schedule should at the time of the assignment be attached to the deed, it would in all cases where that course is practicable, be desirable to adopt it.—Eds. L. J.]

To the Editors of the U. C. Law Journal.

Gentlemen,—Will you please inform me,

1st. To what extent parties are responsible who give advice on titles to land?

2nd. Who are liable in Canada in such cases?

3rd. What are the grounds of their liability?

4th. What is the remedy which a purchaser has against his adviser in a case where by his advice he pays out a sum of money for land, and afterwards loses the land bought through a bad title?

5th. What is the liability which a conveyancer will incur for an incorrectly drawn deed or lease?

6th. Have any cases of the above kinds been decided in Canadian courts, and on what grounds were decisions given?

By kindly giving full answers to the above questions in your next issue you will confer a great favour on,

Yours truly,

A Subscriber.

[Our correspondent would be, we are afraid, rather a hard task-master. His questions, though certainly sufficiently general, and probably also of general interest, can scarcely be answered within the limits that we can devote to answers to correspondents. We may, at some future time, be in a position to return to the subject opened by his exhaustive queries. But at present we can only suggest to any of our readers, who have time and inclination for the task, to give the public the benefit of their researches on the questions submitted. Some of these questions indeed forcibly recal to our mind that which we have so often condemned, namely, that persons devoid of learning and to a great extent irresponsible should be allowed to compete on equal terms with those who have spent their time and money on qualifying themselves for the practice of their profession, to the great injustice of the latter, and to the detriment of the public.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. June 2.

Scott, P. O., v. The Uxbridge and Rickmansworth Railway Company.

Tender under protest is a good tender. *Manning* v. *Lunn*, 2 C. & K. 13, confirmed. 14 W. R. 893.

Monthly Repertory.

C.P. Connelly v. Bremner. June 4.

Practice — Time to plead — Signing judgment on Saturday — Reg. Gen. 1856.

By Reg. Gen. 1856, "it is ordered that the service of pleadings, &c., shall, on Saturday, be made before two o'clock, p.m. If made after two o'clock, p.m. on Saturday, the service shall be deemed as made on the following Monday." The defendant's time for pleading expired on Saturday, and the plaintiff signed judgment at 4.45 p.m. on that day, no plea having then been delivered. *Held*, that notwithstanding the above rule, the defendant had all Saturday to plead, and that the judgment should be set aside. 14 W. R. 781.

H. of L. June 5.

The Mersey Docks and Harbour Board v. Penhallow and Others.

The Mersey Docks and Harbour Board v. Gibbs and Others.

Negligence — Public body constituted by Act of Parliament receiving no profit from their office — Liability for default of servant.

The Mersey Docks and Harbour Board were constituted by Act of Parliament a corporation for the purpose of managing, repairing, and maintaining the Liverpool Docks, and were empowered to levy certain tolls on all ships using the docks, which tolls were to be used exclusively for certain public purposes specified in their Act of Incorporation. The members of the Board, neither in their individual nor corporate capacities, received any profits, directly or indirectly, from the tolls so levied. At the entrance to one of the docks a bank of mud had accumulated, which rendered it dangerous for the purposes of navigation (the lock being nevertheless kept open for the public), and this was known to the servants of the Board, and the Board itself either knew, or was negligently ignorant of the fact.

A ship, in entering the dock, struck against the bank of mud and was injured.

Held (affirming the judgment of the Court of Exchequer Chamber), that the Board were liable to make good the loss sustained by the owner of the ship and the owner of the cargo. 14 W. R. 572.

C.P. Walesby v. Gouldstone. June 9.

Costs — Balance of claim after set-off — County court — 15 & 16 Vict. c. 54 — 19 & 20 Vict. c. 108, s. 24.

To an action in a superior court, brought to recover more than £50, the defendant pleaded, and proved before an arbitrator, a set-off, which reduced the amount recovered to less than £20. The set-off was not admitted on the writ nor in the particulars.

Held, that the plaintiff was entitled to his costs, as the set-off was not an admitted set-off within the 19 & 20 Vict. c. 108, s. 24, and a plaint could not have been entered in the county court. 14 W. R. 899.

EX. June 12

Bickford v. D'Arcy and Beachey.

Interrogatories — Bonâ fides — Tendency to criminate.

Interrogatories, if put *bonâ fide* to make out the case of the plaintiff, will not necessarily be disallowed because the answers may tend to criminate the defendant.

Baker v. Lane, 13 W. R. 293, explained. 14 W. R. 900.

Q. B. Reg. v. Stephens. June 14.

Nuisance — Indictment — Liability of master for unauthorised act of servant.

Although a proceeding by indictment for a nuisance is criminal in form, the same evidence that would support a civil action for an injury arising from the nuisance will support the indictment. 14 W. R. 859.

S. C. U. S.

In re Fennerstein's Champagne.

Evidence — Res inter alios acta.

Letters written by third persons in due course of business are admissible to prove facts relating to that business which the writers might have proved if summoned as witnesses. 14 W. R. 890; Am. Law Reg.

CHANCERY.

L. J. May 25, 28; June 1, 12.

Re Tempest.

Trustee — Appointment — Discretion of Court — Principles upon which the Court Acts in the appointment of new trustees.

Although the Court, in appointing new trustees, exercises its discretion, that is not a mere arbitrary discretion, but one in the exercise of which the Court is guided by general rules and principles.

The following rules were laid down :—

(1) The Court will regard the wishes of the author of the trust, if expressed or clearly to be collected from the instrument creating the trust.

(2) The Court will not appoint a trustee with a view to the interests of some of the *cesteux que trustent* in opposition to the wishes of the author of the trust, or to the interests of others of the *cesteux que trustent*. 14 W. R. 850.

L. J. June 11.

Ex parte Ensby. Re Ensby.

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. 14 W. R. 849.

V. C. W. Suer v. Walmsley. June 19.

Practice — Examination ex parte previous to the hearing — Examiner's objections to questions.

Although, by the order of the Court on evidence, dated February 5, 1861, the examination,

before an examiner, of a witness called *ex parte* in order that his evidence may be used at the hearing of a cause, is to be deemed an affidavit, the examiner is not on that account bound to take down the answers to improper or irelevant questions. He should not, however, refuse to take down answers, except when it is clearly evident that such answers could not possibly be evidence. 14 W. R. 888.

U. C. Yarrington v. Lyon.

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.

An assignment by an administratrix, of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed as administratrix 12 U. C. Chan. Rep. 308.

U. S. Mathews v. Buryee.

Surplus moneys from sale of mortgaged land under foreclosure.

The surplus moneys arising on a sale of land under a mortgage foreclosure, stand in the place of the land, in respect to those having liens or vested rights therein, and the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale.

Where the widow of a mortgagor is made a party defendant in a foreclosure suit, but omits to appear or assert her claim for dower, she is not barred of her action for her share of the surplus moneys by any order for their distribution made in the foreclosure suit.

Nor is she barred from bringing such an action against the person to whom the surplus moneys were assigned in the foreclosure suit by reason of her neglect or omission to assert her claim, on being made a party to a suit brought by that person, for the settlement and closing of his trust as assignee of the mortgagor. 5 Am. Law Reg. 570.

PROBATE.

Sir J. P. W. Myers v. Gibson. April 28.

Will—Attesting witnesses denying signatures—Evidence of attorney who was present and others proving its genuineness—Conflict of evidence.

Where two persons' names appeared as attesting witnesses to a will, and the attorney who drew the will, and who was present during its execution, swore that these persons had duly signed the will as attesting witnesses, and other persons who knew their handwriting swore that the writing was theirs, but they themselves, though admitting a striking resemblance between the signatures to the will and other signatures of theirs produced, denied having signed the will, and swore that the signatures to it were forgeries.

The Court, being satisfied that the signatures were genuine, notwithstanding the denial of the witnesses, admitted the will to probate. 14 W. R. 901.

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 Canada.

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 Glengarry. (Gazetted July 28, 1866.

TO CORRESPONDENTS.

J. B. B., thanks. You are quite correct in your supposition. "T. T." and "A Subscriber," under General Correspondence.

Corrigenda.—On page 188, second column, for "sec. 6, sub-sec. 7," read "sec. 6, sub-sec. 17," and "recoverable with costs," for "recoverable without costs."