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DIARY FOR FEBRUARY.

1. Monday ..... HILARY TERM commences.
2. Tuesday .... *Purification B. V. Mary*
3. Wednesday.. Grammar School Trustees to meet
5. Friday ..... Paper Day, Q. B.
6. Saturday ... Paper Day, C. P.
7 SUNDAY .... *Quinquagesima.*
8. Monday ..... Paper Day, Q. B.
9 Tuesday ..... *Shrove Tuesday.* Paper Day, C. P.
10 Wednesday . *Ash Wednesday* Paper Day, Q. B. Last day for service for
11. Thursday ... Paper Day, C. P. [County Court.
13. Saturday..... HILARY TERM ends.
14. SUNDAY ..... *1st Sunday in Lent.*
20. Saturday..... Declare for County Court.
21. SUNDAY ..... *2nd Sunday in Lent.*
24. Wednesday .. *St. Matthias.*
28. SUNDAY .... *3rd Sunday in Lent.*
29 Monday ..... Last day for notice of Trial for County Court.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

FEBRUARY, 1864.

MERGER OF BILLS AND NOTES IN SPECIALTIES.

By a happy fiction of law, all men are supposed to know the law, and all men are supposed to know the great importance attached by the law to "a seal." But ignorance of law notwithstanding, and ignorance of the effect of taking a promise under seal to secure a debt for which a promise not under seal exists, is the cause of much litigation. And we must admit that on this branch of the law common sense is anything but a reliable guide.

Ignorance, therefore, on the part of laymen, of the doctrine of merger, as applied to bills and notes, is not only pardonable, but excusable. Common sense does not tell a man that simply taking an ordinary mortgage on real estate to secure the payment of a bill or note, destroys his remedy on the bill or note. But the law tells us that such may be the effect of taking an ordinary mortgage containing the ordinary covenant to pay the money, and that such apparently may be the effect, although there be a clear verbal understanding to the contrary between the parties.

The bill or note is generally handed to the lawyer without one word being mentioned as to a mortgage or special security being held for the same debt. The suit is commenced, and a plea from the defendant's attorney setting up the mortgage by way of merger, is the first intimation the lawyer receives of it.

Much of the trouble and expense occasioned to the creditor by his ignorance of the law might have been avoided by his telling his attorney *all* the facts of the case. But he will find that much the most satisfactory thing for him, both to save costs and prevent delay, would have been to have inserted in the mortgage a stipulation in writing to the effect that it was only intended to operate as a collateral security to the note, and every careful practitioner would insert such a provision; but it is equally certain that all practitioners do not do so.

Perhaps, however, the creditor, by way of saving expense, draws the document himself, or goes to a "conveyancer," who does business on cheap principles; and then the chances are largely in favor of there not being the necessary clause, from the want of which arise the evils to which we are about to refer.

If a creditor sometimes gets into trouble in this way, so does occasionally his debtor, as fully appears from the case mentioned at the conclusion of this article. It therefore behoves the debtor as well as the creditor to be careful as to the manner in which the mortgage is drawn, when taken as security for the payment of a previously existing debt, secured by bill or note.

We "take it to be a clear principle of law, that 'if a man accepts an obligation for a debt due by simple contract, this extinguishes the contract, though the acceptance of an obligation for a debt due by another obligation is no bar to the first obligation' (Bac. abr. Debt G.); because it is not a higher security." (See the judgment delivered by Robinson, C. J., in *Matthewson* v. *Brouse*, 1 U. C. Q. B. 272.) All the decisions in this country on this subject keep this principle in view throughout. But the maxim, *Conventio vincit legem* is equally true, and it will be necessary, therefore, to enquire how this *conventio* must appear.

1. If the mortgage or other specialty state that it is given as collateral to the bill or note upon which the action is brought, it is clear that the action may be maintained even though the mortgage be not due (*Matthewson* v. *Brouse*, 1 U. C. Q. B. 272; *Shaw et al.* v. *Crawford*, 16 U. C. Q. B. 101; *Commercial Bank* v. *Cuvillier et al.*, 18 U. C. Q. B. 378).

2. Even if the statement in the mortgage be not explicit, still if it appear from the face of the instrument that it is taken as a further security, and intended to give the payee of the note a better remedy against the maker in case he should be obliged to have recourse to it, and not intended to cancel the note, the right of action on the latter is not extinguished. *Murray* v. *Miller* (1 U. C. Q. B. 353) is our authority for this proposition. In this case the proviso in the mortgage was, that the same should

be void if the defendant should pay the sum mentioned therein by certain instalments at certain times therein stated, "according to the tenor of certain promissory notes drawn by" defendant, &c.

3. Draper, C. J., in *Fraser et al.* v. *Armstrong* (10 U. C. C. P. 506), alludes to cases in which, future advances being contemplated, and a mortgage or other security by deed being given to secure the debt to be created as well as a debt already due, the courts have deduced, from what appeared on the face of the higher security, that it was collateral to, and therefore no merger of the lower security given by bills or notes either for the existing debt or the new advances.

4. The rule has been well established, that parol evidence cannot be admitted to vary the legal effect of an agreement under seal; and it would seem to follow, that no amount of evidence as to what the understanding was between the parties can prevent the note from merging in the mortgage, and thereby putting an end to the right of action on the note (*Matthewson* v. *Brouse* (*ante*); *Parker* v. *McCrea*, 7 U. C. C. P. 124). Nor can the holder of the note be heard to say that the maker of it, at the time the mortgage was given, was liable to a third party who had discounted and held these notes notwithstanding the mortgage (*Fraser et al* v. *Armstrong*, 10 U. C. C. P. 506).

The creditor may, however, although he has a clear right to sue on the note, waive that right by his own act. The case of *Evans* v. *Bell* (8 U. C. C. P. 378) is an example of this. The plaintiff held defendant's note, to secure which the latter agreed to transfer to him some shares in a road company, and the plaintiff was in consideration of this to extend the time for payment of the note for one year. An assignment was accordingly made under seal, reciting the note, and stating that for the purpose of securing the same the defendant transferred this stock to the plaintiff; *habendum* to plaintiff, subject to a proviso for making the same void upon payment of the note and interest at the expiration of two years instead of one. The plaintiff refused to carry out this arrangement, and commenced an action on the note, at the same time holding the stock and refusing to transfer it. The plea as amended at the trial was that this transfer was made for the purpose of securing the amount of the note, and that the plaintiff by his acceptance of it had agreed to postpone the payment of the note for two years. The learned judge directed the jury that there was no evidence to support this plea, and a verdict was found for the plaintiff. A new trial was ordered, on the ground that it was a question for the jury to decide whether the plaintiff, by retaining the security, did not "accept the assignment on the terms it expressed, namely, as a security for the note, and redeemable at the expiration of two years."

The position which the various parties to a bill or note occupy in transactions of this nature now require consideration; and we must again refer to the leading case of *Matthewson* v. *Brouse*, and to subsequent cases, to illustrate this branch of our subject. In the former case the defendant sued as an endorser on a note made by one Carman. The notes were dated on the 11th November, 1842, and fell due on the 14th February following. According to agreement the defendant on 16th November gave the plaintiff a mortgage on certain lands. The question before the court was, "whether the taking the mortgage from the defendant for the amount intended to be secured by Carman's notes extinguished the claim against him for the same money as a party upon Carman's notes, which he had indorsed before making the mortgage."

Robinson, C. J., in delivering the judgment of the Court said:—"If Brouse, on the 11th November, had made a note to Matthewson for the sum due to him, payable on the 14th February, and had afterwards given him a mortgage for the same debt with a covenant to pay the money on the 4th March, it is clear that the debt due on simple contract would be merged in the higher security, and there would no longer remain to Matthewson a remedy on the note. *But I see no substantial difference between that case and the present.* Every indorser of a promissory note is a new maker, and in effect Brouse did, on 11th November, give his note to Matthewson, with this difference only, that his promise to pay was a qualified one, that he would pay the money if Carman (the maker of the note) did not."

In the case of *Shaw et al.* v. *Crawford*, as in the last, the action was brought against the endorser of a note, but, unlike that case, the mortgage was given by the maker to the plaintiff as a collateral security to the note. The note sued on was made by one Polley, payable to defendant's order, and endorsed by him to the plaintiff. The judgment of the court was delivered by Robinson, C. J., who said:—"We are of opinion that the effect of the stipulation in the mortgage given by Polley, the maker of the note, to Shaw and others, the indorsees, that it was agreed between them that the mortgage should operate as a collateral security only, is to save to the plaintiffs, the indorsees, their remedy upon the note, so that they may enforce payment of the note against the maker, Polley, in the meantime according to the terms of the note. Then as a consequence it follows of course, that if these plaintiffs, by reason of their reserving their remedy on the note, can make Polley pay according to the note, they can also make this defendant, as endorser, pay in the same manner, for he is as a new maker and must be bound to pay whenever the maker can be made to pay; and it follows also, that this defendant, as endorser, will stand in the same situation in regard to

his resource against Polley as he would have stood if no such mortgage had been made."

In *The Commercial Bank* v. *Cuvillier et al.* the action was brought against the defendants, A. Cuvillier & Co, as endorsers of a promissory note. It was pleaded by them that the plaintiff had accepted a mortgage from the maker of the note in full satisfaction and discharge of the cause of action. It appeared, however, that the right to sue on this was expressly reserved by the mortgage, and on this point as well as on others, the judgment was given for plaintiff, Burns, J., saying:—"As to the other point (meaning that above referred to) we have had a similar question before us on several occasions, and have held that a collateral security given by one of two or more joint debtors did not merge the debt."

This case was referred to and followed by the court in the judgment given in *McKay* v. *McLeod et al.*, 20 U. C. Q. B. 258, in which the defendants were the joint makers of the promissory note sued upon.

The mortgage or other speciality, therefore, to effect a merger, may be given to the holder of the bill or note by either the maker or the endorser, or by a joint maker or joint endorser of it, and that without reference to which party on the note the action may be brought against.

We shall now, in conclusion, refer to the position of a debtor who has given to his creditor a bill or note, and also a mortgage or other assignable specialty security for the purpose of protecting the note, it not appearing on the face of such mortgage or other specialty security that it was only intended as a collateral security.

The case of *Fairman* v. *Maybee*, 7 U. C. C. P. 467, was an action of ejectment, the plaintiffs claiming under a mortgage from defendant to one Badstone, and by him assigned to plaintiffs. It appeared at the trial that this mortgage had been given to Badstone together with and to secure a note for the same debt, but there was nothing in the mortgage to show the fact. Badstone subsequently paid away the note to a third party, who held it till it was taken up by the defendant. Badstone, after disposing of the note, assigned the mortgage to the plaintiff. Draper, C. J., in delivering judgment, said, "The plaintiff had no notice even that such notes were given..... and it was the duty of the defendant to see that he paid the money to the proper person. Even if there would have been no defence to an action by the holder of the note—if he had taken it *bona fide* without notice—it would in my opinion make no difference ..... If sued by the holder of the mortgage for default, it would be no answer that he was also liable on the note in the hands of a third party, and ..... the remedy on the deed is not affected even by payment of the note ..... It is argued that the defendant may thus be compelled to pay the debt twice; but even if so, it is his own fault, for he has enabled the mortgagee to commit a fraud by assigning the note to one and the mortgage to another."

SUMMARY PROCEDURE BEFORE MAGISTRATES.

An article on this subject, in the December number, has elicited, as we desired, more than one communication with reference to it. The letter of "W. B.," published last month, calls for particular notice, not merely because we happen to know the writer as a well informed and thinking member of the bar, but for its intrinsic value as a contribution to the discussion in hand. He suggests as a cure for evils pointed out—to enable amendments in convictions by order of the judge at the Court of Quarter Sessions. We quite agree with "W. B.," that such a provision would be desirable, and that to some extent it would lessen the evil complained of. Such an enactment is in force in England, and is to the effect—that upon the trial of any appeal to the Quarter Sessions against any order or judgment, if any objection be made on account of "any omission or mistake in drawing up such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order or judgment to have authorized the drawing up thereof free from the said omission or mistakes," the court may amend, &c. But this would not meet all the difficulty; the amendment would be on the evidence taken down before the justices; and many matters over which they have jurisdiction are of a very technical and involved description. A thing done, innocent in itself, often acquires a criminal hue when accompanied by a particular act, or when done under particular circumstances; and, acting on certain statutes, it requires a nice discrimination to mark exactly every fact necessary to be put in evidence as an element in the offence charged. There may therefore be nothing in the evidence to amend by—in point of fact it would often be so. Forms in every case are a great aid, and, if properly framed, suggestive of the facts and circumstances which are required to constitute the offence, and of the particulars which go to make it out. All we can admit in our correspondent's suggestion is, that if carried out it would *lessen* the difficulties in respect to convictions, but we do not see that it would touch the root of the evil. The subject calls for full and free discussion, and we will be happy to see it further debated in the *Law Journal*.

There is a good deal in what "W. B." says of the Division Courts having already plenty to do; but the experiment might be made of giving them jurisdiction in a class of cases partaking as much of a civil injury as of an offence against society.

SELECTIONS.

DOCTOR COLENSO'S CASE.

Since the Reformation there have been only two cases in which English bishops have been deprived of their bishopries by sentence of law. The first of these was the case of *The Bishop of St. David's* v. *Lucy* (reported 12 Mod. 237, 1 Ld. Raym. 447, 537, Carthew 485, 1 Salk. 135,) in which nearly all the learning on the subject is to be found. Towards the close of last century, one Lucy promoted a suit before the Archbishop of Canterbury against Dr Thomas Watson, the Bishop of St. David's, upon several articles for simony and other offences. The bishop having put in his answer, moved in the King's Bench for a prohibition, upon a suggestion that the matters contained in the articles were of temporal cognizance; but Lord Holt, C. J., and the other judges of the Court of King's Bench, decided that the Archbishop had jurisdiction to cite any of the suffragan bishops to appear before him, and to punish them with deprivation or ecclesiastical censure for any offence in violation of their episcopal office or duty. The Archbishop thereupon pronounced sentence of deprivation against Dr. Watson, who appealed to the Court of Delegates; and when they were on the point of deciding against him, he again applied to the Court of King's Bench for a prohibition, upon various grounds—among others, that by the Canon Law, the Archbishop alone could not deprive, although he might visit and censure a bishop. This proceeding was also unsuccessful, and the judgment which it elicited from Lord Holt is a complete repertory of the law upon the subject. Commencing with a citation from a work of the Archbishop of Spalata, to the effect that an Archbishop has the same authority over his suffragan bishops that the bishop has over inferior clergy, his lordship traces the primatial and archeopiscopal jurisdiction of the English church from a very early period, and gives his opinion clearly that it extended beyond the mere power of censure, and included the power of deprivation. The question was, whether, even assuming the Archbishop's judgment was unwarranted by the Canon Law, the Court of King's Bench would issue its prohibition? The Court held that, so long as the Archbishop kept within his clear Common Law jurisdiction, no prohibition would lie for acting contrary to the canons. The bishop subsequently petitioned Lord Chancellor Somers for a writ of error upon a denial of the prohibition, and finally the House of Lords decided that a writ of error would not lie. This case, therefore, places beyond all doubt the jurisdiction of an English Archbishop, within his province, to sentence a suffragan bishop to deprivation, although it has been much questioned whether the bishop can be *deposed*, in other words degraded, from the rank and order of bishop, which is said to be indelible. The other case to which we referred is that of the Bishop of Clogher, who was deprived of his bishopric in 1823 for scandalous offences, which are matter of notoriety. If, therefore, Dr. Colenso were a bishop of an English province, he would be clearly subject to deprivation by his Metropolitan, assuming the offence to be proved, and to warrant such a sentence. But he is a colonial bishop, and having been arraigned before the Bishop of Cape Town, as his Metropolitan, has demurred generally to the jurisdiction, relying, probably, upon the great difficulty of substantiating it in so novel and singular a case—one which is not likely to have entered into the minds of those who were concerned in settling the constitution of the Anglo-African Church.

In most, if not all, of our colonies, the Church of England holds a very anomalous and illogical position. Although bishops are appointed for the colonies, and are recognised in the Church of England as of full episcopal rank, yet, in any colony where, and so far as the Church is not established by law, it is, in the eye of the law, in the same situation as any other religious denomination; and, therefore, it is at least questionable whether its bishops can pretend to use the common law jurisdiction which attaches to the episcopal office in England. Indeed, so recently as last year, this view of the position of the Bishop of Cape Town himself was strictly enforced by the Privy Council, in the case of the *Rev. W. Long* v. *The Bishop of Cape Town*, 11 W. R. 901. Mr. Long was the minister of an episcopal church in the bishop's diocese, and licensed by him, but receiving a salary which was paid partly by the Governor, partly by the Society for the Propagation of the Gospel, and partly by his congregation. The Bishop being desirous of settling some scheme of church government which should be binding upon the religious community of which he was the head, convened for this purpose a synod, to which Mr. Long was summoned. The synod met and passed various acts and constitutions, but Mr. Long refused to attend or to observe them, and, being served with a citation to appear before the bishop, denied his authority to hold any court. A decree of suspension was thereupon passed, whereupon Mr. Long instituted a suit, praying the protection of the Colonial Law, and impugning the authority of the bishop to do what he had done. Lord Kingsdown, who delivered the judgment of the Judicial Committee of the Privy Council, decided in favour of Mr. Long upon all the points raised, but upon grounds that are scarcely applicable to Bishop Colenso's case, as their Lordships expressly avoided touching the question of the bishop's authority in spiritual affairs, or Mr. Long's obligations in *foro conscientiæ*, and their reasons are confined to considerations in connection with the want of power in the bishop to summon such a synod, and to the illegality of its act. "The oath of canonical obedience," said their Lordships, "does not mean that the clergyman will obey all the commands of the bishop against which there is no law, but that he will obey all such commands as the bishop, by law, is authorized to impose." The bishop had clearly exceeded his authority, and, therefore, even though he had jurisdiction to pronounce a sentence of deprivation, it could not be upheld upon the merits of the question involved. But their Lordships appear to have been careful in abstaining from extra judicial remarks on the Common Law powers of colonial bishops, although there are some observations in their judgment to the effect that any such tribunal as that which was constituted by the synod, can be in no sense a "Court," assuming to have any authority either from the Crown, or inherently, to enforce any sentence which it may pronounce.

The question, therefore, in Dr. Colenso's case, appears to be reduced within very narrow limits. In 1832, when the legislative authority in the colony of the Cape of Good Hope was vested in the Crown, and all denominations of Christians in the colony stood upon an equal footing, a Charter of Justice was granted to the colony, giving its Supreme Court supreme jurisdiction *in all causes* arising within the colony, and over all persons within its boundaries. In 1847 the colony was erected by letters patent into a bishop's see and diocese, but no ecclesiastical court was thereby expressly constituted. On the contary, it was declared that the letters patent should not interfere with the existing ecclesiastical jurisdiction under any charter; and they provided that the Bishop of Cape Town should be subject to the Metropolitan see of Canterbury in the same manner as any bishop within that province. In 1853, however, new letters patent were issued, under which some portions of the original diocese were erected into a separate diocese, to be called thenceforth the Bishopric of Cape Town, and to be the Metropolitan see of the colony. In other respects the new letters patent were in the same form as the old ones, and therefore it would seem that the only question now is, whether the letters patent of 1847, in making the Bishop of Cape Town Metropolitan for the colony, gave him all the rights, powers, and jurisdiction in respect of his suffragan bishops as he would have, both at Common Law and according to Canon Law, if he were a Metropolitan in England. This is too grave a question

for us to attempt to discuss in our limited space. Our attempt has been merely to show the nature of Bishop Colenso's demurrer, and of the questions which it involves. The case will hardly be allowed to rest upon the decision of the colonial Metropolitan, and is almost certain to be brought under the cognizance of the Privy Council, in some shape or other, before it is finally determined. In the meanwhile it is probable that the Supreme Court of the colony, acting as an ecclesiastical tribunal, may be called upon to apply the principles of Roman-Dutch law for decision of the grave matters in question; and, in the meantime, there are not many lawyers in this country who will care to volunteer as much labour as will be necessary for its elucidation.—*Solicitor's Journal.*

LEGAL HUMOR.

They are much in error who imagine that legal bibliography is invariably dry and insipid. The profession, like all others, has its peculiar humor and its peculiar humorists, although in the immensity of more practical researches, lawyers are apt to overlook the spicy refreshments of the side table for the solid banquet of the law proper.

Numerous are the stories of funny scenes of judicature, but the curious and funny books on the law are the subject of present examination.

I beguiled the intervals of a recent visit to the Court of Appeals by running through the alcoves of the splendid law library of the State, and by a special favor of my friend, Alfred B. Street, Esq., the librarian, was introduced to the more rare, curious, and mysterious works, which are locked up in the private case. A few of them I will attempt to review, with selections.

The legal curiosity is "Coke's Reports in verse," published in 1742, in London, from an ancient anonymous manuscript, accidentally discovered. The object of this work is serious, and intended, by a concentration of the substance of each of the celebrated decisions in Coke's Reports (six vols.), to refresh and amuse the memory, and thus fix them firmly in the mind. The style of the work is a series of rhymed couplets, each headed with the prominent name of the case.

The substance of the "Rule in Shelly's" case is thus stated:

"*Shelly.*—Where ancestors a freehold take,
The words 'his heirs' a limitation make.

Another upon a now well settled point:

"*Goddard.*—Th' effect the deed doth take shall be,
Not from the date, but the delivery."

And what may be considered doubtful law, at least now a-days:

"*Snag.*—If a person says, 'he killed my wife,'
No action lies if she be yet alive."

This work was reprinted in Philadelphia in 1835, and can probably be procured. Some lawyers have committed the whole to memory, as a kind of index to Coke's Reports.

"Ausley's Pleader's Guide.

A very innocent and serious title, but a book full of humor, puns, droll allusions, quaint rhymes and queer proverbs; in fact, a very revel of satirical, but good natured wit. The whole science and system of law, as it relates to pleading, is set forth and styled "The lectures of Mr. Surrebutter on the conduct of a suit at law, including the arguments of Counsellors Bother-em and Bore-em in an action for assault and battery betwixt John A. Gull and John A. Gudgeon." It sets out with a prologue and invocation, evidently in imitation of the venerable classics, viz.:

"Of legal fictions, quirks and glosses
Attorney's gains and client's losses,
Of suits created, lost and won,
How to undo and be undone,
Whether by common law or civil,
A man goes sooner to the devil,
Things which few mortals can disclose
In verse, or comprehend in prose,
I sing—Do thou bright Phœbus deign
To shine for once in Chancery lane."

The work then conducts the reader through all the comic mazes of this funny suit, to trial, examination and cross examination of witnesses, charge and verdict.

The trial is replete with jokes and satires, "as good as new," and is especially laughable for its racy dashes at the ridiculous old system of "counts" in criminal cases.

Counsellor Bother'em opens the case to the jury:

"I rise with pleasure, I assure ye,
With transport to accost a jury
Of your known conscientious feeling,
Candor and honourable dealing;
From Middlesex discreetly chosen.
Aside (A worthy and an upright dozen!)
This action, gentlemen, is brought
By John-A-Gudgeon for a tort;
The pleadings state 'that John-A-Gull,
With envy, wrath and malice full,
With swords, knives, sticks, staves, fists and bludgeon,
Beat, bruised and wounded John-A-Gudgeon;
First count's for that, with divers jugs
To wit, twelve pots, twelve cups, twelve mugs
Of certain vulgar drink called toddy,
Said Gull did sluice said Gudgeon's body;
The second count's for other toddy
Cast, flung and hurled on Gudgeon's body;
To wit, his gold-laced hat, and hair on,
And clothes, which he had then and there on,
To wit, twelve jackets, twelve surtouts,
Twelve pantaloons, twelve pairs of boots,
Which did thereby much discompose
Said Gudgeon's mouth, eyes, ears and nose,
Back, belly, neck, thighs, feet and toes;
By which, and other wrongs unheard of,
His clothes were spoiled and life despaired of.
To all these counts the plea I find
Is *son assault* and issue's joined.

Lawyers at all familiar with old English practice will see the fun in the enumerations of damages, dozens, &c. Counsellor Bore'em sums up in a very pathetic style, and the case goes to the jury.

"Crisp's Conveyancer's Guide," or Law Students' Recreation.

This work is more serious in its purpose, and is funny only by way of remarkable and easily remembered illustrations. It is really a very valuable book, and would be a capital remembrancer, to be read after, or even during a course of real estate law study. One feature of it is a very amusing compilation of ancient, quaint, droll and funny poems, relating to the law generally, and to certain queer and obsolete customs, all of which are spread in spicy profusion over the introduction.

The idea of teaching a solemn and serious science in verse is not a new one, but, on the contrary, the most ancient method which we have any knowledge of, transmitting in poetic tradition the laws and customs, as well as the religion and morals of the most ancient nations.

Strabo tells us that Apollo was one of the first legislators, and that his laws were published to the sound of the harp. And we are quite satisfied that the first laws of Greece were inculcated in song. Pittacus prepared an entire code in song, that it might be the more easily remembered. The ancient laws

of Spain were chanted vocally, in song and chorus, and Tuisco, the first legislator of German history, published his laws likewise.

Thus it will be seen that this method of instruction is old, and any reader will testify to the superior facility with which such a style of composition can be committed.

The law of "remainders," and their general characteristics, are thus set forth:

"All remainders owe their being
To the estate that's intervening,
For, things unsupported needs must fall,
If no support they have at all,
And such estates particular we call,
On it are all remainders rested,
As well contingent as those vested;
And such estate in tail must be,
For life or years, and not in fee,
For if you give the whole to Doe,
What part remains to give to Roe?
On such estates particular,
Remainders all dependant are;
So must and ever will remain,
As links all hanging to a chain."

The chapter on "Uses and Trusts" is remarkably amusing and highly instructive. The history of this law, in its relations to conveyancing, is set forth in a very elaborate manner. The statute of 27th Henry VIII, known as the "Statute of Uses," is wittily, but learnedly, discussed, and the abstrusities of this metaphysical branch of the law made exceedingly clear and plain. The very best lawyer could read this chapter with profit—must read it with laughter. The subject of "Conveyances," as they relate to estates, commences as follows:

"Time was, a grant and feoffment too,
Were made as well by an old shoe,
As by a deed, wrote in a hand
Which very few can understand;
But when men learnt to read and write,
Lawyers soon found the way t' indite,
Sheepskins no longer served for breeches,
But evidences were of riches!"

No doubt, many may be familiar with "The Comic Blackstone," by Gilbert Abbott A-Beckett, author of the "Comic History of England," originally published periodically in the London *Punch*, where the Blackstone also first appeared. Cary & Hart, of Philadelphia, republished it in 1844, and copies can probably be procured. Part I, on the "Rights of Persons," is all that has appeared, I believe, and regret to say.

The Parliament, the King and Royal Family, with the Royal Council, come in for the greater share of the barbs of wit, and the heaviest satires are launched against them. The following is a fair "specimen brick" from the introduction, which students of Blackstone will recognize as imitative.

"Section I. On the study of the law: 'Every gentleman ought to know a little of law,' says Coke, and perhaps, say we, the less the better.—Servius Sulpicius, a pratrician, called on Mutius Scævola, the Roman Pollock (not of the firm of Castor and Pollux) for a legal opinion, when Mutius Scævola thoroughly flabbergasted Servius Sulpicius with a flood of technicalities which the latter could not understand. Upon this, Mutius Scævola bullied his client for his ignorance, when Sulpicius, in a fit of pique, went home and studied the law with such effect that he wrote one hundred and four score volumes of law books before he died, which task was, for what we know, the death of him, &c."

"The clergy and the Druidical priests were in former times great lawyers, and the word 'clericus' has been corrupted into 'clerk,' so that the seedy gentlemen who carry the wigs and gowns down to Court for the barristers are descended from the Druids."

The chapters on the "Domestic Relations" are commended to the legal "Maritus," for their wholesome homilies, and to the general public for their unlimited humor. The whole work is of a very high order of learned wit, without appearing stilted or pedantic. It is replete with historical allusions and profound deductions, and would amuse the most eminent and dignified Chief Justice, as well as a young student of legal mysteries.

In another communication I will review some of the quaint and peculiar legal curiosities.

—*Pittsburgh Legal Journal.* W. H. Ingersoll.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office"

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

CAUSE OF ACTION—WHERE IT ARISES.

There is considerable conflict of opinion among county judges as to the effect of the words "cause of action," in sec, 7 of the Division Courts Act; as, for instance, with respect to a note made in Toronto, but payable in Hamilton, "and not otherwise or elsewhere." Some judges would hold that an action for the recovery of such a note as this should be brought in Toronto; others that Hamilton would be the proper place; others again, and more correctly it would seem, that the action should be brought in the division where the defendant resided. The writer remembers that the Judge of the County of Simcoe, as early as 1855, took the same view of the enactment as that which is now laid down as law by the Chief Justice of Upper Canada, in the following case:—

In the matter of the Judge of the County Court of Brant, in a cause in the First Division Court of that County, of Watt v. VanEvery and Rumball.

Division Court—Cause of action, where arising—C. S. U. C. cap. 19, sec. 7.

Where defendants, residing at Goderich, made a contract at Brantford with one W., to deliver to him certain goods at the railway station at Goderich: *Held*, that an action in the Division Court for the bad quality of the goods delivered must be brought at Goderich, as the whole cause of action did not arise at Brantford.

John Paterson applied for a rule *nisi*, calling on Stephen J. Jones, Esq., judge of the County Court of Brant, and *ex officio* judge of the First Division Court in that county, and upon the said George Watt, to show cause why a writ of prohibition should not issue, directed to the said judge, to prohibit him from further proceeding in the said Division Court in the plaint against the said Thomas B. VanEvery and George Rumball, on the ground that the cause of action in whole or in part arose in Goderich, and that the defendants lived in Goderich.

The affidavits disclosed that Watt had entered a plaint against VanEvery and Rumball in the First Division Court of the county of Brant, claiming $40 damages for breach of a contract by which the defendants agreed to deliver to him thirty half-barrels of sound marketable herring fish, and instead thereof delivered unsound, bad, and utterly worthless fish. According to the affidavit of the defendant's agent, he as such agent made the contract with Watt at Brantford, in the county of Brant, that defendants should deliver to Watt, at the railway station at Goderich, and not elsewhere, the fish mentioned in Watt's plaint, and that the fish were so delivered, and that Watt was to pay the freight. The defendants resided and carried on business at Goderich.

Borthwick v. *Walton*, 15 C. B 501; *In re Walsh*, 1 E. & B 383; *Buckley* v. *Hann*, 5 Ex. 43; *Hernaman* v. *Smith*, 10 Ex. 659, were cited in support of the application.

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

The 71st section of the Division Court Act enacts that "any suit may be entered and tried in the court holden for the division in which the cause of action arose, or in which the defendant, or any one of several defendants, resides or carries on business at the time the action is brought."

The words "cause of action" have, in the English County Court Act, been repeatedly determined in England to mean the whole cause of action; in other words, whatever the plaintiff must prove to entitle him to recover. See *Borthwick* v. *Walton* (15 C. B 501), *Hernaman* v. *Smith* (10 Ex. 659), and the cases therein referred to. Our statute gives a plaintiff two alternatives The one, to enter his suit in the court for the division in which the causes of action arose, the other in the court for the division in which the defendant or any one of several defendants resides or carries on business at the time the action is brought.

Now, what is the cause of action in this case? Not the contract only, but the contract and the breach, for which the plaintiff claims damages. The first was made at Brantford, but the fish were to be and were delivered to the plaintiff at the railway station at Goderich. The breach of contract alleged is, that the fish there delivered were unsound, &c, and if true, this breach occurred at the place of delivery stipulated for by the contract. The cause of action, therefore, arose partly at Brantford and partly at Goderich, and the plaintiff must bring his action according to the second alternative. The rule *nisi* must issue.

Rule *nisi*.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Your opinion on the following points respecting the practice of the Division Courts, will be of service, as there are different views taken by different persons.

1st. Has a bailiff a right to purchase at the auction sale of the clerk of his court?

The 157th section of the Division Court Act is the only clause I know of, touching upon the prohibition of officers purchasing at bailiff's sales; and I do not think there is anything in that clause to prohibit a bailiff purchasing at a sale made by the clerk; but still the one clause seems to prohibit *any* bailiff or clerk from purchasing at the sale (under execution) of any other bailiff.

2nd. Can a plaintiff have his judgment transferred, by "transcript and certificate," from one division to another in the same county?

The power given to transfer judgments from one court to another is given in the 139th section of the Act. I think the clause gives the power to a plaintiff to have a judgment transferred to any other division. If not, suitors would often lose their claims. Say A. lives in division 1, where he has a judgment against B., who lives in division 6, of the same county, but twenty or twenty-five miles distant. A. has execution issued, and given to the bailiff of division 1. The bailiff has to travel twenty-five miles, and B. tells him he has "no goods." The bailiff, not finding any goods, has his long trip (which he is compelled to make) and gets no fees; and suppose the bailiff finds goods, the costs would be much more than if sent by transcript from division 1 to division 6. Furthermore, the bailiff of No. 6 division may know of goods, and could collect from B., when the bailiff of division 1 would know nothing of B.'s affairs. The 73rd section provides plainly for the sending of summonses for service to any division, and the same rule ought to apply to the collecting of the claim. What is your opinion?

CLERK 6TH DIVISION COURT, CO. NORFOLK.

Dec. 28, 1863.

[1. The 157th section does not in terms touch the case put by our correspondent. The prohibition relates to sales under executions, which are never directed to clerks. The sales under section 213 are under process of the court, and it would open the door to improper conduct if officers were allowed to purchase at such sales. We have no doubt the judge would discountenance the practice as one likely to give rise to suspicion of collusion, if not encourage unfair dealing.

2. It is extremely doubtful whether a judgment can be transferred, under section 139, to another division in the same county. Our impression is that it cannot. Our correspondent has shown in a clear and pointed manner that the power ought to be given, by exhibiting the inconvenience and evils that might arise from the want of it.—EDS. L. J.]

Ottawa, Dec. 28, 1863.

To the Editors of the Law Journal.

GENTLEMEN,—Twenty-two years have elapsed since our local judicial establishments, as now constituted, came into operation in this country, and we have had some opportunity of judging how far they have answered the end designed by those who introduced the present system.

No subject is more worthy the consideration of an enlightened statesman than the judicial establishments of a progressive and educated people, and therefore many of our most patriotic and learned men devote much of their time and talents towards rendering the administration of justice as perfect as possible. As you have always manifested a deep interest in our County and Division Courts, I take the liberty of submitting a few observations, the result of experience from the first enactment relating to Division Courts.

The chief duty of a Judge is to do right; the next is, as far as possible, to give satisfaction to suitors. I trust that in both cases the County Court Judges have been in some degree successful. To expect that in every case both interested parties should be satisfied, would be unreasonable. The judge, no doubt, often feels disappointed, and perhaps unhappy, when he discovers signs of disapproval of his decision manifested by men who ought to know better; but with the upright and pains-taking judge, the *mens conscia recti* is the staff and stay of his life.

We have in Upper Canada no less than thirty-three distinct, separate and independent judicial establishments, each presided over, with one or two exceptions, by a single judge, who, the law says, must be a barrister of five years standing. Each man measures out justice—particularly in the Division Courts—according to his own idea of equity and good conscience, upon his own responsibility, and from his decision there is no appeal. What may be equity and good conscience

in one county, may be quite a different thing in another. Perfect uniformity cannot be expected. There is no common available centre to which the judges can look for authority to guide them, either in matters of practice or in the innumerable critical and often complicated cases which are brought before them.

Then, again, a County Court judge is going the same round every two months for a number of years, without any change. He becomes familiar to and with every man, and knows something of his affairs. The people also become acquainted with the judge, his peculiarities, and perhaps his weaknesses (and who is without both?) May it not therefore sometimes happen that the scale of justice unintentionally will fall to the wrong side? Ideas may take root in the mind of a judge (as they often do in the minds of other men), which may lead him, in spite of the exercise of the most anxious wish to arrive at a right conclusion, to render a wrong judgment. No man in any situation has more responsible duties to discharge than the judge of a Division Court. He is often called upon to decide at a moment questions of law and equity of the most abstruse and complicated character; and if he should take time to look into the particular case more at leisure than can be done at the sittings of the court, even then he has to work out the problem as he best can, by the single aid of his own reason and judgment. What an advantage has the judge of the superior courts, who in such cases is assisted by learned counsel, enlightened by the arguments and guided by the wisdom of the great jurists of ancient and modern times, and in the end consultation with minds constantly running in the grooves of legal science!

I fear the present system, which was intended to bring, as it were, justice to every man's door, has a tendency to change the law and the study of it from being an interesting science to be nothing more than such notions of right and wrong as may be adopted by each separate county judge in the Province, and that in a few years such names as Coke and Blackstone will be unknown to the profession in Upper Canada, without the limits of the city of Toronto.

The chief business of the country is now done in the local courts; and as it is of great importance that these tribunals should be brought to as high a degree of usefulness as possible, I would venture to suggest some alterations, which my experience has led me to think might be an improvement in our system.

I would enable a County Court judge to preside at the sittings of County Courts, Quarter Sessions and Division Courts in other counties as well as in his own. I see no reason why he might not do as the judges of the Queen's Bench, Common Pleas and Chancery do, leaving his notes for the use of the resident judge, to direct him in subsequent proceedings. Thus practitioners and others would have an opportunity to form their opinions of the relative merits of the judges, and the judge himself would be relieved from trying cases in which perhaps he may have incidentally expressed an opinion, or have been in some way mixed up with the matters in dispute; for indeed I have heard of a case of interpleader where one of the parties held the property in dispute under an assignment as trustee for the judge who was to decide the question at issue! Besides, we know that men who are long accustomed to preside without change upon the same bench, addressing the same juries, hearing and heard by the same lawyers, is very prone to become indifferent, and fails to observe that self-restraint, and that cool and proper bearing, which are so necessary to command the respect so essential to his office. I think if the judges were enabled to exchange duties with each other according to convenience, we should all retain a higher interest in our duties, and keep better "posted up," as the saying is, in our work. If the system of deciding questions in term was in some way altered, so that three or five judges should hear and decide the question raised, expenses of appeals might in some cases be avoided; for it does seem rather an anomaly that the same man who rules at the sittings should again in term be asked to set himself right. I am also of opinion that some facilities of appeal from Division Court decisions should be introduced, when the amount is over £10 or £12.

All I have said is merely the result of a retrospective glance over the twenty-two years which have this day expired since I was sent into this, until very lately, unknown region, in which I have toiled uninterruptedly (except for a period of five months many years ago).

At the risk of being too troublesome to you, I would suggest, in conclusion, that great advantages might arise, if all the County Court judges were to be drawn together—say at Toronto—for a day or two, in order to compare notes, and see if any alteration or amendments could be introduced into our system. I am sure the Legislature would gladly avail themselves of the experience of so large a number of men who have spent their years in studying and trying to work out the laws as they exist.

I am your very obedient servant,

C. Armstrong.

[We insert the foregoing with much pleasure. The January number was in press when it came to hand, or it would have appeared last month.

We are amongst those who think that defects, which have been from time to time pointed out in pages of this journal, are not altogether to be charged to the system, but are to some extent to be traced to a faulty administration. One of our leading articles of last month is *apropos* to the subject. There are several grades of "repealers," we fear, and not a few to whom the phrase "not posted up" would apply. While we have endeavored to do the "posting up" by opening our columns to correspondence, and exchange of views by answers to correspondents, and preparing articles on subjects of interest, with a measure of success, yet there has not been that hearty co-operation from officials which we had every right to expect. Even the money due for subscriptions—a large part of which is now money out of pocket—has been in arrear for years, and our accounts now show over six thousand dollars of arrearages.

Notwithstanding these discouragements, we have steadily persevered, and will continue to do so. Judge Armstrong's letter shows that he at all events is not insensible to the

responsibilities of his position, and that he for one would be willing to be a contributory to any plan that would tend to secure soundness and uniform administration in the Division Courts.

We could name many other gentlemen, animated by the same feelings, and to whom our thanks are due for assistance rendered in the object which from the first the *Law Journal* had in view.

In our Prospectus, issued in January 1855, it was stated as follows:—"A space will be afforded to elicit whatever experienced officers or practitioners may be able to set down for the information of others, whose doubts lead them to query; thus giving, as it were, the advantages of a monthly conference on the many difficult points which are constantly arising; also for queries on points of practice, &c., which the conductors of the *Law Journal* will gladly aid in resolving."

The "monthly conference" proposed has been kept up, to a limited extent, ever since. For the present, the part of Judge Armstrong's letter with which we most cordially agree, containing the suggestion of a general meeting of the county judges at Toronto, is the only part we advert to. Many of the judges have had an experience of over twenty years, and there is scarcely a clause of the statutes that has not undergone judicial construction by one or more of the judges—hardly a point of practice that some one or more of the thirty-three judges have not considered. Each judge, by a conference of this kind, would have the advantage of the experience of all, and all would be enlightened in some way.

At the suggestion of several judges, we have more than once thrown out the idea of such a meeting, and we would gladly see it take place. The first thing is to hear from each judge on the subject. We will be happy to learn the views of any one who feels an interest in the proposed meeting, not for publication, unless so desired, but that we may be enabled to offer a definite suggestion.

Immediately after July term would probably be the most convenient time for a meeting. No judge, whatever his standing, would feel himself quite warranted in taking steps for a meeting, unless armed with a call to do so from a very considerable number of his brother judges. Yet we are convinced it only requires some one to take up the matter, to ensure a full meeting.—EDS. L. J.]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*)

LIVINGSTONE ET AL v. MASSEY.

Action against carrier—Felony shewn by the evidence—Nonsuit.

In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after his delivering the parcel to defendant he found that he had absconded, that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in goal, charged with stealing the money. *Held*, that this evidence sufficiently showed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny, under Consol. Stats. C., ch. 92, sec. 55; and a nonsuit was ordered.
Hagarty, J., dissenting. [Q. B., M. T., 27 Vic.]

Action for money had and received. The first count was in the common form. The second stated that defendant was a common carrier of goods for hire: that on the 21st of February, 1863, the plaintiffs delivered to defendant, and he accepted for carriage and delivery, a money parcel containing $888 22, of which the plaintiffs theretofore had lawful possession, to be carried by defendant for the plaintiffs, and to be delivered within a reasonable time to Messrs. Simpson & Eaton, at their place of business in the village of St. Mary's, for reward to defendant. Breach, non-delivery within a reasonable time, or at any time.

Pleas, to the first count, never indebted, and payment; to the second count, not guilty.

The trial took place at Stratford, in October, 1863, before Hagarty, J. It appeared that defendant was a carter at St. Mary's and was in the habit of receiving parcels from the plaintiffs' agent to carry from the railway station and deliver in that village. On the 21st of February, 1863, defendant received two parcels for Simpson & Eaton, done up in brown paper, containing $888 and some cents. The agent heard within a week that the parcel was not delivered, and enquiry found that defendant had absconded. He traced defendant to London, but lost the trace there, and then sued out an attachment against him as an absconding debtor. The agent swore that he only knew the contents of the parcels from the amounts marked outside: that the Express Company (the plaintiffs) mark the amount according to the declaration of the parties forwarding money parcels, without counting. He also stated that, as he believed, the defendant was then in gaol, charged with stealing this money.

One of the firm of Simpson & Eaton proved that in February last they expected about $888 to be sent to them by parties in Montreal: that they never received it; and the Express Company made good the loss to them.

For the defence it was objected that the evidence shewed the defendant had committed a felony, and if so the action would not lie. Leave was reserved to move for a nonsuit on this objection, and the plaintiffs had a verdict for $888.

J. Read obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved.

Read, Q. C., shewed cause, citing *Edwards* v. *Kerr*, 13 U. C. C. P. 24; *Wellock* v. *Constantine*, 7 L. T. Rep. N. S. 751.

DRAPER, C. J.—The action is against the alleged felon. In Hale Hist. Plac. Cor. 546, the following case is stated: "A. steals the goods of B., viz., fifty pounds in money, A. is convicted, and hath his clergy upon the prosecution of B. B. brings a trover and conversion for this fifty pounds, and upon not guilty pleaded this special matter is found, and adjudged for the plaintiff, because now the party hath prosecuted the law against him, and no mischief to the commonwealth; *but it was held, that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings trover, it lies not, for so felonies should be healed.*"

It seems to me two questions arise. First, on the pleadings: is the evidence admissible, assuming its sufficiency to prove a felony, on these pleadings?

The plea of not guilty puts in issue the loss or damage charged, and the plaintiffs of necessity have to prove it. If the evidence shews that the alleged loss was caused by a felonious act committed by the defendant, it is in truth a failure on the plaintiffs' part to prove the cause of action. It is not an answer set up by defendant to a cause of an action *primâ facie* proved. The defendant will then succeed on not guilty, because the plaintiffs' evidence does not sustain the declaration, and not on a plea which confesses the loss complained of, and seeks to avoid by alleging that he stole the goods.

Secondly, is the evidence sufficient to prove a felony, and not merely such a breach of duty as is charged? The objection taken at trial was not as to the proof of value or contents of the two parcels, but that whatever the value, great or small, the evidence, if it proved any thing, proved that the defendant stole them. On this point I felt doubtful, but at last I am constrained to hold that such is the proper conclusion.

The delivery of the parcel to the defendant at the railway station at St. Mary's was proved, as well as admitted on the pleadings, and so was his undertaking to deliver these parcels to a firm in St. Mary's. The non-delivery of either parcel to this firm was also proved, as well as defendant's absconding shortly after the receipt of them. I cannot satisfy myself that this is not evidence

that the defendant not only took but also converted these parcels to his own use, and if this evidence were not met by contradiction or satisfactory explanation, I think the defendant might, as a bailee, be properly convicted of larceny under the 65th section of our Consol. Stats. C., ch. 92.

I think, therefore, that the rule to enter a nonsuit should be made absolute.

HAGARTY, J.—I concur in the principles of law laid down by the Chief Justice, and only differ from him as to their applicability to the case presented to us on the evidence.

In this case the original receipt of the goods by defendant as a carrier was of course lawful. That fact, coupled with the usual evidence of non-receipt by the consignee, is a *primâ facie* case of liability against defendant. Such evidence was given here, coupled with the fact that defendant absconded, and that an attachment was taken out against him as an absconding debtor for this claim. So far all this is quite consistent with the conclusion that it is common case of civil liability on the carrier.

Under section 55 of ch. 92, Consol. Stats. C., if defendant, being a bailee of property, fraudulently took or converted it to his own use, or the use of any person other than the owner, although he might not have broken bulk, or otherwise determined the bailment, he would be guilty of larceny.

Apart from the fact of absconding, I cannot see how the evidence here necessarily involves a charge of felony. In this it differs from ordinary cases, where the facts relied on for the plaintiffs, in themselves, suggest that a felony has been committed. The facts relied on here are the receipt and non-delivery of goods as a carrier. By themselves they in no way even suggest, much less prove or make out, a case of felony. The absconding is, as far as the civil remedy is concerned, a mere collateral matter, unconnected with the issue.

I cannot help feeling that it is a dangerous precedent to allow defendant's counsel, who offers no evidence for his client, to suggest that a felony has been commited. He may know perfectly well that there is not the most remote chance that his client could be convicted on such a charge. I fully recognise the great importance of the old rule of compelling parties first to vindicate the justice of the criminal law before enforcing the civil remedy; but, with great submission, I think the rule inapplicable to a case like the present.

It is not easy to find many cases, if any, in point. The latest is *Well ck* v. *Constantine*. (2 F. & F 291; 7 L. T. Rep. N. S. 751.) It was an action for assault, and on the trial the plaintiff swore that, in addition to other violence, a rape had been committed. Willes, J., nonsuited the plaintiff The Chief Baron Pollock, in giving the judgment of himself and Bramwell, B., says, "The majority of the court are of opinion the rule should be discharged. The ground upon which the nonsuit proceeded was, that after it appeared that the civil right, or rather the wrong complained of, and for which a civil remedy was sought by the action, involved a charge of felony, the proper course to take was not to go on with that enquiry, but to leave the matter to be tried as a criminal offence. My brother Martin differs so far as to enablet he parties, if they think fit, to take the case to a Court of Error. In speaking of the decision of the court, I am stating what is the opinion I entertain, together with my brother Bramwell."

I think it very important to notice, that what the statute law makes a felony is a subsequent fraudulent dealing with goods lawfully received by defendant. It is not this fraudulent disposition which creates the plaintiffs' civil right, nor is it for any such act that they seek to recover, but for a non-feazance, *i. e.*, the non-delivery to the consignee. The statutable felony is for an act done, not for any omission.

If this action were in trover, where the plaintiffs sought to charge the carrier on proof affirmatively that the latter had broken bulk, or used the goods for his own purpose, (of which there are examples in the books,) I should feel more pressed by the objection; the very act of conversion, which the plaintiffs have to show to prove their case, being by the statute (if done *malâ fide*) declared to be a felony.

As I said before, the plaintiffs have to show nothing of the kind here, and I repeat, it seems to me that it is not inconsistent with the well known rule of law in favor of public justice, to do complete justice by allowing the plaintiffs to recover their just claims.

In *Stone* v. *Marsh* (6 B. & C. 564), one of the cases arising out of Fauntleroy's forgeries, Lord Tenterden says, "In general a man cannot defend himself against a demand by showing on his part that it arose out of his own misconduct, according to the maxim, '*Nemo allegans suam turpitudinem est audiendus.*' There is, indeed, another rule of the law of England, namely, that a man shall not be allowed to make a felony the foundation of a civil action. * * * He shall not sue the felon; and it may be admitted that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears by his own showing to be founded on the felony of the defendant. This is the whole extent of the rule."

I think that in the case before us the plaintiffs' claim is not founded on the felony of the defendant, but on his legal liability as a carrier, arising from the receipt and non-delivery of goods.

For reasons of public policy, the statute has made an intermediate act—namely, a fraudulent appropriation—a felony. The plaintiffs' case in no way depends on any act of defendant bringing him within the statute, and I think we can allow him to recover without violating any known rule of law.

MORRISON, J., concurred with the Chief Justice.

Rule absolute—*Hagarty, J.*, dissenting.

HAWKINS v. PATERSON AND KENRICK.

Con. Stat U C cap 24, secs 3, 41—Judgment for costs of defence—Right to examine plaintiff—Liability of defendant and his attorney for arrest under illegal order.

Held, that under Con. Stat U. C. cap 24, secs. 3, 41, a plaintiff against whom a judgment has been recovered for costs of defence only, cannot be compelled to submit to examination or be imprisoned for contempt in not attending.

Held, also, that both defendant and his attorney, who applied for and obtained the order for such imprisonment, and caused the plaintiff to be arrested, and who justified under it, were liable.

Quære, whether a defendant who recovers on a plea of set-off an excess above the plaintiff's demand, is entitled to examine the plaintiff.

The plaintiff declared against John Kenrick and James Paterson, his attorney, for trespass and false imprisonment.

The defendants severed in their pleadings, though their pleas were substantially the same. The pleas averred a suit brought by the plaintiff against Kenrick in the County Court, and a judgment therein recovered by Kenrick against the plaintiff for $83 48; a *fi fa* thereon against the plaintiff's goods, and a return of *nulla bona* thereto; a summons issued by the judge of the County Court for the plaintiff's oral examination on oath, and an order made by the junior judge (acting on account of the unavoidable absence of the senior judge), that the plaintiff should attend before W M C. at such time and place as he might appoint, and be examined *viva voce* on oath touching his estate and effects, and as to the property and means he had when the debt or liability was incurred, and as to the property the plaintiff then had or interest therein, and the means the plaintiff still had of discharging the said judgment, and as to the disposal he might have made of any property since contracting such debt or incurring such liability; that W. M. C. made an appointment, of which the plaintiff was duly notified, but the plaintiff did not attend, whereupon W. M. C. reported his non-attendance, and returned the order with his report to the County Court; that thereupon a summons was issued by the judge of the County Court, calling on the plaintiff to show cause why he should not be committed to the common gaol for a term not exceeding twelve months, for his default in not attending to be examined, which summons was duly served on the plaintiff, and on the return thereof, and the same being moved absolute before the county judge, the plaintiff by his counsel appeared; and at his request, and on his undertaking that the plaintiff should attend before the said W. M. C. at a named time and place, and submit to be examined pursuant to said order, the summons was enlarged to a future named day; that the plaintiff did not attend, whereupon W M. C. reported this non-attendance to the judge, and the last mentioned summons was again moved absolute; that the county judge was again unavoidably absent, and the junior judge sat in his place, and the plaintiff again appeared by his counsel, and at his request, and on his undertaking that the plaintiff should attend before W. M. C. at a named time and place, the summons was

again enlarged; that the plaintiff did not attend, whereupon W. M. C. reported this non-attendance; that on the day to which the summons was lastly enlarged (the judge of the County Court being unavoidably absent), the summons was moved absolute before the junior judge, who made and signed an order, under Con. Stat. U.C. cap. 24, sec 41, for the committal of the plaintiff to the common gaol for thirty days for his default in not attending and being examined. The defendants then severally justified the plaintiff's arrest and imprisonment under this order.

The plaintiff replied that the judgment recovered by Kenrick was for costs, and not for any debt or liability from the plaintiff to Kenrick previous to the recovery of that judgment, which was entered up for less than $100; that the judge of the County Court was not unavoidably absent when the order for the plaintiff's committal was made; that the junior judge had no power to make that order, and that it was illegal and void; and that each of the defendants caused the plaintiff to be arrested and imprisoned thereon.

Rejoinder, by each defendant, that at the time of making the said order for committal the judge of the County Court was unavoidably absent, and the junior judge had power, &c.

Demurrer to the rejoinder, because it does not answer the replication; that it admits the judgment was obtained for costs and for less than $100, and thereby shows the order for the committal of the plaintiff was illegal, and beyond the power of the junior judge even if the senior judge was unavoidably absent.

The defendants joined in the demurrer.

In support of the demurrer, *M. C. Cameron, Q C.*, cited *Bullen* v. *Moodie*, 13 C. P. 126; *Brooks* v. *Hodgkinson*, 4 H & N. 712, to show that the attorney was liable as well as the client. He also referred to Lord Campbell's judgment, in *Copeman* v. *Rose*, 7 E & B 679, 685, to show that the commitment in this case, though in some sense a punishment for misconduct or default, was founded entirely on the judgment debt, and granted at the instance of the defendant Kenrick, who had recovered the judgment; and he referred to the judgment of Mr. Justice Adam Wilson, in this very case, on the proceedings on a *habeas corpus*, when the now plaintiff was discharged from custody, to show that the plaintiff could not be lawfully committed (9 U. C. L. J. 295).

J. H. Cameron, Q C., for defendant Kenrick, cited the case of *The Marshalsea*, 10 Co. 68, 78; *Brown* v. *Chapman*, 6 C. B. 365; *Cooper* v. *Harding*, 7 Q. B 928; *Houlden* v. *Smith*, 14 Q. B. 841; *Rafael* v. *Varelst*, 2 W. Bl. 983; *Rex* v. *Dancer*, 6 T. R. 242; *Henderson* v. *Dickson*, 19 U.C. Q.B. 592; *Murray* v. *Byrne*, 4 Ir. C. L. Rep. 642.

Robert A. Harrison, for defendant Paterson, cited *Meyers* v. *Robertson*, 5 U. C. L. J. 254; *Wallis* v. *Harper*, 7 U. C. L J. 72; *Mills* v. *Collett*, 6 Bing 85; *Pike* v. *Carter*, 10 Moore, 376, S. C, 3 Bing. 78; *Lowther* v. *Earl of Radnor*, 8 East, 113; *Reid* v. *Jones*, 4 C. P. 424; *McCarthy* v. *Parry*, 9 U C Q B 215; *Ackerley* v. *Parkinson*, 3 M. & S. 411; *Prentice* v. *Harrison*, 4 Q. B 852; *Codrington* v. *Lloyd*, 8 A. & E. 448; *Brown* v. *Jones*, 15 M. & W. 191; *McInnes* v. *Hardy*, 7 U. C. L. J. 295; Saund. Plg. & Ev. 1087; *Boyd* v. *Bartram*, 3 U. C. Pr. 28.

DRAPER, C. J.—This case arises upon the act respecting arrest and imprisonment for debt (Con. Stat. U. C. cap 24), the 41st section of which enacts, that "In case any party has obtained a judgment in any court in Upper Canada, such party, or any person entitled to enforce such a judgment, may apply to such court or to any judge having authority to dispose of matters arising in such court, for a rule or order that the judgment debtor shall be orally examined upon oath before the clerk of the Crown, or before the judge or clerk of the County Court within the jurisdiction of which such debtor may reside, or before any other person to be named in such rule or order, touching his estate and effects, and as to the property and means he had when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred, and as to the property and means he still hath of discharging the said judgment, and as to the disposal he may have made of any property since contracting such debt or incurring such liability; and in case such debtor does not attend as required by the said rule or order, and does not allege a sufficient excuse for not attending, or if attending he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors, or any of them, such court or judge may order such debtor to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months; or such court or judge may by rule or order direct that a writ of *capias ad satisficiendum* may be issued against such debtor, and a writ of *capias ad satisficiendum* may thereupon be issued upon such judgment, or in case such debtor enjoys the benefit of the gaol limits, such court or judge may make a rule or order for such debtor's being committed to close custody."

The third section of the same act declares that no person shall be liable to arrest for non-payment of costs.

The first section of the same act forbids the issue of a capias to arrest and hold to bail for a cause of action less than $100.

I heard, at the request of Mr. Justice Adam Wilson, together with that learned judge, the argument on the application to discharge the plaintiff in this case from custody on the order in question, when he was brought up on a writ of *habeas corpus*. I continue of the opinion that under the foregoing section 41, a plaintiff against whom a judgment has been entered for costs on his failing in his action, cannot be compulsorily examined, or if he fails to attend for the purpose of, or attending refuses to submit to, such examination, he cannot be lawfully imprisoned as guilty of contempt.

The words "debt or liability" apply to the debt or liability to recover or enforce which the action was brought, and upon which the judgment has been recovered, and consequently they include only a debt or liability existing when the action was brought. As a consequence, the words "any party," in the beginning of this section, are restrained by what follows to any party who obtains judgment for a pre-existing debt or liability. The judgment against the present plaintiff being only for the costs of Kenrick's defending that action, cannot be said to be founded upon such debt or liability, for the plaintiff was not indebted or liable to him until that judgment was entered.

I am not now called upon to consider or decide whether a defendant who, under the 104th section of the Con Stat. U. C. cap. 22, obtains on a plea of set-off a verdict for a sum in excess of the plaintiff's demand as proved against him, is entitled to examine the plaintiff. There would be literal difficulties to overcome in giving to the 41st section above quoted such an interpretation, though there may be strong ground for arguing that such a case comes within its true spirit.

In my opinion, therefore, the plaintiff was arrested and imprisoned unlawfully.

I am also of opinion that this action is maintainable against both the defendants. It is admitted on the pleadings that they applied for and obtained this order, and caused and procured the plaintiff to be arrested upon it. The judge of the County Court had no jurisdiction or authority to make an order for the examination of the plaintiff, and consequently no authority to order his committal for disobedience to it, and neither order can afford protection to the defendants for the imprisonment complained of.

HAGARTY, J —I agree in holding that the order for this examination, and afterwards for the arrest of the plaintiff, were unlawful.

I think that there must be judgment against defendants on the demurrer before us.

The rule appears to me to be clearly laid down by Wilde, C. J., in *Kinning* v. *Buchanan* (8 C. B. 290), (the action was against the attorney), "where, by a special plea, like the one in question, he admits and undertakes to justify his concurrence in it, we are of opinion that he can only make out his justification by showing a legal authority under which he acted; and, consequently, that it is essential to the defence in the present case that the order relied upon should be a valid order."

The same view is taken in the case cited of *Murray* v. *Byrne* (4 Ir. Com. Law Rep. 642), where the cases down to the period of judgment (1855) are reviewed. The same case re-appears in 6 Ir. Com Law Rep. 580, after trial upon the issues.

I abstain from expressing any opinion on many points raised in the argument, respecting the ultimate liability of the parties, con-

fining myself to the decision of this demurrer, on which I am satisfied the plaintiff is entitled to judgment.

Morrison, J., concurred.

Judgment for plaintiff on demurrer.

Robinson v. Gordon and McKay.

Sale of goods—Statute of Frauds—Acceptance and receipt.

Defendants, wholesale merchants, in December, verbally ordered certain cloth goods from the plaintiff, a manufacturer, by sample, at a stipulated price per yard, to be delivered by the 1st April next. Three cases were received by defendants, at different times, before the 10th of March, and on that day they wrote to the plaintiff that they would not keep them except at a less price, because he had disregarded an alleged condition of the bargain, not to sell to retail merchants. The plaintiff in reply denied this condition, and refused to lower the price; and on the 12th the defendants again wrote, that the goods were in their hands subject to the plaintiff's order. On the 26th, having received the last case, defendants wrote declining to take it in stock, "for other reasons as well as those already mentioned," and stating that the goods were stored at the plaintiff's risk

Defendants sold part of the first two cases, whether before or after the 26th of March was not clear, and soon after, as they alleged, discovered defects in quality, and did not open the other cases till the end of October, about ten days before the trial. The objections as to selling to retail dealers and as to quality having been left to the jury, they found for the plaintiff

Held, that there was an acceptance and receipt of the goods by defendants, within the Statute of Frauds.

[M T., 27 Vic.]

Declaration for goods bargained and sold, goods sold and delivered, work and materials, and account stated.

Plea, as to $187 53, payment of that sum into court; as to the residue, never indebted.

The plaintiff took the money out of court on the first plea, and joined issue on the second. The trial took place at Berlin, in November, 1863, before Hagarty, J.

The plaintiff proved a verbal order given by one of the defendants, wholesale merchants in Toronto, for certain goods, of which the plaintiff was a manufacturer. The goods were sold by sample at 75 cents per yard, and were to be forwarded by the plaintiff to defendants. The contract was made in the end of December or beginning of January next before the trial. On the 11th of February, 1863, the defendants wrote to the plaintiff that it was time for the plaintiff to be sending a portion of the two samples of tweeds ordered. On the 10th of March, 1863, the defendants wrote to the plaintiff the following letter:

"We have invoice of three cases of goods from you—last case just in, but unopened. We beg to say that circumstances have come under our knowledge, viz, that at prices sold to us these goods were to be exclusively sold to wholesale houses. Such not being the case, we beg to advise that we shall not take them into account except at 70 cents. This will refer to all received." To which, on the 12th of March, the plaintiff replied, "that the goods have been sent as per agreement; consequently there can be no abatement on the price invoiced to you at."

To this on the same day the defendants answered: "We have your favour of this date. In reply we beg to state that goods alluded to in ours of 10th instant are here subject to your order. We fully comprehend our position, and will abide the result." On the 26th of March, 1863, the defendants wrote to the plaintiff as follows: "Since writing you 12th instant, advising you that your goods were held here subject to your orders, we have received another case, which, for other reasons as well as those already mentioned, we decline taking in the stock. They are stored at your expense, and in every other way at your risk. We think your better plan would be to do something with them in season."

The only other letter put in evidence was dated 19th of October, 1863, this action having been commenced on the 23rd of September preceding. It was written to the plaintiff by the defendant Gordon, as follows: "I learn that you were looking at your goods one day that I was absent. I regret I was not in, as I could have shewn you the lot—Mr. Spence or Mr. McKay not knowing their whereabouts. Last spring, upon their imperfections being pointed out, and some of them being returned, I stopped their sale, and they are all here, except what has been paid into court. I advised you 26th March. You did not choose to reply. I yet believe had you been aware of their condition you would have acted differently. Law in any case is unpleasant; and as a manufacturer I can't see what you can gain by present course. There is not a merchant in Upper Canada but will bear us out as to condemning them. I would still say, best course to accept of amount paid in and take the goods. 'Tis the first thing of the kind we ever had. I may add that a number of the pieces are short measure as well."

It appeared that all the goods bargained for were delivered before the 1st of April, 1863 The plaintiff's general manager proved the bargain and delivery, and that he took samples to the defendants when he sold the goods to them. He swore it was no condition of the sale that the plaintiff should not sell such goods at such prices to retail merchants: that they (meaning the plaintiff) did not make a business of selling to retail houses, but did not promise not to do so. This order was given in the plaintiff's cloth room at Galt—no one present but the witness and McKay, one of the defendants. He had shown defendants samples in Toronto. McKay in Galt selected from pieces which he looked at, fifty pieces of one and fifty pieces of another quality. He and other witnesses gave evidence of their being properly manufactured and saleable goods, but cheap—made from coarse wool.

It further appeared that the defendants had actually sold 275¼ yards of the goods first received, but that they had not opened the two last cases received until about ten days before the trial. And on their part evidence was gone into to show that when the plaintiff's manager came to Toronto with patterns, to get orders, Mr. Spence, who was in defendants' employ, told him it would be an objection to defendants ordering these goods if the plaintiff sold such goods to retail merchants, and the plaintiff's manager said there would be no cause of complaint on that head. Spence understood him to say that if defendants gave an order the plaintiff would not sell to retail merchants.

A good deal of evidence to shew that the goods were not as good as the patterns produced in Toronto, nor merchantable, was gone into; and the plaintiff gave additional evidence in reply on this head. There was no proof that the plaintiff had sold to retail dealers. The amount paid into court was admitted to be $19 too little.

It was objected, at the close of the plaintiff's case, that there was no contract in writing, and that, so far from there being evidence of acceptance of the goods, there was express evidence of their being rejected. The learned judge overruled the objection, and at the close of the plaintiff's case told the jury that when persons purchase goods to be delivered according to sample the vendees are entitled to a reasonable time to examine them, and if they do not answer the sample the vendees may refuse acceptance, giving notice to the vendors; and he left to them to say whether the goods delivered answered the samples or not. He remarked on the fact that when the defendants in March gave notice to the plaintiff, it was not apparently from any defect in quality, but on an alleged breach of contract in selling such goods to retail dealers—nothing being said of defects, and two cases, in fact, not having been opened at all until ten days before the trial: that vendors are entitled to know in a reasonable time on what grounds the goods sent are objected to: that if there was an inferiority in the goods delivered to the sample, they might (if defendants were bound by their conduct to keep them) make some allowance.

The jury gave the plaintiff the full amount claimed.

Read, Q. C., obtained a rule *nisi* for a new trial, or to reduce the verdict to $19, or to $335, that being the price of the first case of goods in question in this suit, less the sum paid into Court; or to reduce the verdict to such sum as the court might direct; the verdict being contrary to law and evidence, and for misdirection, because, except as to the goods sold by the defendants, there was no acceptance, and defendants refused to accept the same, and therefore the plaintiff's cause of action so far was not for accepting, and for the goods not accepted the plaintiff could not recover in this action: that the plaintiff did not prove a contract within the Statute of Frauds, and within the statute 13 & 14 Vic., ch. 61.

John Read shewed cause, and cited *Scott* v. *The Eastern Counties R. W. Co*, 12 M. & W. 33; *Lillywhite* v. *Devereux*, 15 M. & W. 291; *Elliott* v. *Thomas*, 3 M. & W. 176; *Fragano* v. *Long*, 4 B. & C. 219; *Rohde* v. *Thwaites*, 6 B. & C. 388; *Morse* v. *Chisholm et al*, 7 C P. 131; *Hunt* v. *Silk*, 5 East 449.

Read, Q. C., contra, cited *Kent* v. *Huskinson*, 3 B. & P. 233; *Thompson* v. *Maceroni*, 3 B. & C. 1; *Howe* v. *Palmer*, 3 B.

& Al. 321, 326; *Tempest* v. *Fitzgerald*, 3 B. & Al. 680; *Atkinson* v. *Bell*, 8 B. & C. 277; *Astey* v. *Emery*, 4 M. & S. 262; *Walker* v. *Boulton*, 3 U. C. O. S. 252; *Norman* v. *Phillips*, 14 M. & W. 277; *Mucklow* v. *Mangles*, 1 Taunt. 318; *Bushell* v. *Wheeler*, 15 Q. B. 442; *Meredith* v. *Meigh*, 2 E. & B. 364; *Acraman* v. *Morrice*, 8 C. B. 459; *Smith* v. *Surman*, 9 B. & C. 561; *Bill* v. *Bament*, 9 M. & W. 36; *Boldey* v. *Parker*, 2 B. & C. 37; *Curtis* v. *Pugh*, 10 Q. B. 111; *Wilkins* v. *Bromhead*, 7 Scott N. R. 921.

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

In this case the original bargain was verbal, and was for goods of a value exceeding £10 sterling in amount, at a stipulated price (75 cents per yard), and at the making of the bargain part of the goods were not manufactured. All were to be delivered by the 1st of April, 1863. Before the 10th of March, 1863, three cases of these goods came (not all together) into defendants' hands, and on that day they wrote that they would not keep them except at a less price, (70 cents per yard,) because the plaintiff had disregarded an alleged condition of the bargain. The plaintiff replied in effect denying there was such a condition, and refusing to lower the price. On the 12th of March defendants write that the goods alluded to in their former letter are in their hands, subject to the plaintiff's order. And on the 26th of March they write stating they had received another case, which they declined taking in stock, for other reasons as well as those already mentioned; and they inform the plaintiff the goods are stored at his risk. All the goods agreed for were forwarded by the plaintiff within the time stipulated.

At some time the defendants sold part of the contents of the first two cases, and soon after, as their witness Mr. Spence states, they discovered defects in the quality of the goods, and did not open the other two cases until about ten days before the trial. They made no other communication to the plaintiff until the 19th of October, 1863, upwards of three weeks after this action was brought.

It was not shewn when the defendants sold a part of these goods, but by the language of their letters of the 10th, 12th, and 26th of March, they represent the goods to be in their hands as the plaintiff's goods, the last letter stating they were stored at his risk. Against this, however, Mr. Spence's evidence is, that the sale was before the receipt of the last case, and within a week or so of the first two cases being opened; but he qualifies the statement by adding, "this is only conjecture." It appears to us more reasonable to rely on the defendants' own representations up to the 26th of March. In the letter of the 19th of October, one of the defendants writes, "Last spring, upon their imperfections being pointed out, and some of them returned, I stopped the sale, and they are all here, except what has been paid into court;" and this passage confirms rather than weakens the conclusion that sales of part of these goods were made by defendants after the 26th of March.

The two objections raised on the defence, 1st, as to selling to retail dealers, and 2nd, as to the quality of the goods, which might possibly have justified the defendants in repudiating the goods, have been submitted to the jury, and their verdict must be taken to negative both.

Under these circumstances, the question raised is whether the contract is binding on the defendants under the Statute of Frauds, which enacts "that no contract for the sale of any goods, wares, and merchandize, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the *buyer shall accept part of the goods so sold, and actually receive the same*, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

We are of opinion the defendants, the buyers, did accept part of the goods so sold, and did actually receive the same.

We have not felt it necessary to enter upon an examination of the authorities cited by Mr. Read for the defendants, because some of them are not in our view of the facts applicable—we allude to those relative to goods not in *esse* when the bargain was made; and because there are later authorities, to which we shall make a brief reference, in which the more important cases cited are reviewed.

If *Morton* v. *Tibbett* (15 Q. B. 428) had been entirely supported by later authorities, it would be decisive of this case. It is there stated by Lord Campbell that, "as part payment, however minute the sum may be, is sufficient, so part delivery," (and acceptance) "however minute the portion may be, is sufficient:" that such delivery and acceptance is only a waiver of the note or memorandum in writing, and that there may be an acceptance and receipt within the meaning of the statute, without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract.

In *Hunt* v. *Hecht* (8 Ex. 818), however, Martin, B., remarks upon this: "Acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection." And he says that *Morton* v. *Tibbett* decides no more than this, "that where the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same."

Lord Campbell's judgment is again observed upon in *Coombs* v. *The Bristol and Exeter Railway Co.* (3 H. & N. 510), the determination of *Morton* v. *Tibbett* being approved, though afterwards, in *Castle* v. *Sworder* (6 H. & N. 828), during the argument in the Exchequer Chamber, Cockburn, C. J., says, "It must not be assumed that I assent to the decision in *Morton* v. *Tibbett*." Within a few days after *Castle* v. *Sworder* was decided in the Exchequer Chamber, Blackburn, J., delivered the judgment of the Court of Queen's Bench in *Cusack* v. *Robinson* (1 B. & C. 299), and he quotes the following passage from *Morton* v. *Tibbett* with approval: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." Which is not altogether in accordance with the observation of Crompton, J., in *Castle* v. *Sworder* (p. 832), "Perhaps the true rule is, that there can be no acceptance while the purchaser continues at liberty *to reject* the goods as not being according to sample or contract."

There is, however, no inconsistency between the decisions in *Castle* v. *Sworder* and *Cusack* v. *Robinson*; and the whole current of unshaken authority in our opinion warrants us in holding that the defendants' conduct, in selling part of the goods purchased by them under one entire contract, after the receipt of the greater part, and not improbably of the whole of such goods, was an act of acceptance sufficient to make the contract a binding contract, though made originally without any note or memorandum in writing. We are fortified in this conclusion by the verdict, which, as the case was left to the jury, involves a finding either that there was no condition in the contract as to sales to retail dealers, or if such condition that it was not broken; and that the goods delivered corresponded with the sample, or that the defendants, by unreasonable delay in giving the plaintiff notice of this objection, waived it.

We have not overlooked the case of *Nicholson* v. *Bower* (1 E. & E. 172), but it does not appear to us to affect our conclusion. We refer also to *Meredith* v. *Meigh* (2 E. & B. 364) and to *Currie* v. *Anderson* (6 Jur. N. S. 442), in which Crompton, J., observes, "I must say, to day, I think the case of *Morton* v. *Tibbett* is more satisfactory than I ever thought it before;" and to the remarks of Erle, J., in *Parker* v. *Wallis* (5 E. & B. 21).

Rule discharged.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

IN RE THE TRUSTEES OF THE WESTON GRAMMAR SCHOOL AND THE CORPORATION OF THE UNITED COUNTIES OF YORK AND PEEL.

School trustees—County council—Con. Stat. U.C, ch. 63.

Held, that a county council is not bound under Con. Stat. U. C., ch. 63, to raise a sum of money upon the application of grammar school trustees for the purposes connected with the grammar school, but that the statute is permissive not obligatory.

[T. T., 27 Vic.]

Moore moved for a mandamus to compel the corporation of the united counties of York and Peel to collect $3,081 78, a portion of the expense of erecting the grammar school-house, &c., for the grammar school at Weston; the trustees of the grammar school having applied to them for that purpose on the 22nd June last.

He referred to Con. Stat. U. C, cap. 63, secs. 16, 17, 20, 21, 22, 23, 24, and 25, and sub-sections of the latter sec. from 1 to 5 inclusive, and also to cap. 64, secs. 222 and 224, as shewing that the corporation were bound to raise the money on the application of the trustees.

He also referred to Tapping on Mandamus, p. 30, where it is stated it is a general rule that whenever an act of parliament gives power to, or imposes an obligation on, a particular person to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court of Queen's Bench will, in order to prevent a failure of justice, grant *ex debito justitiæ* a mandamus to command the doing of such act or duty.

RICHARDS, C.J.—Con.Stat.U.C. c 63, s.16, enacts that the municipal council of each county, township, city, town, and incorporated village, *may* from time to time levy and collect by assessment such sums as it judges expedient to purchase the sites, to rent, build, and repair all grammar school-houses and their appendages, and for providing the salary of teachers, &c, and all sums so collected shall be paid over to the treasurer of the county grammar school for which the assessment is made; sec 17 merely provides that the county council may establish additional grammar schools within their municipality and appoint trustees according to the 20th section; sec. 20 provides for the appointment of a board of trustees for each grammar school by the county council; sec. 21 states that two members of the board shall retire annually; sec. 22 authorises the council to fill up any occasional vacancy in the board; sec. 23 directs the council to name two trustees on the 1st of January in each year, to fill the vacancies caused by the annual retirement of the two members; sec. 24 constitutes the trustees of each grammar school a corporation; sec. 25 declares their duties —sub-sec. 1, to appoint a chairman, secretary, treasurer, &c.; sub-sec. 2, to take charge of the county grammar school for which they are appointed, and the buildings and lands appertaining thereto; sub-sec. 3, to appoint and remove the master and other teachers, and to fix their salaries, &c.; sub-sec. 4, to appoint such other officers and servants as they may deem expedient, and fix their remuneration; sub-sec 5, to do whatever they deem expedient with regard to erecting, repairing, warming, furnishing, and keeping in order the buildings of such school and their appendages, lands, &c., and enclosures belonging thereto, and to apply (if necessary) for the requisite sums to be raised by municipal authority for such purposes. The other sub-sections are not material. The sections in the Municipal Act merely refer to the authority of the municipalities to pass by-laws to raise money to pay their debts. Now contrast the language used in the Grammar School Act with that used in the Common School Act, on which latter act, section 27 of Consol. Stats., cap. 64, writs of mandamus have frequently been issued. Duties of trustees, sub-sec. 12, to apply to the township council at or before its meeting in August, or to employ their own lawful authority as they may judge expedient for the levying and collecting by rate according to the valuation of taxable property * * * all sums for the support of their schools * * * or for any other school purposes authorised by the act to be collected from the freeholders and householders of such section.

Then sec. 34, under the head of Duties of Township Councils:

For the purchase of a school site, the erection * * * of a school house * * * the salary of the teacher, each township council *shall* levy by assessment on the taxable property in any school section, such sum as may be required by the trustees of such school section, in accordance with the desire of the majority of the freeholders and householders expressed at a public meeting called for that purpose.

Under the Common School Act the trustees of a school section have power to app'y to the township council to raise the money they require, but the 34th section is the one which declares that the council shall levy It does not, like the 16th section of the Grammar School Act, say that certain municipalities *may* from time to time levy and collect, but it is obligatory, *shall* collect.

Then which of the municipalities under the Grammar school Act are to levy and collect the amount—the township in which the grammar school is situate, or the county municipality? Each of the municipalities has the power if it be compulsory who is to say which municipality shall raise this sum of $3,000 odd dollars. If the board of grammar schools for the particular locality where the expense has been incurred, then the county council, as a general rule, would, I apprehend, always be compelled to pay.

The section in Tapping referring to parties having the power by act of parliament to do an act, being compelled to do so by mandamus, can never apply to a case where a municipality has the power given to it to raise such sums as it judges expedient. If it judges it expedient not to raise the sum applied for, it surely must be acting within the law, and cannot be compelled to do what is now sought for on this application. We are all of opinion that the county council are not bound to raise this money, and that consequently no mandamus can go to compel them.

Per cur.—Mandamus refused.

IN RE GLASS AND SPRINGER AND THE HON. JOHN A. MACDONALD, ONE, &c.

Attorney—Costs of sale under mortgage.

Held, that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, (Consol Stats. of U C, ch. 35,) though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto.

Semble, per *Richards, C J*, an application to set aside a judge's order should be made within a reasonable time after the issuing of the order.

[T. T., 27 Vic.]

In Trinity Term last *Vankoughnet* obtained a rule *nisi* to set aside the order of the Honourable the late Chief Justice of Upper Canada, dated the 6th of July, 1863, or so much thereof as the court might think fit, on the ground that the taxation on which the order was made having been a taxation between third parties under the third parties' clauses of the Attorneys Act, Consol. Stats. of U. C., cap. 35, there was no power to order the costs of the taxation to be paid by the said John A. Macdonald to the said W. & D. Glass, there being no privity between them, and the statute not providing for the same. And on the ground that the order irregularly calls on the Trust and Loan Company of Upper Canada and the said John A. Macdonald to pay over to the said Messrs. Glass the sum of money therein named as the sum deducted from the said Macdonald's bill under the order of taxation thereof, there being no power to order the said Trust and Loan Company to pay over, as not being parties to the taxation, and not being subject to the summary jurisdiction of the judge, and there being also no power to order the paying over the said sum of money to the said Messrs. Glass, they having only a right to tax the said bills, and being left to their remedy against the said Trust and Loan Company for the said amount.

The order of the late Chief Justice was dated the 6th of July, 1863, and was to the following effect: He ordered the said John A. Macdonald and the Trust and Loan Company of Upper Canada, or either of them, forthwith to pay over to Messrs. W. & D. Glass, the sum of nineteen pounds, nine shillings and nine pence, being the amount deducted from the said Macdonald's bills under the order of taxation thereof of the Honourable Mr. Justice Hagarty, dated the ninth day of May last, the same having been retained by the Trust and Loan Company out of moneys in their hands belonging to the said Messrs. W. & D. Glass, and now due and owing to the said Messrs. W. & D. Glass. He further ordered the said Honourable John A. Macdonald to pay all costs incurred by the said Messrs. W. & D. Glass in obtaining said order for taxation, and incurred in and by said taxation and in the course thereof, and of that application.

The above order was entitled in the matter of the Honourable John A. Macdonald, Gentleman, one, &c.

The order of Mr Justice Hagarty was dated the 9th of May, 1863, and was entitled the same as the order of the Chief Justice McLean, and was to the effect that he ordered that the said Honourable John A Macdonald's bill of costs, incurred in selling the lands under the power of sale, and in the causes and matters mentioned in the papers filed on said application arising from mortgage given by D. Glass to the Trust and Loan Company, be

referred to the master to be taxed as between attorney or solicitor and client, and as on a taxation between said attorney and his clients the said company. The said attorneys' amended bills then produced to be those referred in lieu of those formerly given.

IN RE SPRINGER.

Vankoughnet obtained a rule *nisi* in Trinity Term last to set aside so much of an order made by *Richards*, C. J., dated 26th May, 1863, as directed that the said John A. Macdonald should refund to Daniel Springer, his attorney or agent, what should appear on the taxation of the said Macdonald's bill of costs to have been over-paid, and so much of said order as directed the master to pay the costs of the said reference, and to certify what upon said reference should be found due to or from either party in respect of the bills so referred, and the costs of such reference should be paid according to the event of such taxation, and to rescind so much of the master's allocatur under the reference as certifies the cost of such reference "that there is due from the said Macdonald to the said Springer the sum of £13 6s," or so much thereof as the court sees fit, on the ground that the taxation being one under the third parties clauses of the Attorneys' Act, ch. 35, of Consol. Stats. of U. C., the judge had no power to order the said attorney to refer, there being no privity between him and the said Springer, said Springer being merely entitled to tax the said bills, and being left to his remedy against the mortgagees for anything overpaid, and also on the ground that the said attorney is not liable to Springer for costs of said reference under the said act; there being no privity between them.

The order of Richards, C. J., making the reference, is dated 26th May, 1863, and is to the effect that he ordered that the bill of costs in the causes and matters delivered by the said the Honourable John A. Macdonald to Daniel Springer be referred to the master to be taxed, and that the said Macdonald should give credit for all sums of money by him received from or on account of the said Springer; and he further ordered Macdonald to refund to Springer, his attorney or agent, what, if any, might appear on such taxation to have been overpaid, and he further ordered the master to tax the costs of the reference and certify what, upon such reference, shall be found due to or from either party in respect of such bill and demand, and the costs of such reference to be paid according to the event of such taxation pursuant to the statute.

W. H. Burns and *Robt. A. Harrison* showed cause.

RICHARDS, C. J.—In this case and on a similar motion made *In Re Glass and the Hon. John A. Macdonald*, we shall be obliged to discharge the rule, inasmuch as the materials on which the judges' orders moved against were obtained, are not before us. The order in this case was made before the end of Easter Term, and was not moved against until the sixth day of Trinity Term. I do not find any decided cases that the motion is too late; yet the general rule is, that a motion to rescind a judge's order must be made within a reasonable time, and certainly before the end of the next term after the order is made. Though not deciding against the motion on that ground, I am by no means certain the application is not too late, and merely mention the matter that it may not be understood that we decide the application to be in time.

On the main question, however, we have no doubt that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto.

In Re Baker, 8 L. T. Rep., N. S. 566, is an express authority that where the state of facts is such that as between the mortgagee and his solicitor, the bill though paid may be taxed, the excess beyond the amount taxed may be ordered to be re-paid to the mortgagor by the solicitor when the application to tax has been made by him. But where the mortgagee has paid his solicitor under such circumstances as would preclude him from having the bill taxed, then whatever amount the mortgagee has received beyond the taxable sum, there the order may go to direct the mortgagee to refund if he is before the court. The facts before the judge in Chambers no doubt warranted fully the order to pay over by the attorney who now seeks to set them aside.

It is probable the parties having heard our view of the statute will have obtained the object of the motions.

Rule discharged in both cases with costs.

Per cur.—Rules discharged.

SMITH V. ROBLIN ET AL.

Promissory note—Appearance—Defence—Laches.

One of several defendants served with a summons instructs an attorney to defend his suit, who enters an appearance, but no notice is taken of it by the plaintiff's attorney, because the attorney defending for the other defendants has entered and filed an appearance and pleaded for all.

The defendants' attorney having ascertained the error notified the plaintiff's attorney that he had a defence, but took no measures to set aside his proceedings. Upon motion to set aside the verdict,

Held, that the defendant having neglected to set aside the proceedings, knowing the plaintiff was going on, and his affidavits not showing substantial merits of defence, a new trial was refused. [T. T., 27 Vic.]

This was an action on a promissory note made by D. Roblin, endorsed by D. Roblin and J. Chamberlain, for $887 25, due on the 8th of November, 1862, at the Bank of Upper Canada, in Kingston. The writ was sued out on the 12th of November, 1862, and all the defendants were served before the 21st of the same month. That in due time appearance was entered for all the defendants by Peter O'Reily, one, &c., of Kingston; upon whom all the subsequent papers were served, and who appeared for Chamberlain without his authority and pleaded that he had no notice of the non-payment of the note.

The defendant Chamberlain, on the 1st of November, retained Mr. Wilkinson to appear and defend for him, and on the 26th he caused an appearance to be entered for him, in the office of the Crown at Cornwall, from which the writ had issued.

The plaintiff's attorney took no notice of the appearance for the defendant Chamberlain, which Mr. Wilkinson had entered, but proceeded, and in the end of December served notice of trial on O'Reilly for all the defendants for the assizes at Toronto, for the 8th of January last.

On the 31st of December it came to the knowledge of Mr. Wilkinson, by information from O'Reilly, that he, O'Reilly, had through mistake entered an appearance for Chamberlain, and that notice of trial had been served on him; and he then wrote to Messrs. Macdonald & McLellan, plaintiff's attorneys, telling them of the mistake of O'Reilly, and that he had appeared for Chamberlain in due course; that Chamberlain had a good defence, that if they persisted in going to trial without giving him an opportunity of defending, he should be obliged to move to set aside any verdict they might obtain. He further stated that he should insist upon being placed in a position to plead and prepare for trial, as he had several witnesses to establish his defence. That he heard nothing further until, in March, the defendant told him there was an execution against his goods and chattels on a judgment in this action. The defendant Chamberlain in his affidavit stated that he had retained Mr. Wilkinson, not O'Reilly; that he had heard nothing of the matter from the time of his retaining his attorney till about the 10th of March, when the execution issued was then in the sheriff's hands. That his defence was, that he never had received any notice of the non-payment of the note.

Mr. Jones, a clerk of Mr. Wilkinson, stated in his affidavit that Chamberlain resides in North Fredericksburgh, about three miles north of Napanee, which is his post-office. That Fredericksburgh post-office is in the township of South Fredericksburgh, about twenty miles from Napanee.

For the plaintiff—Whilman R. Smith, in his affidavit, stated that he was present when Chamberlain endorsed the note. That Chamberlain at the time told him that he lived in Fredericksburgh, and that was his address. That attached to his affidavit is a true copy of the protest, which shows that the notice of dishonour and protest was addressed, "John Chamberlain, Fredericksburgh."

On this showing, a rule was granted last term calling upon the plaintiff to shew cause why the proceedings from the service of the writ as against this defendant should not be set aside with costs, or set aside on payment of costs by Chamberlain, or why a new trial should not be granted without costs or on payment of costs, on the grounds above appearing, and that Chamberlain has a good defence to the action.

JOHN WILSON, J.—The defendant seeks relief on the ground of irregularity and on the ground of having a good defence on the merits. Mr. Wilkinson knew of the circumstances on the 31st of December, and should without any delay have taken steps to set aside any proceedings which were wrong. He did nothing, did not even watch whether the plaintiff entered his record for trial pursuant to his notice. The plaintiff had a right to proceed, for he found an appearance entered for all the defendants, and the mere suggestion of a mistake was nothing to him without the intervention of the court. The defendant, we think, is too late to move on this ground.

Then as to his having a defence on the merits. It is admitted the defendant lived in Fredericksburgh, Mr. Wilkinson's clerk says his residence is in North Fredericksburgh, his P. O. Napanee, but Whitman Smith swears the defendant told him that his residence and address were Fredericksburgh, and there the notice was addressed. We think his defence is more than doubtful on these grounds; besides, if he had a good defence, he was bound promptly to set it up, which he has not done.

The rule will therefore be discharged with costs.

Per cur.—Rule discharged.

THE QUEEN v. BROWN AND STREET.

Joint-stock company—Road of—Not public roads or highways—Duty of company to repair—22 Vic., ch. 54, sec. 336.

B. & S. having become the purchasers of the St. C. T. & S. B. Road Co.'s Road, at a sale ordered by the Court of Chancery, under 22 Vic., ch. 43, originally owned by that company, neglected and refused to keep that portion of said road lying within the limits of the corporation of the village of T. in repair, on the ground that such portion of said road was not owned by them, but was established under the Joint Stock Company's Road Act, and vested in the corporation of said village by 22 Vic., ch. 54, sec. 336, which corporation, by sec. 337, are bound to keep it in repair.

On motion for a mandamus requiring B. & S. to repair said portion of said road, *held*,

That roads of joint-stock companies are not public roads or highways within the meaning of 22 Vic., ch. 54, sec. 336, and that the portion in question of said road was not vested in the corporation of the said village, but belonged to B. & S., the successors of the original joint stock company, and that B. & S. are therefore bound to keep it in repair.

But as the case of 12 A. & E. 427, is against the granting a mandamus in such a case as this, it is refused, the parties being left to their remedy by indictment if said road be not repaired.

In last Easter Term, *Freeman, Q. C.*, on filing the affidavits of William James and Samuel Black Freeman, and the papers attached thereto, obtained a rule calling upon John Brown and Thomas C. Street to shew cause why a writ of mandamus should not issue directed to them, and requiring them to repair that part of the road constructed and formerly owned by the St. Catharines, Thorold and Suspension Bridge Road Company, which lies within the corporation of the village of Thorold, which road is now owned and possessed by the said John Brown and Thomas C. Street.

The first affidavit of James shewed, that on the 18th day of March, 1851, a company had been formed at St. Catharines called "The St. Catharines, Thorold and Suspension Bridge Road Co.," under the provisions of the act to authorise the formation of joint-stock companies, for the construction of a macadamised and plank road from the Niagara Falls Suspension Bridge, in the township of Stamford, by the way of the village of Thorold, to the town of St. Catharines, in the township of Grantham.

He swore in that affidavit that the road was, by the assistance and permission of the corporation of the village of Thorold, constructed and finished from the Niagara Falls Suspension Bridge to the town of St. Catharines, so as to pass, and did pass through the village of Thorold, and toll-bars were placed thereon, and tolls taken on said road by the company. That on or about the 12th of March, 1862, the road had been sold by an order in Chancery, and that Brown and Street had become the purchasers, and took possession of it, and since the sale had taken tolls thereon at the toll-bars upon it. That a portion of the road lying within the limits of the corporation of the village of Thorold, was greatly out of repair, and was dangerous to the travelling community, and had been in a bad state of repair for several months then past; that the said Brown and Street had not repaired that part of the road, although they had maintained and repaired the other parts of the road lying out of the limits of the village of Thorold; and that Brown and Street, as their reason for not repairing that part of the road, allege they are not under any legal liability to do so, and that they intend to abandon it.

In the second affidavit of James, he swears, that in the year 1850, when he was reeve of the village of Thorold, certain persons applied to the corporation of that village to unite with them and form a joint-stock company for the purpose of building the said macadamised and plank road; that the leading motive to induce the said corporation of the village of Thorold so to unite and form said company was, that the road should pass through said village, and that the part of said road so running through said village should be kept in repair by the company.

That at a public meeting called for the purpose of considering the proposition, at which he as reeve presided, it was advocated by the parties concerned, that great benefit would result to the said village by having the road kept in repair by the company.

That on condition that the road should pass through the village and should be kept in repair by the company, the meeting passed a resolution, that the corporation of the village of Thorold should unite with and assist in forming said company, and take stock therein, which was done accordingly, to the amount of £750. "That the council empowered the reeve to take stock in the company only on the foregoing conditions." That the corporation about the year 1853, aided the company to raise a further sum of money on the credit of the village of Thorold, to finish the road and extend its operations, with the understanding fully expressed, that the principle on which said corporation united in forming said company should be fully carried out, namely, the keeping that part of said road passing through the village in repair.

That the road had been completed, toll-bars erected thereon, and tolls taken. That in the year 1855 or 1856, a toll-bar had been erected by the company within the limits of the corporation of the village, and tolls taken thereat. A copy of the bill filed in Chancery in the proceedings in the suit in which the road was sold was put in, and it is not denied that Brown and Street sold the road, as the purchasers thereof at the sale, under the decree made in this suit in Chancery.

In Trinity Term, in shewing cause against the rule, Brown filed his affidavit denying that the leading motive to induce the corporation of Thorold to unite with the company was as is stated by James, denying that it was advocated at the public meeting mentioned by James that the road should be kept in repair by the company.

Denying that the resolution was passed by the corporation to take stock in the said road on condition that the said road should pass through the village of Thorold, and should be kept in repair by the company.

Denying that the council empowered the reeve of the village to take stock in the company on the conditions mentioned in the affidavit of James.

Denying that the corporation of Thorold aided the company as mentioned in the affidavit of James upon the understanding expressed or otherwise, that the principle on which the corporation united in forming the company, namely, the keeping that part of the road passing through said village in repair, should be carried out.

Denying that a toll-bar had ever been erected within the corporation of the village of Thorold.

Denying that when the corporation of Thorold assisted the company, as mentioned by James, in raising money, there was any such understanding as is mentioned by him.

Asserting that to secure the loan a mortgage was given on the road to the corporation of Thorold.

Asserting that in or about the year 1856, a toll-bar was erected, not within the corporation, but on the corporation line, where it remained a few months, and was removed; that the present corporation limits now extended over the place where the toll bar was erected, but the extension of the limits took place since the removal of the toll-bar.

That the corporation of Thorold for years past, and until lately, kept that portion of the road within its limits in repair, and assumed and exercised control of such portion of the road.

That in the year 1859 a flood of water, caused by the breaking of a lock-gate of the Welland Canal, extensively damaged a portion

of the road, within the village, including a bridge forming part of the road; that without requesting or requiring the company to repair or make good the damage, the corporation proceeded to repair and did repair the damage, and renew the road and bridge without making any claim upon the company for such repairs; and afterwards the corporation made a claim against the goverment for compensation for the damages, and was paid for such damages $700, no part of which has been offered to or asked for, or expected by the company. That the corporation gave permission to a gas company to lay down gas pipes along a portion of said road in the village of Thorold several years ago.

The first resolution passed at the public meeting of the inhabitants of the village of Thorold, on the 23rd of March, 1850, was that the meeting consider that the corporation of the village should become a subscriber to the capital stock of the said company then about to be formed.

The second was, that the amount of stock to be taken by the corporation be £1000, payable, except the first six per cent, by five years' debentures of the corporation, semi-annually, and that the only condition to be annexed to the subscription be, that the said road shall pass through the village of Thorold, and shall be macadamised through the said village by the turnpike company.

The resolution passed by the inhabitants of the village of Thorold, at a public meeting held on the 30th of April, 1850, was, that the line of road surveyed and laid down by Geo. Keefer, Esq., and approved of by him, be the line adopted by this meeting, and William James, Esq, town reeve, be instructed to pay the three per cent. forthwith on stock taken up, and that the directors guarantee an equal proportion of work done of said line above mentioned.

On the 16th of March, 1850, the corporation of the village of Thorold met, and resolved that the two resolutions adopted at a public meeting of the freeholders and householders of the said village on the 23rd instant, in reference to the proposed macadamised and plank road, leading from the Suspension Bridge through Thorold to St. Catharines and Port Dalhousie, be adopted by the council and that the council do hereby authorise the reeve to subscribe for stock in said road on behalf of this municipality to the amount of £1000, and that said resolution be entered on the minutes of the council.

2ndly. That the reeve be instructed to examine the list of stockholders, and if there is a ground for him to believe that there is a sufficient amount of stock subscribed for by responsible individuals, then he is to take up stock to the amount of £1000 on behalf of this corporation, but if the list of subscribers is not satisfactory he is to withhold his signature.

The two resolutions of the public meeting just referred to are those just above mentioned of the 23rd of March.

At a meeting of the corporation of the village of Thorold, held on the 1st of May, 1850, the following resolutions were passed:

1st That the resolution respecting the contemplated plank road leading from the Falls through Thorold, passed last evening, (30th of April,) by the inhabitants of this village, be adopted and entered upon the minutes of this council.

2nd. That the directors be also required on the payment of the six per cent, to guarantee that a proportionate sum be laid out on the road through this village (as adopted by said directors) as will be laid out on other sections this season.

The resolution of the meeting referred to is that of the 30th of April, above written.

The following resolution of the corporation of the village of Thorold was passed 30th July, 1852:

"That whereas the directors of the St. Catharines and Falls Suspension Bridge Road Company have made application to this corporation to loan them the sum of £2000 in debentures, upon the security of a mortgage of the road for the purpose of enabling them to complete the same forthwith, and as this council is anxious to have the said road completed without delay, the reeve is hereby authorised to enter into an agreement with the said directors with the view of carrying out said object, and in the event of the request being effected this council agree to pass a by-law authorising the issuing of debentures for the above amount, payable in from one to twenty years, with interest payable semi-annually."

The following resolution of the corporation of Thorold was passed on the 2nd of August, 1852:

"*Minute*.—An agreement to loan £2000 to the St. Catharines and Supension Bridge Road Company, on certain conditions therein specified, was signed by the reeve and president of the said company Resolved that the clerk be and is hereby authorised to sign the necessary notice, and to publish in the St. Catharines *Journal* a proposed by-law for the purpose of raising the sum of £2000, and lending the same to the St. Catharines and Suspension Bridge Road Company, the same to be taken into consideration on the 5th November, next."

The following resolution of the corporation of the village of Thorold was passed on the 15th November, 1852:

"That notice was given in the St. Catharines *Journal*, one of the nearest papers printed in this municipality, that a by-law would be taken into consideration on the 15th day of November, 1852, for the issue of debentures to the amount of £2000, for the purpose of loaning the same to the St Catharines, Thorold, and Suspension Bridge Road Company on certain conditions, and as that period has now arrived, it is hereby resolved that said by-law be now introduced and read a first time, and read accordingly."

It was read a first, second, and third time, and passed: and it was further resolved, "that whereas the council had passed a by-law to issue debentures to the amount of £2000 as a loan to the St. Catharines, Thorold, and Supension Bridge Road Company on certain conditions, it was resolved that the reeve of the municipality should hold the said debentures from the aforesaid company until all the obligations on the part of the aforesaid company should have been complied with to the satisfaction of the council."

These resolutions have been put in to shew that Mr. James was mistaken in what he says about the subscription to the stock and the further loan in aid of the company.

R. A. Harrison shewed cause to the rule, and cited the statutes referred to in the judgment of the court.

Freeman, Q.C., supported the rule, referring to the case of *The King* v. *Kerrison*, 3 M & S. 525; *Hartnell* v. *Ryde Commissioners*, 11 Weekly Reporter, 963.

JOHN WILSON, J.—This road company was formed under the provisions of the 12th Vic., cap. 84, which with other acts was consolidated by 16 Vic., cap. 190, and again consolidated, and the company continued by 22 Vic., cap. 49, and the road was purchased by Brown and Street at a sale under legal process under 22 Vic, cap. 43. They took it under this statute with all the rights, and subject to all the duties and obligations which the law gave or imposed with reference to this road company. The first and material question is, to whom does that portion of the road belong which passes through the limits of the village of Thorold. The corporation of Thorold say it belongs to Messrs. Brown and Street, and it is their duty to repair it; Brown and Street say that it is vested in that corporation by 22 Vic., cap. 54, sec. 336, which corresponds with the 322 sec. of 22 Vic, cap. 99, A. D. 1858, and by the sec. 337 of 22 Vic, cap. 54, it is bound to keep it in repair.

The second question, whose duty is it to keep in repair this portion of the road, arises out of the first one, and the duty to repair has given rise to the motion before us. We are asked to grant a mandamus directed to Brown and Street, requiring them to repair this part of the road, because it is their duty to repair it.

The affidavits, on which this motion is granted, set up the duty of Brown and Street to repair as arising from certain conditions which the company, that formed the road, undertook to perform, the keeping in repair this portion of the road being one of them. This is met by affidavits and resolutions showing that such conditions, to the extent contended for, had never in fact existed, and had the question turned on what was made, or met on the shewing of these parties as matters of fact, we should have felt no difficulty in discharging this rule But as the matter is put before us, we cannot avoid the question broadly presented to us: in whom is that portion of the road vested by law? In sec. 336 of the 22 Vic, cap. 54, it is laid down that "every public road, street, bridge, or other highway in a city, township, town, or incorporated village shall be vested in the municipality" And by the following sec., "every such road, street, bridge, and highway shall be kept in repair by the corporation." If there was nothing found to control

this language it is comprehensive enough to bear the construction put upon it by Brown and Street. But is it a public road or other highway within the meaning of these sections? If so, it is to be feared that no joint-stock road company could have existence, for they will generally be found to be in some city, town, village, or township in the province.

The company whose rights Brown and Street have acquired, was formed under the provisions of the 12 Vic., cap. 84, consolidated by the 16 Vic., cap 190. By the 20th sec. of this act, the road was vested in the company and their successors. By the 2°rd sec., municipalities through which the road passed might acquire stock in the company, and this municipality of Thorold did acquire stock therein. And by the 25th sec. this company had authority to sell their road to any municipality through which the road passed, and such municipality had the right to purchase such road. The 16th Vic., cap. 190, and the 22 Vic., cap. 49, continued the existing road companies subject to its provisions. By this act companies may sell to any municipal council through which any such road passes, and the municipal authorities may purchase the stock or any part of the road belonging to such company at the value that may be agreed on, and the municipality may hold the same for the use and benefit of such locality, and shall after such purchase stand in the place and stead of the company, &c.

But what need is there of these provisions, if the legislature intended to vest the roads of joint-stock companies in the respective municipalities through which they passed?

The court of Queen's Bench in the case of the *Port Whitby and Lakes Scugog, Simcoe and Huron Road Company* v. *The Corporation of the Town of Whitby*, held, that the corporation was bound to keep a road in repair which ran through the town, which was part of a macadamised road made by the government and sold to the plaintiffs. But the attention of the court in that case was not drawn to the fact, that at the time the 13 and 14 Vic., cap. 15, which applied exclusively to cities and towns, had been repealed by the 22 Vic., cap. 99, (A. D 1858,) sec. 403.

The roads of joint-stock companies are not, we think, such public roads or highways as the legislature intended, in case they were in a city, township, town, or incorporated village, should vest in these municipalities. We are all of opinion, therefore, that the portion of the road in question was not vested in the corporation of the village of Thorold, and that it belongs to Brown and Street, who are bound to keep it in repair as the successors to the original road company. But inasmuch as the case of *Queen* v. *Trustees of the Oxford, &c., Turnpike Roads*, 12 A. & E. 427, is against the granting a mandamus in a case like this, we refuse it, leaving the parties to their remedy by indictment, if the road be not repaired.

Per cur.—Mandamus refused.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, ESQ, *Barrister-at-Law.*)

BOULTON V. JONES ET AL.

Necessity for issue books—Passing nisi prius record.

Held, that the effect of sec 203 of the Common Law Procedure Act, making it again necessary, as formerly, to pass nisi prius records, is to render it no longer necessary to deliver issue books.

(Chambers, 1862)

This was a summons calling upon plaintiff to shew cause why the notice of trial in this cause should not be set aside for irregularity, on the ground that no issue book had been made up, delivered, &c.

ROBINSON, C J.—I think the effect of sec. 203 of Con. Stat. U. C. cap. 22, making it again necessary, as formerly, to pass the *nisi prius* record, is to render it no longer necessary, under the 33rd rule of court to deliver issue books, and that plaintiffs may give notice of trial without such delivery; but I reserve leave to renew the objection after verdict, if the defendant desire to do so. In the meantime I discharge the summons.*

* We cannot discover that defendants afterwards availed themselves of the leave reserved to them The decision, therefore, stands unreversed It is often referred to, and, though late, we now publish it We have to thank the taxing officer of the Common Pleas for the report of it. It is said that the present Chief Justice of Upper Canada has expressed an opinion at variance with this decision. —EDS L J

HUNTINGDON V. LUTZ, COWAN AND NEFF.

Action for infringement of letters-patent for an invention—Injunction—Several defendants—Verdict for some—Costs.

Held, 1 That Con Stat Can cap 34 sec. 23, which gives to a party whose patent for an invention has been infringed, besides damages, "treble costs to be taxed according to the course and practice of the court," does not entitle a plaintiff who has availed himself of the provisions of the C. L. P. Act, and claimed an injunction to tax treble costs of his application for the injunction.

2. That one of several defendants who, in an action of tort, joins his co-defendants in plea or not guilty, upon which a verdict is rendered in his favor against plaintiff, though plaintiff recovers against his co-defendants, is entitled to a proportion of the taxed costs of defence.

(Chambers, December 15, 1863.)

This was an action brought for the infringement of letters-patent for an invention. The declaration, according to the provisions of the Common Law Procedure Act, prayed an injunction. The only plea upon the record was not guilty. All the defendants, by one attorney, pleaded that plea.

An interim injunction was granted during the progress of the suit, but afterwards dissolved upon the undertaking of defendant, Lutz, to keep an account—costs to abide the event.

The case was tried at Berlin before the present Chief Justice of the Common Pleas, and resulted in a verdict in favor of plaintiff, with nominal damages against defendant Lutz, and against plaintiff in favor of defendants Cowan and Neff.

Afterwards the court, on the application of plaintiff, granted a perpetual injunction, and ordered that such granting form part of the final judgment to be entered, and that the costs of the application for the rule, so far as related to the injunction, should be costs in the cause.

Plaintiff, on the taxation of costs, claimed under Con. Stat. Can. cap. 34 sec. 23 treble costs of the cause, including the costs of the application for the injunction. The master, holding that the application for the injunction was a proceeding collateral to the suit, refused to tax treble costs for it.

Defendant Cowan thereupon, on affidavit of the attorney for defendants, to the effect that his retainer was a joint and several one by the two defendants Lutz and Cowan, claimed, as against plaintiff a moiety of the taxed costs. The master though willing, upon being shewn that defendant Cowan had incurred extra costs by being made a joint defendant, to allow him such costs, refused, in the absence of such information, to tax him any costs.

Both parties appealed from the master's decision.

Robert A. Harrison for plaintiff.

W. Atkinson for defendants.

The following cases were cited:—*Nauny* v. *Kenrick*, 2 Dowl. P. C. 334; *Starling* v. *Cosens*, 3 Dowl. P. C 782; *Griffith* v. *Jones*, 4 Dowl. P. C. 159; *Bartholomew* v *Stevens*, 7 Dowl P. C. 808; *Norman* v. *Clemenson*, 4 M. & G. 243; *Alderson* v. *Warstell*, 2 D. & L. 127; *Gambrell* v *Falmouth*, 5 A. & E 403; *Redway* v. *Webber*, 7 L. T. N. S. 385; *Huntington* v. *Lutz*, 13 U. C. C. P. 168.

MORRISON, J., held that plaintiff was not entitled to treble costs of the application for an injunction, and also held that defendant Cowan was entitled to a proportion of the taxed costs, but refused to give any specific direction of costs to the master as to the proportion that ought to be allowed.

The master accordingly revised his taxation by taxing the whole costs of defence, counsel fees, witness fees, plans, &c., and allowed defendant Cowan one-third of the whole.

CHANCERY.

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

MILLER V. MCNAUGHTON.

Will—Defeasance clause—Practice.

A testator after appointing executors and expressing full confidence in them, provided "that in case any of the legatees offer obstructions to the proceedings of my said executors in the fulfillment of the powers hereby conferred, then that such persons should suffer the penealty of being debarred of all claims to any part, or portion, of my estate under any pretense whatsoever, in the same manner as if he, she, or they had actually predeceased me without issue, and such shall be, and are hereby declared to be debarred therefrom accordingly, any law or practice to the contrary notwithstanding"

Held, in an administration suit by one of the legatees, made parties in the master's office, that an enquiry might properly be directed whether any of the legatees had forfeited his or her share under the above provision.

The original decree not containing such a clause of enquiry, was now amended in that respect on motion.

The bill in this cause was filed in September, 1862, by Mary Miller, a daughter and legatee of the late Graham Lowton, who resided near the town of Milton, and died on the 19th of March, 1861, having first made his last will and testament disposing of all his estate, bearing date the 20th day of September, 1859. By this will the testator, after providing in the usual manner for the payment of debts and funeral expenses, made several specific devises and bequests to several members of his family, and directed the remainder of his estate to be realized and devided among them in certain specified proportions. John McNaughton and Ninion Lindsay were appointed executors with ample powers to manage and wind up the estate The executors were empowered to appraise, divide, and apportion among the members of testator's family such parts of the personal estate as they should think it "neither seemly or advisable to bring to public sale,' and it was provided that any "legatee or legatees to whom such shall be apportioned shall be bound to accept the same at the valuation so placed thereon in part payment of the share of such residue hereby bequeathed to him, her, on them, under the penalty, should they refuse to do so, or should they in any other way offer obstruction to the proceedings of my said executors in the fulfillment of the power hereby conferred, of being debarred of all claim to any part, or portion of my estate under these presents, or under any pretence whatsoever, in the same manner as if he, or she, or they had actually predeceased me without issue, and such shall be, and are hereby declared to be debarred therefrom accordingly, any law or practice to the contrary notwithstanding."

The original defendants to the suit were the executors and John G. Scott, a grandson and legatee of the testator.

The bill charged that Scott was indebted to the testator at his death on a promissory note for $700, which the executors refused to take any means to collect, under the pretence that the same was cancelled by the testator before his death, the contrary whereof the plaintiff chargod to be the truth.

Evidence was taken at Hamilton, and the cause heard before his Honour V. C. Spragge. Evidence at great length was taken as to the state of the testator when the settlement referred to with Scott took place, the result of which was to shew that, though the testator was bedridden at the time and in a very low state of health, yet the settlement had been previously contemplated, and was concluded in the presence of Mr. McNaughton and other witnesses with full knowledge of its contents, the testator signifying that he desired such to be a release of all his claims against his grandson.

The settlement was therefore sustained, and Scott dismissed with costs. Various other matters were specifically charged against the executors, but their investigation was held properly matter of account, and the usual administration decree was made with reference to the master in Hamilton.

The master in considering the decree, ordered the other legatees to be made parties, and this being done *Blake* moved on their behalf, and on notice to the other parties, to vary the decree by inserting an enquiry such as is above indicated.

Proudfoot for the plaintiff.

J. C. Hamilton for the executors.

The following authorities were cited by counsel: *Wheeler* v. *Bingham*. 3 Atk. 364; *Powell* v. *Morgan*, 2 Vern. 90; *Morris* v. *Burroughs*, 1 Atk. 399; *Wynne* v. *Wynne*, 2 Manning & Gr. 8; *Cook* v. *Turner*, 14 Sim. 293; Williams on Executers, page 1133, *Tattersall* v. *Howell*, 2 Mer. 26, and *Cleaver* v. *Spurling*, 2 P. Wms. 526.

After taking time to look into the authorities,

SPRAGGE, V. C.—This is an application to vary the decree, made in an administration suit, by legatees not made parties before the hearing. The application is made upon grounds appearing upon the face of the bill.

The will of the testator, after authorising the conversion of the estate in money, by his executors, and the disposition of the proceeds, authorises the executors, in their discretion, instead of bringing "certain parts," as the will expresses it, to sale, to apportion them in specie among the legatees, requiring them to accept the same "under the penalty, should they refuse to do so, or should they in any other way offer obstruction to the proceedings of my said executors in the fulfillment of the powers hereby conferred, of being debarred of all claim to any part or portion of my estate under these presents, or under any pretence whatever, in the same manner as if he or she had actually predeceased me without issue." The provision as to legatees dying without issue before the testator, is as follows:—"In case any of my said legatees, special or residuary, shall depart this life before me, and before the bequests hereby made shall vest, then his, her, or their interest herein shall accrue and belong and be paid to the lawful offspring of each such so predeceasing, if any, share and share alike; otherwise the same shall go and be divided among the survivors of my whole children alive at the time of my death, equally share and share alike."

For the application, it is contended that the filing of the bill was an obstruction involving a forfeiture under the will, and that if not so, still there should be an enquiry as to whether the plaintiff has done any act to work a forfeiture. The filing of a bill for administration of the estate would certainly not necessarily be an obstruction, and I see nothing in this bill having that character, unless it be the prayer, "that the estate of the said testator may be administered, and the trusts of his will executed by and under the direction of this honourable court."

This, construed strictly, is, I think, asking the court to take into its own hands that which the will commits to the discretion of the executors, and so, offering an obstruction to the fulfillment by the executors of the powers conferred upon them. But none of the allegations in the bill are directed to this point. The bill complains of various acts of malversation for which it asks to bring the executors to account. I incline to think this not an obstruction within the will, but rather that the pleader in framing the prayer has followed the general form, omitting, inadvertently perhaps, to except from administration by this court that which the testator had left to the discretion of his executors I think the discretion was a matter of personal confidence not to be withdrawn from the executors and exercised by this court. I think so from its nature, and from the language of the will: "Finally, having full faith and confidence in my executors before named, and considering that circumstances may occur to make it in their judgment," &c. I incline to think too that the forfeiture is one to which the court will not refuse to give effect, if the obstruction be established, and so to that I think there should be an inquiry. It is true there is no answer raising the point, nor, of course, any evidence upon it. The course taken under the general orders has made it impossible for the parties making this application to do either, and I think it would be doing them less justice, unless they were placed in the same position as if they had answered and given evidence upon the point. Further directions should be reserved. The costs of this application to be costs in the cause.

MALLOCH v. PLUNKETT.

Fraudulent conveyance—Pleading—Purchase at sheriff's sale.

An execution creditor proceeded to sale of the lands of his debtor, and sold a property which was subject to a mortgage for £500, given, as the creditor alleged, to defeat creditors, but which property the creditor alleged was worth not more than £200, and became himself the purchaser thereof at the price of £10 10s.; whereupon he filed a bill setting forth these facts; or that the mortgage was given to secure a much smaller, if any debt, and praying alternate relief in accordance with such allegations. The court at the hearing *pro confesso* refused to set aside the mortgage, but gave the plaintiff the usual decree as a judgment creditor, not as a purchaser. The proper course for the plaintiff to have taken under such circumstances was to have come to this court in the first instance, and not to proceed to a sale of the property with such a cloud upon the title.

The bill in this case set forth that the defendant Plunkett being owner of 75 acres in Nepean, on the 7th of March, 1859, conveyed the same by way of mortgage to the defendant Caldwell, to secure £500 without interest, payable in March, 1869, although the land was worth not more than £200, for which mortgage no consideration was given by Caldwell to Plunkett, and Plunkett was not indebted to Caldwell in the sum of £500, or any other sum, for which the mortgage was given, but the same was given for the

purpose and with the intent of defeating and defrauding the creditors of Plunkett, and to prevent them from recovering their debts against him; that Plunkett was at the time of creating the mortgage deeply involved and unable to pay his debts; that plaintiff had since recovered judgment against Plunkett, on which he issued a *fi. fa.* against lands, under which the interest of Plunkett in this land was sold, and a deed therefor executed by the sheriff to the plaintiff, who became the purchaser thereof at sheriff's sale for £10 10s.; since which time he had offered Caldwell £150 to induce him to discharge the mortgage so held by him, although plaintiff did not thereby mean to admit Caldwell's right to be paid any portion of the amount secured by the said mortgage; but, on the contrary, plaintiff only offered that amount by way of preventing litigation, which offer Caldwell refused to accept; and the bill charged that even if the mortgage to Caldwell was not given to defraud creditors, yet the same was given for a much larger sum than was owing by Plunkett to Caldwell, and plaintiff submitted that Caldwell was entitled to no more than the amount actually advanced by, and *bona fide* due to him on such security; that in any event plaintiff was entitled to have the mortgage discharged upon payment of what (if any thing) was due thereunder, in the event of its being ascertained that any thing was due to Caldwell; and that he was entitled to have an account taken of what moneys Caldwell had, or might have, received, and prayed a declaration that the mortgage was void, as a fraud upon creditors; that Caldwell had not advanced £500, or any part thereof, to or on account of Plunkett, and that the mortgage might be discharged; but if the court should be of opinion that Plunkett was indebted to Caldwell at the date of the mortgage, that an account might be taken; and for the usual relief consequential thereon.

Both defendants made default in answering, and the bill was thereupon set down to be taken *pro confesso* against them. On the cause coming on to be heard

Fitzgerald, for plaintiff, asked a decree declaring the mortgage to Caldwell void, and ordering it to be delivered up to be cancelled; but

SPRAGGE, V. C.—I think the case sufficiently stated to bring it with the statute 13th Elizabeth, and should give plaintiff relief on that ground as a judgment creditor, not as purchaser, but for the form of allegation as to the amount due on the mortgage to Caldwell. I cannot read the bill as alleging positively that the mortgage was made without consideration. There must therefore be an account; the plaintiff having the ordinary remedies of a judgment creditor, with leave to add the expenses of sale to his claim.

The proper course for the plaintiff was to come to this court in the first instance, not to sell at law with an evident cloud upon the title, purchase at one-twentieth of the value, and then come to this court as purchaser.

CHANCERY CHAMBERS.

(*Reported by* THOMAS HODGINS, ESQ., *Barrister at-Law*)

McDOWELL v. McDOWELL.

Writs of Sequestration—Effect on choses in action.

Held, 1. That a chose in action is not a subject of sequestration, unless the third party, the debtor, consents to it.

2. That a creditor has a right, under a writ of sequestration, to compel payment by a third party of a debt which he owes to the defendant, against whose estate the writ issues.

3. That a chose in action is not so bound, either by the issue of a sequestration or by its delivery to the sheriff, so as to prevent the third party paying his creditor in good faith, and so discharging himself, or preventing the creditor in good faith transferring the security, and so avoiding the effect of the sequestration.

4. That writs of execution only bind moneys, choses in action, or securities for money, from the time of seizure by the sheriff, and not from the time either of the issue of the writs or delivery thereof to the sheriff.

(December, 1863.)

In this case, the plaintiff having issued a writ of sequestration, which had been returned by the sheriff unsatisfied, but with a special statement that one Healay had executed to the defendant a mortgage to secure payment of a sum of money now overdue, and which the mortgagor expressed his willingness to pay as the court might direct, applied for an order on the mortgagor to pay the money to the plaintiff or into court.

Notice of the application had been served on the defendant, and on one Elizabeth Miller, the assignee from the defendant of the mortgage.

The writ of sequestration was put in the hands of the sheriff on the 31st day of January, 1862. The mortgage was assigned by the defendant to Miller on or about the 12th day of December, 1862.

The plaintiff rested the application on two grounds:

1st. That the assignment was fraudulent, and was made without consideration, and with the intent to defeat the plaintiff's claim.

2nd. That it having been made after the writ of sequestration was lodged with the sheriff, it is inoperative, as the mortgage was bound in the hands of the defendant by the writ.

S. H. Blake for plaintiff. *Thomas Hodgins* for defendant.

VANKOUGHNET, C.—As to the first ground, I cannot, upon the evidence, say that the transaction between the defendant and Mrs. Miller was fraudulent, but as I think it admits of further enquiry will order the payment into court of the money, the defendant being willing to make such payment, and leave it to Mrs. Miller to apply for it. There is no affidavit from herself as to the nature of the transaction by which she acquired the mortgage. The affidavits of her son and of the defendant do not state the amount of the consideration paid by her for it, though they state it was a valuable consideration. She is sworn to be the mother of the woman, with whom the defendant, having deserted his wife, cohabits.

As to the second ground, I am of opinion that if the assignment be *bona fide*, it is not rendered ineffectual by reason of the writ being in the hands of the sheriff prior to and at the time of the assignment. It is laid down very generally in text books that a chose in action is not a subject of sequestration, unless the third party, the debtor, consents to it; and *Johnston* v. *Chippindall*, 2 Sim. 55, is quoted as an authority for this position. If this be so there, at all events until the consent of the third party, the debtor, was obtained, the writ could have no effect upon the debt owing by him, for it could not bind that which the sheriff could not seize, or which could not be realized under the writ, or by the order of the court. But if the creditor has a right, under the writ of sequestration, to compel the payment by a third party of a debt which he owes to the defendant against whose estate the writ issues, as I think he has, in accordance with the decision of the Master of the Rolls in *Wilson* v *Metcalfe*, 1 Beaven 262, it would not follow from that that this debt was so bound by the writ from the time of its issue or delivery to the sheriff, that the person to whom it was payable could not transfer it *bona fide* to another party, or the debtor pay it, and so free himself from further responsibility in respect of it. On the contrary, I think that until either the sequestration or the party claiming under the writ take steps to obtain payment of the money, the chose in action is not bound. In *Wilson* v. *Metcalfe*, a Mrs. Brown owed to the defendant against whose estate a writ of sequestration had issued, a sum of £225, arrears of a rent charge. The money was lying in the bank ready to be paid over, and a copy of the writ of sequestration was served on Mrs. Brown, and a demand of the money made upon her. She did not dispute that she owed the amount. Subsequently the defendant, against whom the writ issued, demanded payment, and threatened to distrain if it was not made to him. Mrs B paid him over the money. The court held she was justified in so doing; no order having been obtained upon her to pay it to the plaintiff, and nothing done to prohibit her if she had so paid it.

I have not failed to consider how far the statute which now permits the sheriff to seize choses in action under execution, may give me rights under writs of sequestration, and in so doing I have had necessarily to judge whether or not such choses in action are bound, as goods and chattels are, from the time of the delivery of the writ to the sheriff, or only from the time by the sheriff of actual seizure, or of some act symbolical therewith or tantamount thereto. And I am of opinion that writs of execution only bind moneys or choses in action, or rather securities for money, from the latter period, and not from the time of the delivery of the writ to the sheriff. At common law writs of execution bound goods and chattels from the teste of the writ. By the

Statute of Frauds, 29 Charles II., this hardship was lessened by making them operative only from the time of the delivery to the sheriff; and now, by the Imperial Statute, 19 & 20 Vic. cap. 97 sec. 1 (not in force here) these writs only have effect from and upon actual seizure. Money or securities for money could not be seized under a *fi. fa.*, nor in this country until the 20 Vic cap. 57 By that statute the creditor in this respect received great and direct additional rights and advantages, and the debtor was subjected in a corresponding degree to the deprivation of the property. A new subject of execution was created, and in looking at the language by which this was effected, we find it to be, "that the sheriff or other officer *having the execution* of any writ of *fi. fa.* against goods sued out, and of any precept made in pursuance thereof, shall seize any money or bank notes, &c., belonging to the person against whose effects the writ of *fi. fa.* has issued." Now, the natural meaning of this language is that if the moneys or securities for money shall belong to the execution debtor at the time of seizure—for it is only such as belong to him that the sheriff shall or can seize—property, goods and chattels belonging to the debtor after the delivery of the writ to the sheriff, even after seizure, and, notwithstanding the writ, cease to belong to him if he had assigned them, though they may be subject to the writ in the hands of the assignee. The statute does not say that upon such property the writ of *fi. fa.* shall operate in the same manner as it does upon goods and chattels. Nor does it say that the sheriff having the execution of any writ against goods shall seize, &c. We cannot strain this language to any larger meaning than it naturally imports. There is no principle governing the construction of the statute which warrants it, and there is no rule of the common law applicable to executions which requires it; and when we look at the consequences which would result from carrying the operation of the writ in such cases further back, we cannot suppose for a moment that the Legislature intended such a construction of the statute as would produce them. Take but one illustration:—A holds the promissory note of B in Toronto. An execution is issued against A, and is placed in the hands of the sheriff while he holds the note. A subsequently discounts with a bank in Toronto, or, to make the case stronger, with a bank in Hamilton, the promissory note of B. If that promissory note were bound as the property of A by and on the delivery of the writ to the sheriff, what property would the bank have acquired in it? More full of hardship and embarrassment still might be the case of moneys paid away by or for the debtor after the delivery of the writ to the sheriff. No statute where the legislative language is not too plain to admit of a doubt should be so construed as to work mischief to innocent parties, or to create embarrassments and difficulties in the every-day transactions of life. The tendency of legislation in England has been to restrain the operation of writs of execution as to the time they are to take effect.

The language of other statutes of Upper Canada which subject, for the first time, certain other descriptions of property to execution are variously worded. The 2 Wm. IV. cap. 6 sec. 1 provides that "bank-stock may be taken and sold in execution, in the same manner as other personal property of a debtor." The statute 12 Vic. cap. 73 which enacts that an equity of redemption in real estate may be sold, provided "that the effect of such seizure, sale and conveyance shall be to vest in the purchaser all the legal and equitable interest of the mortgagor therein, at the time the writ was placed in the hands of the sheriff, as well as at the time of such sale." The 20 Vic. cap. 3 sec. 11 subjects equities of redemption in chattels to seizure and sale under execution, and declares that "such sale shall convey whatever interest the mortgagor had in such chattels *at the time of the seizure.*"

The act under consideration is silent as to time, but I think its obvious meaning is, and its practical use should only be, that which I have ascribed to it. The creditor must find out for the sheriff the best way he can where such property can be got at, and when got at by the sheriff, and only then, in my judgment, is its use restrained. There is no decision of any of the common law courts upon this question, and I have, therefore, had to take upon myself to pronounce an opinion upon it The result is that, in my opinion, the powers conferred by the statute in no way alter, by analogy or otherwise, the effect which before it a writ of sequestration.

COUNTY COURTS.

In the County Court of the Co. of Brant, before S. J Jones, Esq., County Judge.

In the matter of Daniel Brooke, Gentleman, One, &c.

Right of Attorneys to practise as Advocates in County Courts.

Held, that it is not now in the power of County Court Judges to allow attorneys who are not barristers to practise before them as advocates in County Courts.

McMahon obtained a rule calling upon Daniel Brooke to shew cause why the order made or application granted by Stephen James Jones, Esq., the judge of this honourable court, on the fifth day of July, 1863, allowing the said Daniel Brooke to be heard as an advocate in this honourable court should not be rescinded, on the ground that the same is contrary to law and public policy, and adverse to the rights of barristers. And why the said Daniel Brooke should not be prohibited from being heard as an advocate or counsel in this honourable court until such time as he should be duly authorised by law to plead at the bar, on the ground that he has not been called to the Bar of Upper Canada or otherwise admitted under the act relating to barristers, the rules of the Law Society of Upper Canada, to practise at the bar, and on grounds disclosed on affidavit filed.

D. Brooke shewed cause, citing *In re Lapenotiere*, 4 U. C., Q. B., 492; *Benedict* v. *Boulton*, ib. 96.

McMahon supported the rule, citing *Reg.* v. *Erridge*, 3 U. C. L. J., 32. Con. Stat U. C. cap. 15, s. 18.

Jones, Co. J.—The application is to have the order rescinded which was made by me on 5th July, 1853, granting to attorneys the privilege, under certain restrictions, of practising as advocates in this court, on the ground that the same is contrary to law and public policy, and adverse to the rights of barristers.

The order referred to was made by me on the application of Mr. Brooke on the organization of this court when this county was set apart, and was restricted to attorneys conducting their own cases in court, and was granted on the condition that it might at any time be revoked. And although this application is directed against Mr. Brooke, an attorney who has, under the permission granted by this order, conducted his own cases in this court, yet the matter must be considered and treated as affecting attorneys generally. At the time the order in question was made it was assumed, under the authority of *Re Lapenotiere*, 4 U. C Q B., 292, that it was discretionary with County Court judges to allow attorneys to practise before them as advocates; and there being then but few barristers resident within the county, this order was made, but on the restrictions and terms above stated.

It is contended (whatever may have been the practice heretofore) that since the passing of the present County Court Act, Con. Stats. U. C, cap. 15, attorneys cannot now be allowed to practise as advocates in the County Courts, for that sec. 18 of that Act makes the practice of these courts conform to that of the superior courts.

The first question to be considered is whether it is now *discretionary* with the County Court judges to allow attorneys to practise before them as advocates. When making the order now moved against I was of opinion that I had that power, and this would be inferred from the concluding portion of the head-note in *Re Lapenotiere*, where it is stated that "the result of this decision seems to leave it discretionary with the district (county) judge either to grant or refuse to attorneys the privilege of practising as advocates in this court." I think on examining carefully this case that the above statement by the reporter is not borne out by the judgment of the court delivered by Macaulay, J., who held that the then district courts being courts of *record*, were included in the words, "any of His Majesty's courts," as used in 37 Geo. III, c. 18, sec. 8 (Consol. Stats. U. C. c. 34) which enacts that "no person should be permitted to practise at the bar in any of His Majesty's courts in Upper Canada, unless such person should have been previously entered of and admitted to the practise of the law as a barrister." If, as I take it, the decision in *Re Lapenotiere* establishes that the County Courts are included within the provisions of the statute 37 Geo. III, then it is clear that county judges have not the power to permit attorneys to practise before them, as by that statute they are expressly prohibited.

By the present County Courts Act it is enacted that "in any case not expressly provided for by law, the practice and proceedings in the several County Courts of Upper Canada shall be regulated by and conform to the practice of the superior courts of Common Law, and the practice for the time being of the said superior courts shall, in matters not expressly provided for, apply and extend to the County Courts and to all actions and proceedings therein" (s. 18). Under this section I am of opinion, that as by the practice of the superior courts none but barristers can exercise the rights of advocates therein, the same practice must be followed in the County Courts, and that I have no power to permit attorneys to practise therein as advocates.

Were it discretionary with me to grant or withhold this privilege, I should not, I think, rescind the order in question, as I have seen no inconvenience arise from its operation; and as regards the gentleman against whom in particular this application is directed, I must say that his conduct before me as an advocate would do no discredit to any member of the bar; but as I am now satisfied I have no power to grant this privilege, I have no alternative but to rescind the order I had made.

In corroboration of the decision I have arrived at, I would refer to the able judgment of his honour Judge Gowan, in the case of *The Queen* v. *Erridge*, 3 U. C. L. J., 32, where he has fully considered the matter in question and arrived at the same conclusion.

Per cur.—Order rescinded.

UNITED STATES REPORTS.

(From the *Monthly Law Reporter.*)

SUPREME COURT OF NEW HAMPSHIRE.

STATE v. BARTLETT.

Where insanity is set up as a defence to an indictment, the jury must be satisfied beyond reasonable doubt of the soundness of the prisoner's mind and his capacity to commit the crime, upon all the evidence adduced before them, regardless of the fact whether it be adduced by the prosecutor, or by the defendant.

Indictment of three counts, substantially charging that the respondent, on the 20th day of June, 1861, with force and arms, at Upper Gilmanton, did make an assault upon one Lucien Dicey, and with a gun charged with powder and ball did shoot and wound said Dicey, feloniously, wilfully, and of his malice aforethought, intending him to kill and murder.

The defence of the prisoner, in part, was, that at the time of the supposed commission of the offence he was a monomaniac upon the subject of the infidelity of his wife, imputing an improper connection between her and the said Dicey.

Upon this part of the defence, the counsel for the prisoner requested the court to charge the jury.

1. "That if upon the whole evidence they are of the opinion that it was more probable that the prisoner was insane, so as not to be responsible for his acts, than that he was sane, they ought to find him not guilty by reason of insanity.

2. "That though if the jury find the prisoner committed the offence, the burden of proof is on him to remove the natural presumption of sanity, yet that the jury must be satisfied beyond a reasonable doubt that he was a sane man and responsible for his acts, or it is their duty to find him not guilty, by reason of insanity."

Among other things, the court did say to the jury: That a man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing. He must have a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

On the contrary, although the person may be laboring under partial insanity, if he still understand the nature of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know, if he does the act, he will do wrong and receive punishment, such partial insanity is not supposed to exempt him from responsibility for criminal acts. If it be proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the act, acted from an irresistible and uncontrollable impulse.

If so, the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of the mind directing it. Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury; and to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what was wrong; that he was unable to discriminate betwen right and wrong; that he was not therefore a moral agent, responsible in a legal sense for his acts, and a proper subject for punishment. One kind of insanity known to our law was "monomania," where the mind, in a diseased state, broods over one idea, and cannot be reasoned out of it; and in this case, in order to find the act of the prisoner, if committed by him, to be not criminal, the jury must be clearly satisfied it was the result of the disease, and not of a mind capable of choosing; that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

On the other hand, it devolved upon the State to show that the prisoner committed the act as charged, with the malicious intent to kill; and that the jury must be satisfied of the existence of such malice, at the time, beyond a reasonable doubt, in the prisoner, and that he had a sufficient degree of mental capacity or sanity, as to render him a fit subject of punishment upon the principles before suggested.

The court declining to charge otherwise than as before stated, the counsel for the prisoner excepted. The jury having rendered their verdict against the prisoner, he moved that the verdict be set aside, and for a new trial.

E. A. Hibbard for the respondent.

The presiding judge declined to give either of the requested instructions, and expressly charged the jury differently on both points.

If the last paragraph of instructions should be found to be substantially correct, still the verdict must be set aside, if the other instructions were erroneous.

Now, there does seem to be some inconsistency between the different instructions, but the general drift was clearly contrary to our views of the law, and was so understood by the jury. If the court shall be of the opinion that the jury ought to have been satisfied beyond a reasonable doubt, of the respondent's sanity, or that a preponderance of evidence was sufficient to establish his insanity, then the presiding judge will not ask nor desire that the verdict should stand.

Must it then "be clearly proved," and the jury "be clearly satisfied" that the respondent was insane, or is a preponderance of evidence sufficient? Or must the jury be satisfied beyond a reasonable doubt of the respondent's sanity in order to convict?

In Massachusetts, it is now settled that a preponderance of evidence suffice. *Commonwealth* v. *Rogers*, 7 Met. 501; *Commonwealth* v. *Eddy*, 7 Gray, 583, and cases cited by counsel.

It cannot be that this court will establish any less merciful rule here; on the contrary, a step in advance will be taken *in favorem vitæ*. The jury ought to be satisfied of the sanity, as of all other points necessary to a conviction. It is the same as an *alibi*, self-defence, and the like.

The jury, upon the whole evidence, must be satisfied beyond a reasonable doubt that the respondent was not in another place, or if he committed the act, did not do it in self-defence, or was not insane, &c.

"It is difficult to see why the rule of proof beyond a reasonable doubt does not apply, or why a reasonable doubt of the sanity of the defendant should not require the jury to acquit." 2 Greenl. Ev (10th edition, sec. 81, c. [This was written later than the passage from Professor Greenleaf quoted by the presiding judge] See 1 Bennett & Heard's Leading Criminal Cases, note to *Commonwealth* v. *Rogers*, page 111; but more particularly see page 347, note to *Commonwealth* v. *McKie*, in which the whole subject is elaborately treated (although it is carelessly stated, in the leading case, that insanity as a defence stands on a different ground).

Blair, solicitor for the State.

The foundation of the defendant's brief is based substantially upon the reasoning of Mr. Bennett in 1 Bennett & Heard's Leading Criminal Cases, cited by the defendant, and the closing argument of Mr. Hale, in the case *Commonwealth* v. *Eddy*, 7 Gray, 583, and cases cited by him. Indeed the only legal authority to support the points suggested by the defendant to the presiding judge to charge the jury, which we have been able to find, is contained in *State* v. *Brenyeau*, 5 Ala., 244; *State* v. *Marler*, 2 Ala., 43; *Crawford* v. *State*, 12 Geo., 142, cited in Bennett & Heard 112-353, 354.

The amount of the authority, as settled in Massachusetts, is, that a preponderance of evidence is sufficient to remove the presumption of sanity; but what preponderance? Is it such a preponderance as would suffice to support the defence of insanity in a civil action, or is it such a preponderance as to clearly prove to the satisfaction of the jury the insanity of the prisoner at the time of committing the act? The position taken by the defendant that the preponderance of evidence to support the defence of insanity is the same as to support an *alibi* or self-defence, is not warranted by anything either expressed or implied in the cases *Commonwealth* v *Rogers*, or *Commonwealth* v. *Eddy*, cited by the defendant. Now the fallacy in the defendant's reasoning is this, that ignoring the presumption of sanity, or at least presuming the accused to be simply *primâ facie* sane, which the slightest breath of rebutting testimony may remove, he rests his case upon the Massachusetts authorities above mentioned, which do not ignore the presumption of sanity nor assert that any accused person is only *primâ facie* sane. There is a slight difference between presumptive and *primâ facie* evidence. If the defendant's premises, resting upon the cases cited, are correct, his conclusions, in order to be correct, cannot base proof of insanity and an *alibi* on the same ground, unless it is to be presumed that every accused person was present, when the offence, with which he stands charged, was committed; and, consequently, no evidence is required on the part of the government to establish that fact.

The charge of the presiding judge is supported by all the authorities in England touching the subject, and by most American authorities, although the last paragraph suggests a rule as merciful as anything cited by the defendant.

The following authorities not only support the charge of the presiding judge, but contain almost his precise language: Whart. Am. Cr. Law, 16; 1 Arch. Cr. Pl. and Ev. 11, note, wherein is cited *Clark* v. *State*, 12 Ohio, 483; Rose Cr. Ev., 944-947-949-950; 1 Russ on Cr., 8 & 9, note (8th Am. ed.); 2 Greenl. on Ev., secs., 372, 373 (ed. 1842).

Bellows, J.—The defendant's counsel requested the court to charge the jury that, if it was more probable that the prisoner was insane than otherwise, it was their duty to find him not guilty by reason of insanity; and also, although the burthen was on the prisoner to remove the natural presumption of sanity, the jury must be satisfied, beyond a reasonable doubt, that he was a sane man, or else acquit him.

But the court declined to charge the jury according to either request, unless it be found in the direction "that the jury must be satisfied of the existence of such malice at the time, beyond a reasonable doubt, in the prisoner, and that he had a sufficient degree of mental capacity or sanity to render him a fit subject of punishment, upon the principles before suggested."

If the term "beyond a reasonable doubt" could be applied to the finding of the jury in respect to the sanity of the prisoner, it must be regarded as a full compliance with both branches of the request; because, if his sanity was established beyond all reasonable doubt, there could be no ground to claim that he was probably insane. But we think the term "beyond a reasonable doubt," cannot be so applied, or at least not necessarily; and this is indicated by other parts of the charge, in which it is stated, in substance, that, to overcome the presumption of sanity, it must be clearly proved that the prisoner was laboring under such a disease of mind as to render him unable to discriminate between right and wrong; and again, that to find the act not criminal, they must be clearly satisfied that it was the result of the disease, and not of a mind capable of choosing. It must be taken, then, that the judge declined to charge the jury that it would be sufficient if the prisoner's evidence rendered it more probable that he was insane than otherwise; or that they must be satisfied beyond a reasonable doubt that he was sane, and responsible for his acts. It must be taken, also, that evidence had been adduced tending to prove the prisoner's insanity; otherwise there was no occasion to give any instructions upon the subject.

Upon this state of the case, two questions arise:

1. Is it enough that the proof should render the insanity more probable than otherwise?

2. Ought the prisoner to be found guilty when, upon the whole evidence, there is a reasonable doubt of his sanity?

Upon a careful examination of the questions, both upon principle and authority, we are of the opinion that the jury ought not to return a verdict of guilty, so long as a reasonable doubt rests in their minds of the prisoner's capacity to commit the offence charged, and this, of course, is an answer to both questions. Nor do we think it at all material whether the proof of insanity comes from the government or the accused, or part from each; but, however adduced, it is incumbent upon the prosecutor to satisfy the jury beyond a reasonable doubt of the existence of all the elements, including the necessary soundness of mind, that constitute the offence. We are aware that there is conflict in the adjudged cases upon this subject, and that highly respectable authorities have maintained that when insanity is set up as a defence, the burthen of proof is thrown upon the respondent, by force of the natural presumption of sanity, and that he must establish his defence by a preponderating weight of evidence; and that some cases have even gone so far as to hold that it must be sufficient to remove all reasonable doubt of the insanity, as in the case of *State* v. *Spencer*, 1 N. J., 196; but we are unable to assent to either view, for reasons which we shall proceed to state.

The rule in criminal cases requiring the prosecutor to establish the guilt of the accused beyond a reasonable doubt, has its origin in the humane maxim, that is better that many guilty persons escape than that one innocent person should suffer. This maxim, obviously, is not founded upon any technical rule or system of pleading, but is based upon broad principles of justice, which forbid the infliction of punishment until the commission of the crime is to a reasonable certainty established. It has received the sanction of the most enlightened jurists in all civilized communities, and in all ages; and, with the increasing regard for human life and individual security, it is quite apparent that the energy of the rule is in no degree impaired. When the evidence is all before the jury, they are to weigh it, without regard to the side from which it comes, and determine whether or not the guilt of the prisoner has been established beyond a reasonable doubt. To hold that the quantity and weight of the evidence is in any degree affected by the fact that the prosecutor has been able to make a case without introducing any matter in excuse or justification, is clearly contrary to the spirit of the rule, and is giving to mere form an effect which, in many cases, must be contemplated with great pain; inasmuch as juries might feel bound to find the prisoner guilty of a capital crime, when, in their consciences, they had serious doubts of the existence of malice or of mental capacity sufficient to charge the prisoner. Such a doctrine must inevitably lead to a constant struggle, on the part of the prosecutor, to prove his case without introducing any evidence of those facts or circumstances upon which the respondent is understood to rely. In a large number of cases, with skilful management, he might succeed, and thus deprive the accused of that protection which the rule, independent of all technicality or matters of form, was designed to afford.

The conflict which exists has probably arisen, in a great degree, from an attempt to apply to criminal cases the rules which go-

vern the trial of issues in civil causes. In the latter, where the defendant sets up matter in excuse or avoidance, he must establish the defence by a preponderance of proof; and by analogy it has sometimes been held, in criminal cases, that matters of defence arising from accident, necessity, or infirmity, must be established by a like preponderance of proof. In some cases it has been carried so far as to require the same quantity of evidence to prove such matters of defence as to prove the commission of the crime, namely, enough to remove all reasonable doubt. But we think there are marked distinctions between the two classes of trials, and that the rules as to the weight of evidence and burthen of proof in civil cases, are not safe guides in criminal causes. In civil causes the burthen of proof is, in general, upon the party who maintains the affirmative; and, when thrown upon the defendant, it is because he sets up, by his plea, matters which avoid the effect of the plaintiff's allegations, but do not deny them. It is, therefore, right that the burthen of proof should be upon him to establish the truth of such matters in avoidance by a preponderance of evidence, especially as nothing more is required than to render the truth of such matters more probable than otherwise In criminal causes, the trial is usually had upon a plea that puts in issue all the allegations in the indictment; and, upon every sound principle of pleading and evidence, the burthen is upon the prosecutor to sustain them by satisfactory proofs A system of rules, therefore, by which the burthen is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or, in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which, *in favorem vitæ*, requires the guilt of the prisoner to be established beyond reasonable doubt. Not only so, but, fairly considered, such a system derives no countenance from the rules which govern the trials of civil causes, inasmuch as in respect to all the allegations in the declaration, provided they are put in issue, the burthen of proof, in general, rests with the plaintiff.

The indictment in this case is for an attempt to commit murder; and, by the well settled definition of the offence, murder is when a person of sound memory and discretion unlawfully kills any reasonable creature in being under the peace of the State, with malice aforesaid, either express or implied. To justify a conviction, all the elements of the crime, as here defined, must be shown to exist, and to a moral certainty, including the facts of a sound memory, an unlawful killing, and malice. As to the first, the natural presumption of sanity is *primâ facie* proof of a sound memory, and that must stand unless there is other evidence tending to prove the contrary; and then whether it come from the one side or the other, in weighing it, the defendant is entitled to the benefit of all reasonable doubt, just the same as upon the point of an unlawful killing or malice. Indeed the want of a sound memory repels the proof of malice, in the same way as proof that the killing was accidental, in self-defence, or in heat of blood; and there can be no solid distinction founded upon the fact that the law presumes the existence of a sound memory. So the law infers malice from the killing when that is shown, and nothing else; but in both cases the inference is one of fact, and it is for the jury to say, whether, on all the evidence before them, the malice or the sanity is proved or not. Indeed we regard these inferences of fact as not designed to interfere in any way with the obligation of the prosecutor to remove all reasonable doubt of guilt; but are applied as the suggestions of experience, and with a view to the convenience and expedition of trials, leaving the evidence, when adduced, to be weighed without regard to the fact whether it come from the one side or the other.

Our opinion, then, is, that the inference which the law makes of sanity, malice, and the like, is to be regarded as merely a matter of evidence, and standing upon the same ground as the testimony of a witness; 1 Greenl. Ev., secs. 33, 34; and in this respect is like the presumption of innocence. See *Sutton* v *Sadler*, 91 Com Law, 87 Nor does it shift the burthen of proof in the sense of changing the rule as to the quantity of evidence; but is merely *primâ facie* proof of the sanity, or malice, upon which, other things being shown, the jury may find a verdict of guilty. If further evidence is offered upon the point, by either party, tending to repel the presumption, the whole must be weighed by the jury, who are to determine whether the guilt of the prisoner is established beyond a reasonable doubt. The criminal intent must be proved as much as the overt act, and without a sound mind such intent could not exist; and the burthen of proof must always remain with the prosecutor to prove both the act and the criminal intent.

In the English courts, the direct question does not appear to have been discussed, though it is laid down by elementary writers, that when the defence is insanity, the burthen of proving it is upon the prisoner. Rose. Ev. (5th Am. ed.) 944; 1 Russ on Cr. 10, citing *Bellingham's case*. 1 Collison on Lunacy, 636, and Rose. Ev. 946, and note to *Rex* v. *Offord*, 5 C. & P., 168, where the judge told the jury, that to support such defence, it ought to be proved, beyond reasonable doubt, that the respondent was insane. In Foster's Crown Law, 255, it is said, "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth; and very right it is that the law should so presume. The defendant, in this instance, standeth just upon the same ground that every other defendant doth; the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them." So it is laid down in 1 East Cr. Law, 224-440, and Hawk. Pl., ch. 31, sec. 32; 4 Bl Com. 201. On this point, Ornby's case (reported 2 Str. 766, and, also, in Ld. Raym., 1485, and decided in 1727) is relied upon as a leading case: but it will be observed that the question of the quantity of evidence was not at all considered, and its weight, as an authority, is greatly diminished by the fact that it was then held, that whether there was malice or not, was a question of law; and so, also, whether the act was deliberate or in the heat of passion. In the opinion of the judges, in answer to questions propounded by the House of Lords (reported in note to *Regina* v. *Higginson*, 1 C. & K, 130) *Tindal*, C. J., says, "Every man is presumed to be sane and responsible for his crimes, until the contrary is shown to the satisfaction of the jury; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know it was wrong"

Another class of cases in the English courts, are referred to in Wharton's Criminal Law, 264, 265, as cases where the facts of the prosecution are conceded, but the defendant sets up some matter in excuse or avoidance; in which event, it is said that the presumption of innocence no longer works for the defence, and such matter of excuse or avoidance should be proved by the defendant by a preponderance of testimony. The cases cited in support of this doctrine, are prosecutions for selling liquor without license, shooting game without the necessary qualifications, practising medicine without a certificate, and the like. Some of these cases were civil suits, brought for the penalty, and the substance of them all, was, that the affirmative of the facts being with the defendant, and matter being peculiarly within his knowledge, the burthen of proof was upon him. But the question before the court in this case was not considered, and it was nowhere announced that in case evidence was adduced by the defendant, tending to prove such fact, the jury must require that it should be made to preponderate in his favor.

It will be perceived, then, that according to the general statement of the English doctrine, which is fairly expressed in the extract from Foster's Crown Law which we have quoted, the obligation of proving any circumstances of accident, necessity, or infirmity, which may be set up as a defence to a charge of murder, or other crime, is thrown upon the prisoner; unless such proof arises out of the evidence offered by the prosecution It is said, indeed, that such circumstances must be satisfactorily proved; but it is not stated by what quantity of evidence, whether such as to preponderate in favor of the prisoner, or whether he is to be entitled to the benefit of reasonable doubts, as in other cases When we consider, however, that the passage clearly applies to everything which rebuts malice, whether by showing that the act was justifiable, was done in necessary self-defence, or that the

prisoner was not capable of committing the crime by reason of insanity, it may well be urged that nothing more was intended than this—if the prosecutor has proved the commission of the offence without disclosing any circumstance of justification, necessity, or infirmity, or other matter of defence relied upon by the accused, then the burthen will be upon the latter, to offer so much proof of the matters constituting his defence, as will, upon the rules of law, entitle him to a verdict of not guilty. Not that his proof shall be sufficient to establish such fact by a preponderance of evidence, but sufficient to entitle him to an acquittal. If it were not so, what shall be the rule when some evidence of the matter in excuse or justification unavoidably creeps in with the government proof, and still the accused offers more to the same facts? To hold that the rule upon which the life or death of a human being may depend, is to be affected by a circumstance so trivial before any enlightened conscience, would be giving to mere form a weight wholly inconsistent with the humane spirit of our criminal laws. In the opinion of Tindal, C. J., before cited, which was given without argument, and without the attention of the court being distinctly drawn to this point, it is by no means clear that any different rule as to the quantity of evidence was intended to be announced, although there may be some expressions tending that way.

In *Commonwealth* v. *York*, 9 Met 93, it was decided that malice was to be inferred from a wilful and voluntary killing, unless it was proved by a preponderance of evidence, by the accused, that the act was done in an affray in the heat of blood The opinion was pronounced by Shaw, C J, after a most able and thorough examination of the authorities, and it is apparent that he gave great weight to the statement of Sir Michael Foster, which we have cited. The court, however, were not unanimous, Wilde, J., having delivered an able dissenting opinion. In the previous case of *Commonwealth* v. *Rogers*, 7 Met. 504, it was held, that the ordinary presumption of sanity must stand, until rebutted either by evidence offered by government or the prisoner; and in either case, the evidence must be sufficient to establish the fact of insanity. Subsequently, in *Commonwealth* v. *Haskins*, 3 Gray, 463, the doctrine of *Commonwealth* v. *York* was restricted by Shaw. C. J., to cases where the killing was proved, and nothing else; but it was held that, where the circumstances were fully shown, the burthen was upon the State to show the malice beyond a reasonable doubt. The cases of *Commonwealth* v. *Rogers* and *Commonwealth* v. *York*, put upon the same ground the rebutting of malice, by showing that the act was done during an affray, in the heat of passion, and that by reason of insanity, the accused was incapable of malice. And it is quite obvious, we think, that in principle, there is no difference; in both cases the same element of crime is proved not to exist, and the indictment, therefore, is not sustained; and to that effect is the doctrine of that passage before cited, from Foster's Crown Law.

The general doctrine of *Commonwealth* v *York* has been followed in several of the American courts, giving it as authority. *People* v. *Milgate*, 5 Cal., 127; *Graham* v. *Commonwealth*, 16 B. Mon., 587; *State* v. *Stark*, 1 Strobh. 479; *State* v. *Spencer*, 1 N. J., 196. The doctrine of *Commonwealth* v. *York* has since been greatly shaken, if not overthrown, in *Commonwealth* v. *McKie*, 1 Gray, 61, in an able opinion of Bigelow, J, which decided that where evidence of the facts constituting a justification, came from both sides, the burthen of proof remained on the government throughout, to remove all reasonable doubt of guilt; and the reasons assigned apply with equal force, when such evidence all comes from the prisoner. It is true that the learned judge says, "There may be cases where a defendant relies upon some distinct, substantial ground of defence, not necessarily connected with the transaction on which the indictment is founded, in which the burthen of proof is shifted upon the defendant;" and he instances the case of insanity, but expresses no opinion upon it. It was, however, held in a subsequent case (*Commonwealth* v. *Eddy*, 7 Gray, 583), that the burthen of proof resting on the government, is sustained so far as the defendant's mental capacity is concerned, by the presumption of sanity, until rebutted and overcome by a preponderance of the whole evidence; thus giving to the presumption of sanity an effect that is not given by the doctrine of *Commonwealth* v. *McKie*, to the presumption of malice; which, nevertheless, as we think, stands upon the same ground. According to these decisions, then, the rule in Massachusetts, as to the quantity of evidence to establish a defence, arising from accident or necessity, now corresponds with the views we entertain; and with our construction of the passage cited from Foster's Crown Law; and the principle of the rule also includes the defence arising from insanity, or infirmity.

In accordance with our views is the doctrine of *People* v. *McCann*, 16 N. Y. (2 Smith) 58, where the subject is most ably discussed. *Clinton* v *State*, 28 Ala, 692; *United States* v. *McClure*, U. S. District Court, 7 Law Rep. (N. S.) 439 by Sprague, J.; 1 Lead. Crim. Cases, 437, and note, cases cited.

Such, also, we think, has been the course of trials in this State. It was clearly so on the trial of Corey, in Cheshire County, for murder, in 1830, October term, before the Supeaior Court of Judicature, Richardson, C. J., presiding, where the defence set up was insanity. The court charged the jury, that the State had no claim to their verdict until they were satisfied, beyond all reasonable doubt, that the prisoner was guilty; and in that case the only question was, whether he was insane, the guilt otherwise being clear.

So was *State* v. *Prescott*, tried in Merrimack County, September, 1834, before Richardson, C. J. In that case, which was for the murder of Mrs. Cochran, the fact of killing was also clear, and the only defence was insanity. The judge charged the jury, that it was their duty not to pronounce the respondent guilty until every reasonable doubt of his guilt was removed from their minds. And again, he said, "We are of the opinion that if, under all the circumstances of the case, you have any reasonable ground to suppose that the prisoner could not have had the use of his reason, you are bound to acquit him"

With these views of the law, and the course of our own courts, there must be a new trial.

GENERAL CORRESPONDENCE.

Village Councils—Power of Reeves to move and second resolutions.

To the Editors of the Law Journal.

Sir,—As you kindly give information through the columns of your valuable Journal relating to municipal matters, your opinion upon the following question would be thankfully received by the parties concerned.

Would it be held as wrong, contrary to usage, or illegal for the head of a village council either to move or second resolutions while presiding?

It is generally supposed that the most able and competent of the council is appointed reeve; and if prevented from introducing measures by resolution or otherwise, his services to a great extent would be lost. It is held by many that the reeve merely presides, and gives a casting vote when required: if so the least competent should be elected as head of the council.

Your views will much oblige

January 21, 1864. A Reeve.

[It is provided by the Municipal Institutions Act as follows:

1. That the council of every incorporated village shall consist of five *councillors*, one of whom shall be reeve, &c. (Con. Stat. U. C. cap. 54 sec. 66 sub-sec. 3.)

2. That the *members elect* of every council, except a city or town council, being at least a majority of the whole number of the council when full, shall at their first meeting, &c. organize themselves as a council by electing one of themselves to be reeve, &c. (Sec. 132).

3. That *the council* of every incorporated village shall, at its first meeting, elect *from among its members* a reeve, &c. (Sec. 135).

4. That a majority of the *whole number of members* required by law to constitute the council shall form a quorum. (Sec. 140).

5. That the head of every council shall *preside* at the meetings of the council, &c. (Sec. 143).

6. That the head of the council *may* vote with the *other* members *on all questions.* (Sec. 147).

The conclusions which we draw from the foregoing enactments are as follows:

1. That the reeve of an incorporated village is a member of the council of the village.

2. That as such he is entitled to vote with the other members of the council on all questions.

3. That it would not be illegal for him to move or second resolutions; but that he would exercise a sound discretion in not doing so.

No practical inconvenience can, in general, result from the reeve leaving to others the duty of moving or seconding a resolution. If the resolution be one likely to receive the support of a majority of the council, it is only necessary for him to get one member to move it, another to second it, and himself to carry it.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

M. R. WAINEY v. WELLS.

Partnership—Dissolution by decree—Accounts—Interest upon capital—Mode of calculation—Rests—Scope of usual decree without special directions.

Where the court dissolves a partnership, and directs an account of the dealings and transactions, such account is to be taken as to dealings and transactions before the decree, upon the principle adopted between the partners, as evidenced by articles of partnership or by the books, and it is not necessary to insert special directions in the decree for that purpose.

In taking the accounts of the dealings and transactions after the decree, when the business is carried on for the purpose of being wound up, the previous mode is not to be regarded, but the accounts are to be taken in the ordinary way where there are no articles, and, if the parties have advanced unequal shares of capital, simple interest is to be allowed on the same, from the date of the decree, until the business is finally stopped, and the profits are to be divided equally.

Q. B.

IN THE MATTER OF THE MERSEY DOCK BOARD AND THE FREIGHT OF THE SHIP "DIU MANIER."

Interpleader order—Payment of money into court—Payment of part of money out of court to one of the parties.

An interpleader order having been made for payment into Court of a sum of money (the freight of a ship) in a dispute between shipowners and charterers, the Court, on its appearing upon affidavits that the larger portion was plainly due to the former, ordered it to be paid out of Court to them: and directed an action to try the question between the parties (instead of an issue), in order that a commission might issue to examine the master, who was about to sail on a voyage.

Q. B. TYLER v. BOULDING.

Practice—County Courts Acts—Sum not exceeding £20—Payment into Court.

When an action is brought in the Superior Courts for a sum not exceeding £20, and that sum is paid into Court and accepted, the plaintiff is not entitled to costs.

L. C. EDELSTEN v. EDELSTEN.

Trade mark—Colourable imitation—Injunction—Account—Negotiation before suit—Costs.

The plaintiff employed the device of an anchor as his trade mark, and stamped it on a "tally" on each bundle of the wire which he manufactured, which was well known as "anchor brand wire." The defendants, knowing the plaintiff's trade mark, subsequently adopted the device of a crown and anchor on a "tally" similar to the plaintiff's attached to their wire.

Held, that the plaintiff had a right of property in his trade mark; that this extended both to the device and to the name of the wire; that the device of the defendants was an infringement of the plaintiff's rights; and that he was entitled to an account of the profits derived by the defendants from the sale of all wire to which the tally was affixed, whether the purchasers were or were not deceived thereby, and to an injunction.

It is not necessary to prove fraud on the part of the defendants to entitle the plaintiff to an injunction, but it is necessary to entitle the plaintiff to an account of profits.

Effect of negotiations and offers of compromise on the costs of a suit.

C. P. KENNEDY v. BROWN AND WIFE.

Barrister—Incapacity to contract for payment with his client.

A promise by a client to pay money to a counsel for his advocacy or for other services incidentally connected with litigation, whether made before, during, or after the litigation, has no binding effect, and, therefore, such a promise is not sufficient to support an account stated.

WAUGH v. WREN.

Principal and surety—Payment by surety—Equitable mortgage—Married woman.

A surety guaranteed that certain deeds which had been deposited by his principal with a bank as security for the amount then due, or thereafter to become due from him to the bank, so that the whole should not exceed £2,000, were good for the amount of the arrangement with him, otherwise, he (the surety) would guarantee the same. Afterwards when the principal was indebted to the bank in the amount of £2,000, the surety paid them £3,000, and received back the guarantee; his object being according to his own statement, to liquidate his own engagement, and to reduce the debt of the principal.

Held, that the security was not thereby redeemed.

A married woman is not a necessary party to a suit respecting her husband's interest in real estate, to which he is entitled in her right.

EX. ANONYMOUS

Writ of summons—Time for renewing—Common Law Procedure Act, 1852—Practice.

The six months allowed for the renewal of a writ of summons by the 11th section of the C. L. P. A., 1852, are to be reckoned inclusively of the date of renewal.

The Court, being of that opinion, refused to direct the officer to seal a writ *nunc pro tunc*, as had been done by the Court of Common Pleas in *Black* v. *Green*, 15 C. B., 262.

Q. B. ATTACK v. BRAMWELL.

Distress—Trespass—Trespasser ab initio—Entering through a window, or breaking outer door—Distress void—Damages for taking goods—Full value—Deduction of rent due.

A landlord having authorised a bailiff's entering a tenant's house through the window, in order to distrain for rent due.

Held, that he was a trespasser *ab initio*; that it was as though he had broken open an outer door; that the distress was void, and that the tenant was entitled to recover the full value of the goods, without deducting the rent.

C. P. HAWLEY (APPELLANT) v. SENTENCE (RESPONDENT).

Principal and agent—Ratification—Adoption—Money paid.

An agent employed to buy goods, to be paid for at a future day, paid for them out of his own money, for the purpose of obtaining the discount allowed by the seller. The principal, with knowledge of these facts, directed the agent to clear the goods at the custom-house, which, in the ordinary course of business, would be done after payment of the price by the agent for his principal.

Held, that this was a ratification or adoption of the previous payment of the price, and that the agent might sue the principal for the price as money paid to his use at his request.

EX. GRIFFITHS v. PENSEN.

Ejectment—Grant—Parcels—Falsa demonstratio.

A farm was conveyed by the description—"All that messuage, &c., with the lands and hereditaments thereto belonging * * * now or late in the occupation of B.; which said messuage, &c., lands and hereditaments are called, known or described by the several names and contains the several quantities by admeasurement following, that is to say,"—and then followed a particular description by names and admeasurement of several closes.

Held, that the description of the several closes by name could not be rejected as *falsa demonstratio*, and consequently that three closes, which had always been occupied by B. under the grantor, as part of the same farm, did not pass under the grant.

Q. B. WILSON AND ANOTHER v. CATOR.

Summary proceeding—Public commissioners—Expenses of works ordered or required by them—Orders upon "owners" for payment—Liability of part owner—Executor of deceased owner.

Under a local act commissioners were empowered, when a vessel has been sunk or stranded, if the owner should neglect or refuse, within a certain time, to raise it or to cause it to be raised, or if that could not be effected to blow it up, and to recover the expense in a summary manner from the owner. A vessel having sunk, her two partners did not raise her, so, by order of the commissioners, endeavours were made to raise her, and these proving ineffectual, she was blown up. After the attempt to raise, but before the blowing up, one of the owners died, and proceedings were taken against the survivor and the co-executor to enforce payment of the expenses, both of the attempts to raise the ship and blow it up.

Held, that the order for payment of the expenses could not be made against the executor, but that it might be made against the co-owner.

Held also, that it was for the justices to say whether the attempts to raise were reasonably prudent; and, if so, they were recoverable, as well as the expense of blowing up.

Q. B. IN RE BARNARD THOMAS.

Attorney—Articled clerk.

Where an articled clerk had been articled to his father, an attorney, for three years, and was afterwards assigned to A. B., and served under the articles and assignment for two years, one month, and twenty three days, and then went to America, where he remained for nearly four years, when he returned and resumed service with A. B., the Court allowed him to enter into fresh articles with A. B. for the remainder of the term of three years, the service under the old articles and assignment to count.

Q. B. ISAAC v. BOULNOIS AND ANOTHER.

Contract—Sale of Chattel—Mistake as to price—Equitable defence.

Commission agents, having a chattel to sell at a fixed price, and their salesman having, by mistake, agreed to sell it at one-third of that price, and the mistake having been explained and the contract repudiated before the chattel was delivered,

Held, that the purchaser could not sue to enforce its delivery.

C. P. SNELL v. FINCH.

Distress—Implied authority to distrain.

Where a mortgage by demise has been paid off by the assignee of the equity of redemption, who takes from the mortgagee an undertaking to execute a transfer of the mortgage, there is an implied authority to the assignee of the equity of redemption to distrain in the name of the mortgagee.

C. P. ADAMS AND OTHERS v. MACKENZIE.

Insurance—Total loss—Construction of.

An old ship was insured against "total loss only." She met with an accident which rendered her not worth repairing, and a constructive total loss. In an action against the underwriter,

Held, that he was liable for a total loss.

EX. SULLY v. NOBLE.

Practice—Remanet—Countermand of notice of trial.

Notice of trial having been given for the first sittings in Hilary Term in Middlesex, the defendant at those sittings had the cause made a remanet to the third sittings. More than four days before the third sittings the plaintiff countermanded his notice of trial, and withdrew the record.

Held, that such countermand was in time, under the 98th section of the Common Law Procedure Act, 1852.

B. C. HALL v. CRAWLEY.

Sheriff—Attachment for not making return to writ of fi. fa.—Insufficient return.

Where a sheriff, after being ruled to make a return to a writ of *fi. fa.*, made a return that he had sold the goods seized, and had received for them sufficient to satisfy the moneys directed to be levied, but that he afterwards had notice from the landlord that two quarter's rent was due, amounting to a larger sum, that he had applied to the landlord, but had not been permitted by him to have evidence of his claim, and that though he, the sheriff, had used due diligence, he was unable to ascertain whether the landlord had any just claim in respect of the rent, this Court quashed the return for insufficiency, and allowed an attachment to issue.

L.C. O'BRIEN v. LEWIS.

Solicitor—Promise of a gift by a client—Improper bargain—Lapse of time.

The law will not allow a solicitor to bargain, or permit his client to promise, that any additional remuneration shall be given him in respect of his professional services, beyond the legal remuneration.

A. filed a bill to recover back a sum of money which he had promised to give to his solicitor, in addition to his costs, if he could obtain the settlement of a pending suit, and which sum the solicitor had retained. Nine years elapsed before the filing of the bill, during the greater part of which time the relation of solicitor and client had subsisted between them.

Held, that the money had been improperly retained, and that A., notwithstanding the lapse of time, was entitled to recover.

L. J. CLARKE v. WATKINS.

Injunction—Agreement not to trade within certain limits.

The defendant agreed to serve the plaintiff in his business as a chemist, and that he would not himself carry on the same business within certain limits. In consequence of differences, the defendant left the plaintiff's service, and afterwards acted as agent for another firm within the limits.

The court refused to restrain him from so doing

EX. BANCROFT v. GREENWOOD.

Practice—Judgment non pros. by one of several defendants.

Where a plaintiff declares against some only of several defendants named in a writ, another defendant, against whom he does not proceed after notice to declare, may sign judgment *non pros.*

C. P. COLLINGWOOD v. BERKELEY AND OTHERS. May 26, 27.

Projected Joint Stock Company—Prospectus—Liability of provisional directors.

The manager and secretary of a projected company to be formed to convey passengers to B. C., showed a prospectus of the company to the defendants, and asked them to become directors; the prospectus spoke of a company to be formed and registered, and also spoke of business actually going on for the purpose of transport, and of actual transport as about to commence forthwith; the defendant's agreed to become directors in the event of the company's being formed, if they were qualified and indemnified; they were to receive a certain number of paid-up shares. Copies of the prospectus were advertised in *The Times*, with the names of the defendants as directors in them. The company was never registered, nor was any attempt made to issue shares. The plaintiff paid his fare as a passenger to B. C., to the secretary, at the company's office, and was conveyed a portion of the journey, and was then left

Held, in an action against the defendants as directors of the company, that there was evidence from which a jury might infer that the contract had been entered into on the credit of the defendants' names, by their authority and with their consent.

CHANCERY.

V. C. S. SWANISTON v. CLAY.

Bankrupt—Lien—Order and disposition—Unfinished ship in builder's yard.

B. & Co. agreed to build a ship for F. To enable them to proceed with the work, and before the agreement was signed, S. advanced money, on the understanding that he should have an assignment of the agreement, and a lien upon the ship. The agreement was cancelled. B. & Co. then agreed to sell the vessel, which was in an unfinished state, to S. Four days previously they had stopped payment, and shortly afterwards were made bankrupts.

Held, that S. was entitled to a lien upon the ship.

V. C. S. HOLDER v. RAMSBOTTOM.

Will—Construction—"Plate."

Gift of "all the furniture (except plate and pictures) which shall be in the said house at my decease."

Held, that plated articles were not within the exception.

V. C. W. DAVENPORT v. DAVENPORT. Nov. 3, 4.

Will—Executory devise—Direction to make settlement—Tenant for Life—Waste.

Testator devised his real estate to his son B., but directed him nevertheless within twelve months to settle such real estate to the use of himself B. for life, with remainder to B.'s first and other sons in tail male, or tail general, or otherwise in tail as B. should think proper, with remainder to testator's other son C., for life, and similar remainders to C.'s family. The will also directed that the settlement should contain such powers of jointuring, charging portions, sale and exchange, &c., as B. should direct, and that it should also "contain all other usual and proper provisions for giving effect to his intention as therein expressed, and all such other powers and provisions as counsel should advise."

Held, that the terms of the executory devise did not authorise the insertion in the settlement of a clause rendering B. and the successive tenants for dispunishable for waste.

L. C. EX PARTE GRAHAM. Nov. 4.

RE GRANT.

Bankruptcy—Dividend—Orders of October, 1852, Rule 150—Costs of official assignee.

After a great lapse of time, and the receipt of dividends by a person claiming under an assignment from the proving creditor, and after the death of such person, the title of his representative to subsequent dividends will be presumed; and the production of the securities and direct evidence that the debt was still due and unpaid, were waived, in the absence of any evidence that the debt was extinguished or satisfied.

The Commissioner having miscarried in a matter of account by reason of its not having been brought sufficiently to his notice by the official assignee, no costs of appeal were allowed to the official assignee.

REVIEWS.

LOWER CANADA REPORTS. Published by A. Coté, Quebec.—We are in receipt of No. 12, Vol. XIII., of the *Lower Canada Reports*, which finishes the volume for 1863; and we avail ourselves of this opportunity of stating that we take much interest in reading the decisions referred to in this series. Some of them, on questions of criminal law (which is the same in Upper and Lower Canada), throw light upon points that have not yet received judicial interpretation in Upper Canada. The number now before us contains a case of that description. It is provided by Con. Stat. Can. cap. 99, s. 117, in regard to appeals from the decisions of justices of the peace in matters of a criminal nature, that the Court of Quarter Sessions "shall hear and determine the matter of the appeal, &c.," and, by s. 119 of the same act, that the Court "shall have power to empannel a jury to try the matter on which the decision has been made, &c." The contention was, whether, upon the proper construction of these sections, it was obligatory upon the court, in the matter of an appeal, to empannel a jury; and it was held not to be so, but discretionary only (*Gilchen* v. *Eaton*). This interpretation, if correct, must also prevail in Upper Canada, not only under Con. Stat. Can. cap. 99, in the case of appeals from decisions in matters criminal, but, under Con. Stat. U. C. cap. 114, in appeals from decisions in matters not criminal. In our next issue we shall publish this decision entire. It raises a question quite new to us, and of interest to all who practice in our Courts of Quarter Sessions.

GODEY'S LADY BOOK for February is received. This number is full of novelties. The steel-plate engraving is "St. Valentine's Day." The colored fashion plate contains six figures. "A Watch Pocket in Beadwork" is a very pretty design. There are, besides, a peculiar fancy work bag, and some original music, and about eighty engravings devoted to dress and useful work for ladies.

APPOINTMENTS TO OFFICE, &c.

SOLICITOR GENERAL.

The Honorable ALBERT NORTON RICHARDS, Q C., to be Solicitor General in and for that part of the Province of Canada called Upper Canada, in the room and stead of Lewis Wallbridge, Q C., resigned.—(Gazetted January 2nd, 1864.)

TO CORRESPONDENTS.

"CLERK 6TH DIVISION COURT CO. NORFOLK"—"C. ARMSTRONG."—Under "Division Courts."

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