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DIARY FOR APRIL.

1. Tuesday ..... Chan Examination Term Barrie and Ottawa commences.
5. Saturday ..... Last Day for notice of trial for York and Peel.
6. SUNDAY ..... *5th Sunday in Lent.*
7. Monday ..... County Court and Surr. Ct. Terms beg. Recorder's Ct. sits.
8. Tuesday ..... Chancery Examination Term, Goderich and Cornwall, com.
12. Saturday ..... County Court and Surrogate Court Terms end.
13. SUNDAY ..... *Palm Sunday.*
14. Monday ..... York and Peel Spring Assizes.
17. Thursday ..... Last day for sett. down for Hearing Chancery.
18. Friday ..... *Good Friday.*
20. SUNDAY ..... *Easter Sunday.*
21 Monday ..... Last day for notice of Hearing Chancery.
27. SUNDAY ..... *Low Sunday.*
28. Monday ..... Chancery Hearing Term commences.
30. Wednesday..... Last day for complet. Assessment Rolls. Last day for Non-Residents to give lists of their lands.

IMPORTANT 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 Patton & 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.

APRIL, 1862.

THE NEW CHANCELLOR.

On 18th March last an extra issued from the office of the *Canada Gazette*, announcing that the Governor General had been pleased to appoint the Honorable Philip Michael Matthew Scott Vankoughnet to be Chancellor of Upper Canada.

Mr. Vankoughnet is a very young man to have attained a position so high and important. He is not yet forty years old. His great talents have given him the start of many of his seniors. He is the descendant of a United Empire Loyalist. His grandfather was a loyalist, and his father, Philip Vankoughnet, who is still living, was for many years a member of the Legislature of Upper Canada before the union of Upper and Lower Canada.

The present Chancellor is a Canadian by birth, having been born at Cornwall on the 26th January, 1823. Dr. Urquhart of that town was his instructor. He early gave promise of the talents which have since made him so distinguished. His parents had intended him to embrace the clerical profession; this was their design, and so continued for several years. He is said at one time not to have been averse to it; but owing to some circumstance or other suddenly changed his intentions. Some say that it was his admiration of a speech delivered in his hearing by the late Mr. Justice Hagerman that caused the change.

He first became a student-at-law in the office of George Jarvis, of Cornwall. He next entered the office of Messrs. Smith & Crooks, in Toronto. He displayed great aptitude for the profession and diligence in the pursuit of it. He was known among the students of his day as "a hard working, clever kind of fellow." His principals trusted much to his judgment, and his subsequent career has proved the correctness of their discernment.

He was called to the bar in February, 1844, when only twenty-one years of age. He wisely decided to practise in the City of Toronto, the seat of law. His first partnership was with the present Mr. Justice Burns. His next was with Mr. Oliver Mowat, who at one time was considered his rival for the Chancellorship, in the event of a lucky throw in the political dice. His diligence after his call to the bar was not so great as when a student. He trusted more to his talents than to his industry. He was successful at Nisi Prius as an advocate. His display of industry "during term" was not equal to that of many of his compeers. He during the later years of his practice made Equity his study, and held many equity briefs. He was the Trinity College lecturer on "Equity Jurisprudence," at the same time that the present Mr. Justice Hagarty lectured on the "Law of Contracts," and Mr. J. Hillyard Cameron on the "Law of Real Property." His lectures were oral, and not remarkable as the fruits of industry; but were at all times interesting and instructive.

He was only twelve years at the bar when, in 1856, he accepted the office of President of the Executive Council, at the solicitation of the present Attorney General for Upper Canada. Since then he has not been in the active practice of his profession; his duties as a minister of the crown engrossed his attention. He was shortly after his acceptance of office elected a member for the Legislative Council division of Rideau, and from that time till his acceptance of the office of Chancellor was the leader of the Government in the Legislative Council. At first he was said as a public man to be a failure. This was a hasty conclusion. No doubt, considering his youth and inexperience in politics, he did not for a little time take a decided and prominent position in debates. He was, however, not long in doing so, and when he did so it was with marked effect. His good humor and acknowledged abilities soon made him fully equal to his conspicuous and important position. During the Macdonald-Cartier Administration he was head of the Bureau of Agriculture, and upon the formation of the Cartier-Macdonald Administration he became Commissioner of Crown Lands; and in the latter office, to the surprise of everybody, accomplished wonders in cleaning that Augean Stable. His ready talents, combined with his knowledge of both law and equity, enabled him to dispose of hundreds of "land cases" which for years had lain dormant on the shelves of the department.

It is to be hoped that the industry of his boyhood will characterize the discharge of the duties appertaining to the high office which he now fills. Noted as the Crown Lands Department was for numbers of undetermined cases, he will find still more in the Court of Chancery. The illness of the late Chancellor long before his resignation, and the vacancy in the office since his resignation, have added much to the work of the Court. The two Vice-Chancellors have been far from idle, but the work to be done was more than enough for any two men, however industrious or however able.

AUDITA QUERELA.

The indulgence shown by the Courts in modern times, by way of motion, has in a great measure superseded the remedy by Audita Querela. Still there are cases in which a resort to that proceeding is necessary. The proceeding is neither obsolete nor difficult. Owing to the fact that it is little used there is not much to be found in the books about it.

We therefore propose to devote some of our space to the consideration of the following:—The nature of the writ—Persons entitled to it—How obtained—From what Court issued—Form of writ—Process thereon and effect thereof—Subsequent proceedings—Damages and costs.

1. *Nature of the writ.* The proceedings of courts of justice are not to be perverted to purposes of injustice. Audita Querela is a proceeding invented to prevent the procedure of courts of justice working injustice. It is in general allowed where a party having a good defence at law has no opportunity of setting it up by the ordinary forms of proceeding in courts of law. Thus it lies for a person who is either in execution or in danger of being so upon a judgment or recognizance, when he has matter to show that the execution if issued ought not to have issued, or if not issued should not issue (2 Wms. Saund. 147, 1.) It is a mode of obtaining relief from a judgment at law just as scire facias is the mode of enforcing such a judgment. It is in the nature of a bill in equity, and yet defendant is not, either by the existence of the remedy or by having unsuccessfully resorted to it, precluded from bringing his original bill in equity for relief (*Williams* v. *Roberts*, 8 Hare, 315).

2. *Persons entitled to it.* The writ is only granted upon the application of a party to the judgment, or a person in privity with a party to the judgment. It will be refused when the applicant is a stranger to the judgment. Thus, where applicant had purchased lands from a judgment debtor after execution issued, under 5 Geo. II. cap. 7, contending that as plaintiff was an alien the execution was improperly issued, the court refused to interfere, leaving applicant to his action of ejectment against the purchaser at sheriff's sale (*Beard* v. *Ketchum*, 8 U. C. Q. B. 523. See also Bac. Abr. Audita Querela.) It is not a remedy to which a plaintiff can resort. It is peculiarly intended for relief of a defendant from the oppression or injustice of a plaintiff (*Aldridge* v. *Buller*, 2 M. & W. 418, per Parke, B.)

3. *How obtained.* The Rule of Court, Trinity Term, 9 Jac. I. is as follows:—"That no writ of audita querela for any cause whatever be allowed, nor bail thereupon taken, unless here in public and open court and by special motion here first made and a rule thereupon entered" This has been held to mean that the writ shall not issue without an order made *in open court* (*Beard* v. *Ketchum*, 8 U. C. Q. B. 533). In England it is now provided that "no writ of audita querela shall be allowed unless by Rule of Court *or order of a Judge*" (Eng. R. 79, H. T. 1853). This rule is not adopted in Upper Canada. The authority of a Judge in Chambers in Upper Canada is under the circumstances very doubtful. At one time it was thought that the writ being ex debito justitiæ might be issued without any application to court or judge. There was, however, no decision to that effect, and it has since been said that the Rule of 9 Jac. I. above mentioned is only declaratory of the common law (*Dearie* v. *Ker*, 7 D. & L. 231).

4. *From what Court issued.* An audita querela may be brought in the same court in which the record upon which it is founded remains, or be made returnable in the same court. Therefore in England it has been held that if a man recovers judgment in the Common Pleas or Queen's Bench, and afterwards by deed releases it and then sues out execution, the defendant may have an audita querela out of the Common Pleas or Queen's Bench where the record is; and yet he may have an audita querela out of Chancery returnable in the Common Pleas or Queen's Bench, "and so it is sometimes judicial and sometimes original" (2 Wms. Saund. 148 f.). But it cannot be issued out of any court returnable in the same court where the record upon which it is founded is not in such court (F. N. B. 105 b.).

5. *Form of writ.* The writ, after stating that the complaint of the defendant having been heard (*audita querela defendentis*), and after setting out the matter of the complaint, enjoins the Court to call the parties before them, and having heard the allegations and proofs to cause justice to be done between them (See forms in 2 Wms. Saund. 148 a. *Porchester* v. *Petrie*, 3 Doug. 261.)

6. *Process thereon and effect thereof.* An audita querela is not a supersedeas of execution (2 Wms. Saund. 148 f.). If the writ be founded on a record, or the party be in cus-

tody, the process upon it when allowed is a *scire facias*. But if grounded on a matter of fact, or the party be not in custody, the process appears to be a venire facias and on default a distringas ad infinitum (*Langston* v. *Grant*, 1 Salk. 92; *Clerk* v. *Moore*, Ib. 92; Anonymous 92; Anonymous 93). Where execution is actually issued there must be a writ of supersedeas (*Giles* v. *Hutt*, 1 Ex. 59). In the case last mentioned, a writ of audita querela having issued, a motion was made for a writ of supersedeas to the sheriff to stay execution, and also for a writ of venire facias and the Court made the following rule: "upon the motion of the counsel for George Giles, the plaintiff above named, and upon reading the writ of audita querela issued herein, with the allowance thereof endorsed thereon, and the rule made in the case of *Hutt and another* v. *Giles*, whereby execution was stayed for a month on the terms of the defendant undertaking within that time to issue a writ of audita querela, it is ordered that the said George Giles, the plaintiff above named, be at liberty to issue a supersedeas to the sheriff to stay execution, together with a writ of venire facias thereon (1 Ex. 59, note).

7. *Subsequent proceedings.* If the defendant appears upon the scire facias, venire facias, or distringas, the plaintiff declares, in which declaration the whole writ of audita querela is recited in the same manner as in a declaration in scire facias. The declaration ought to comprehend only one gravamen; or at least if it mentions several, it ought to rely upon one only, otherwise it will be double. The plaintiff should show himself aggrieved. The declaration should conclude with the prayer of relief that defendant be discharged, &c. If the defendant confesses the matter alleged the plaintiff has judgment by confession; but if the defendant denies it the parties proceed to issue in fact or in law as the case may be, as in other cases. If the plaintiff be nonsuited, though he may have a new writ of audita querela, he shall have no writ of supersedeas to stay execution (Sellon's Prac. 287).

8. *Damages and Costs.* It has been held that at common law there can neither be damages nor costs—no costs under Statute of Gloucester, because no damages—in a proceeding by audita querela (2 Tidd's Prac. 976, 1132; 2 Sellon's Prac. 256; Burton's Ex. Prac. 299; *Gascoine* v. *Whalley*, 2 Dyer, 193 b.), but under some recent statutes whereby costs are recoverable, independently of the Statute of Gloucester, it may be held that costs are recoverable in this mode of proceeding. It may be mentioned that in a recent case where plaintiff was without the jurisdiction of the court, proceedings were stayed till security for costs was given (*Holmes* v. *Pemberton*, 5 Jur. N. S. 727; S. C. 7 W. R. 160).

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1861.

FOR CERTIFICATES OF FITNESS.

STATUTES AND PLEADINGS AND PRACTICE.—(EQUITY.)

1. State the statutory alteration in the law of merger.
2. State the statutory alteration concerning *lis pendens*, and the class of cases to which the alteration does not apply.
3. State the various modes by which a plaintiff may bring his cause to hearing.
4. State the classes of cases in which it is proper to move for a decree.
5. Draft that part of an answer setting up the plea of a purchase for valuable consideration without notice.

WILLIAMS ON REAL PROPERTY.

1. State the proceedings upon a common recovery.
2. State the classes of persons not possessing the ordinary rights of alienation of real estates.
3. State the classes of objects in respect of which these rights are restricted.
4. Define a contingent remainder.
5. Define an executory interest.
6. State the difference between a will of lands and a will of personal estate regarding them as documents of title.

STORY'S EQUITY JURISPRUDENCE.

1. State the three great heads of jurisdiction, and shortly define each.
2. State the several divisions of the subject matter which are discussed in the first volume, beginning with "Accident."
3. Define "constructive frauds," and give an example.
4. What are bills *quia timet*? and give an example.
5. Define implied, as contra-distinguished from express, trusts.
6. What is the vendor's lien? State the probable origin and present extent of the doctrine.

ADMISSION FOR ATTORNEY.

BLACKSTONE'S COMMENTARIES—VOL. I.

1. Give the different sources of the law of England.
2. What subject is treated of in the first book of Commentaries? and give briefly the different heads.
3. Mention some of the rights, capacities and incapacities of persons.
4. What are some of the duties of persons in their private relations?
5. What are artificial persons? and how may they be created?

SMITH'S MERCANTILE LAW.

1. When may notice of dishonour to the drawer of a bill be dispensed with?
2. Mention some of the peculiarities of the contract of hiring and service.
3. What are the requisites of a guarantee?
4. In what contracts must a consideration exist and be proved, and in what is it presumed?

5. How far is a pledge by a factor of his principal's goods valid.

6. When is the *transitus* of goods determined ?

STATUTES, PLEADING AND PRACTICE.

1. What are the provisions of the statutes as to warehouse receipts ?

2. What statutory provisions exist as to the registration of different instruments ?

3. When will *replevin* lie ?

4. What circumstances must exist to permit "a defence on equitable grounds" to an action at law ?

5. How is an action of ejectment revived ?

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. Of what estate does escheat arise, and of what not ?

2. How may a lease for a term of years be made valid by estoppel ?

3. What is the doctrine of *cy-prés* ? and give an instance.

4. In what respects do powers of alienation unconnected with ownership, differ from alienations in respect of ownership ?

5. Distinguish between a license and a grant.

6. Is a purely incorporal hereditament the subject of tenure ? and give reasons for your answer.

STORY'S EQUITY JURISPRUDENCE.

1. Explain the maxim "*Equitas sequitur legem*," and state what (if any) exceptions exist thereto.

2. In what cases has equity jurisdiction exclusive of the common law ?

3. Will a court of equity relieve against acts performed under mistaken notions of law ?

4. How far is the maxim "*Caveat empeor*," applicable in case of specific performance ?

5. Describe tacking, and in what cases may it arise ?

6. What is the remedy by injunction, and when is a receiver granted as ancillary thereto ?

TAYLOR ON EVIDENCE.

1. In what cases may entries in the writing of a deceased person be given in evidence to prove the facts stated in them ?

2. Distinguish between the "admissibility" and the "credibility" of a witness.

3. How may a discovery at law be obtained from the opposite party ?

4. When may parol evidence be gone into, notwithstanding a written agreement exists ?

5. Under what general heads is the law of evidence treated of by Mr. Taylor.

BYLES ON BILLS.

1. Can a corporation be sued in assumpsit on a promissory note ?

2. What considerations are illegal ?

3. Can a bill be endorsed after the death of a payee ? and if so by whom ?

4. How far is the title of the transferee affected by his negligence ?

5. As to what parties is presentment unnecessary so as to charge them ?

6. What are the five principal rules established in the law of England with respect to the conflict of laws, which arise in cases of bill of exchange ?

STATUTES PLEADING AND PRACTICE.

1. When may a defendant obtain relief from a plaintiff without filing a cross-bill ?

2. How is a decree in equity enforced ?

3. What is the object of enrolling a decree, and how is it done ?

4. May a defendant in equity when under examination, at the instance of the opposite party, enter into any facts material to his own defence, or to what extent is his examination on his own behalf limited.

5. In what cases will equity assume jurisdiction without requiring a bill to be filed.

6. In what cases is a judgment creditor who obtains judgment subsequent to the attachment of an absconding debtor's goods entitled to priority over the attaching creditor ?

7. What is the effect of suing the several parties to a bill or note in separate actions ?

8. What is the effect of a verdict for the defendant on a plea of *non cepit* in replevin, and to what extent, if at all, are the sureties in the replevin bond liable in such a case ?

9. From what date is a recovery in ejectment evidence of the plaintiff's title in a subsequent action for mesne profits ?

STEPHENS ON PLEADING.

1. What is the proper form of traversing a deed by a party, or by a stranger respectively, and upon what doctrine does this distinction depend ?

2. What is judgment of respondeat ouster, and to what class of plea does it apply ?

3. What is a departure, and what is the earliest stage of the pleadings in which it can occur ?

4. In what cases is it necessary to allege in pleading that a conveyance was in writing ?

SMITH'S MERCANTILE LAW.

1. Is there any, and if so what distinction between such a delivery as would support an action for goods sold and delivered, where there was a binding contract, and such a one as would satisfy the Statute of Frauds where there had been no previous contract within the statute ?

2. How does the right to stop in transitu differ from a lien ?

3. State some of the grounds on which a surety's liability will be discharged.

ADDITION ON CONTRACTS.

1. Can money deposited with a third party to be applied to an illegal purpose, be recovered at any, and if so what time ?

2. State the rule with regard to proof of consideration in simple contracts, bills and notes, and instruments under seal respectively.

3. What is the effect of a *contract* being partly legal and partly illegal, and of the *consideration* for a contract being partly legal and partly illegal ? Give your reason.

NEW CHANCERY ORDER.

SATURDAY, 22ND FEBRUARY, 1862.

It is ordered that sections 8 and 9 of the 36th of the General Orders of this Court of the third of June, 1853, be and the same are hereby repealed: and it is further ordered, that in future all sales are to be with the approbation of one of the Masters of this Court, who is to report the same to the Court, such report to be in the form hereunder set forth, or as near thereto as circumstances will permit, that is to say:—

"IN CHANCERY."

(*Title of Cause.*)

"Pursuant to the decree (*or order*) of this honourable Court bearing date the —— day of —— and made in this cause, I have under the General Orders of this Court, in the presence of (*or after notice to*) all parties concerned, settled an advertisement and particulars and conditions of sale for the lands mentioned or referred to in the said decree, (*or order,*) and such advertisement having, according to my directions, been published in the (naming the newspaper or newspapers) once in each week for the four weeks immediately preceding the said sale, (*or as the case may be,*) and and bills of the said sale having been also as directed by me published in different parts of the township, (*town or city*) of —— and the adjacent country and villages, (*or as the case may be,*) the said lands were offered for sale by public auction according to my appointment, on the —— day of —— by me, (or by Mr. —— of —— appointed by me for that purpose, auctioneer,) and such sale was conducted in a fair, open and proper manner, when —— of —— was declared the highest bidder for and became the purchaser of the same at the price or sum of £ —— (or when sold in different lots, that A. B. became the purchaser of lot No. 1 at the price or sum of £——, as the case may be): all which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this honourable Court.

Under the printed conditions of sale is to be printed a blank form of contract in these words, or to this effect:—

"I agree to purchase the property (or lot No. ——) mentioned in the annexed particulars, for the sum of £——, and upon the terms mentioned in the above conditions of sale," which is to be signed by the purchaser.

Witness, ——."

This order is to take effect on and after the eighth day of March next.

(Signed) J. C. P. ESTEN, V. C.
J. G. SPRAGGE, V. C.

SELECTIONS.

THE MASON AND SLIDELL CASE.

(*Continued from page* 66.)

We revert, for the last time, to the despatch of the American Minister in the affair of The Trent; the fifth of whose propositions is the only one that remains for examination. The question there raised and the arguments used in support of it, are of such a character, that it is but justice to allow the writer to tell his tale in his own words.

"Only the fifth question remains, namely, did Captain Wilkes exercise the right of capturing the contraband in conformity with the laws of nations? It is just here that the difficulties of the case begin. What is the manner which the law of nations prescribes for disposing of the contraband when you have found and seized it on board of the neutral vessel?

"The answer would be easily found if the question were, what shall you do with the contraband vessel? You must take or send her into a convenient port, and subject her to a judicial prosecution there in admiralty, which will try and decide the questions of belligerency, neutrality, contraband and capture. So, again, you will promptly find the same answer if the question were, what is the manner of proceeding prescribed by the law of nations in regard to the contraband if it be property or things of material or pecuniary value? But the question here concerns the mode of procedure in regard not to the vessel that was carrying the contraband, nor yet to the contraband things which worked the forfeiture of the vessel, but to contraband persons.

"The books of law are dumb; yet the question is as important as it is difficult. First, the belligerent captor has a right to prevent the contraband officer, soldier, sailor, minister, messenger, or carrier from proceeding on his unlawful voyage, and reaching the destined scene of his injurious service. But, on the other hand, the person captured may be innocent—that is, he may not be contraband. He, therefore, has a right to a fair trial of the accusation against him. The neutral State that has taken him under its flag is bound to protect him if he is not contraband, and is therefore entitled to be satisfied upon that important question. The faith of that State is pledged to his safety if innocent, as its justice is pledged to his surrender if he is really contraband. Here are conflicting claims, involving personal liberty, life, honour, and duty. Here are conflicting national claims, involving welfare, safety, honour and empire. They require a tribunal and a trial. The captors and the captured are equals; the neutrals and the belligerent State are equals.

"While the law authorities were found silent, it was suggested at an early day by this Government that you should take the captured persons into a convenient port, and institute judicial proceedings there to try the controversy. But only Courts of Admiralty have jurisdiction in maritime cases, and these Courts have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons. The Courts can entertain no proceedings, and render no judgment, in favour or against the alleged contraband men. It was replied—All this is true; but you can reach in these courts a decision which will have the moral weight of a judicial one, by a circuitous proceeding. Convey the suspected men, together with the suspected vessel, into port, and try there the question whether the vessel is contraband. You can prove it to be so by proving the suspected men to be contraband, and the Court must then determine the vessel to be contraband. If the men are not contraband, the vessel will escape condemnation. Still, is there no judgment for or against the captured persons? But it was assumed that there would result, from the determination of the Court concerning the vessel, a legal certainty concerning the character of the men. This course of proceeding seemed open to many objections. It elevates the incidental inferior private interests into the proper place of the main paramount public one, and possibly it may make the fortunes, the safety, or the existence of a nation depend on the accident of a merely personal and pecuniary litigation. Moreover, when the judgment of the prize court upon the lawfulness of the capture of the vessels is rendered, it really concludes nothing, and binds neither the belligerent State nor the neutral upon the great question of the disposition to be made of the captured contraband persons. That question is still to be really determined, if at all, by diplomatic arrangement, or by war.

"One may well express his surprise when told that the law of nations has furnished no more reasonable, practical, and perfect mode than this of determining questions of such grave

import between Sovereign Powers. The regret we may feel on the occasion, is, nevertheless, modified by the reflection that the difficulty is not altogether anomalous. Similar and equal deficiencies are found in every system of municipal law, especially in the system which exists in the greater portions of Great Britain and the United States. The title to personal property can hardly ever be resolved by a court without resorting to the fiction that the claimant has lost and the possessor has found it; and the title of real estate is disputed by real litigants under the names of imaginary persons.

"It must be confessed, however, that while all aggrieved nations demand, and all impartial ones concede the need of some form of judicial process in determining the characters of contraband persons, no form but the illogical and circuitous one thus described exists, nor has any other yet been suggested Practically, therefore, the choice is between that judicial remedy and no judicial remedy whatever. If there be no judicial remedy, the result is, that the question must be determined by the captor himself on the deck of the prize vessel. Very grave objections are against such a course. The captor is armed; the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless. The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or treaty obligation to acquiesce. Reparation is distant and problematical, and depends at last on the justice, magnanimity, or weakness of the State in whose behalf and by whose authority the capture was made. Out of these disputes reprisals and wars necessarily arise, and these are so frequent and destructive that it may well be doubted whether this form of remedy is not a greater social evil than all that could follow if the belligerent right of search were universally renounced and abolished for ever. But carry the case one step further. What if the State that has made the capture unreasonably refuses to hear the complaint of the neutral, or to redress it? In that case the very act of capture would be an act of war—of war begun without notice, and possibly entirely without provocation. I think all unprejudiced minds will agree, that, imperfect as the existing judicial remedy may be supposed to be, it would be, as a general practice, better to follow it than to adopt the summary one of of leaving the decision with the captor, and relying upon diplomatic debates to review his decision. Practically it is a question of choice between law, with its imperfections and delays, and war, with its evils and desolations. Nor is it ever to be forgotten that neutrality, honestly and justly preserved, is always the harbinger of peace, and is therefore the common interest of nations, which is only saying that it is the interest of humanity itself.

"At the same time it is not to be denied that it may sometimes happen that the judicial remedy will become impossible—as by the shipwreck of the prize vessel, or other circumstances, which excuse the captor from sending or taking her into port for confiscation. In such a case the right of the captor to the custody of the captured persons, and to dispose of them, if they are really contraband, so as to defeat their unlawful purposes, cannot reasonably be denied. What rule shall be applied in such a case? Clearly the captor ought to be required to shew that the failure of the judicial remedy results from circumstances beyond his control, and without his fault. Otherwise he would be allowed to derive advantage from a wrongful act of his own."

Applying these principles to the facts before him, the position of the American Minister is this—that although The Trent was carrying persons, whom, by the law of nations, she was prohibited from carrying; although Captain Wilkes had a right to board and search her for those persons, and, on finding them in her, had a right to capture both them and the vessel; still that he had no right (unless with the concurrence of the authorities of The Trent, which he had not obtained, or was compelled by stress of weather, or being unable to spare a prize crew for her, &c.,) to take those persons out of her; but was bound to take her and her illegal freight into port for condemnation as prize by a judicial tribunal. And that, as he did not do this, but took those persons out of the ship, allowing her to go free on her voyage, the persons so taken were in an unlawful custody, and the Government of the United States was bound to restore them to the country from under the protection of whose flag they had been taken. He restores them accordingly.

The first observation that naturally presents itself to the mind on reading this is, that the American Minister does not profess to rest his case on any known and established rule of international law. The rule which he invokes is, in his own language, "unsettled"—a rule uncertainly established,—one respecting which "the books of law are dumb," &c.; and he admits by implication, if not in express terms, that it is a rule for the establishment of which the United States of America have always contended against other nations. For, in subsequent passages of his despatch he speaks of it as "an old, honoured, and cherished American cause;" "the most cherished principle," "the essential policy" of his Government, &c.

Admitting that whenever there is any doubt or dispute, or wherever it is reasonably practicable to bring the captured vessel into port for adjudication, it is right to do so, we deny the rule laid down by the American Minister as a rule obligatory in all cases, and foresee much mischief if it were adopted in its entirety.

Its first effect would be to tie up most unfairly the hands of belligerents, and confer on neutrals most dangerous powers of evading the law of nations. The American Minister plausibly argues in favour of his theory, "The captor is armed; the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless." How the neutral is "disinterested" we confess we do not see; and with respect to the interest of the captor, his interest in general is to bring the vessel into port, for by taking the goods or persons, and forbearing to capture the ship, he sacrifices a prize.

The American Minister, indeed, admits that certain circumstances might dispense with the rigour of his rule—namely, the consent of the authorities of the captured vessel, stress of weather, inability to furnish a prize crew, etc. But many cases occur in war, where, without any of these excuses, the being compelled to place a prize crew in a captured vessel would be a very great hardship on the captor, for reasons which could not be disclosed to a prize court without the greatest inconvenience and danger. Take this case:—A ship of war, pretty fairly but not over manned, meets, off the enemy's coast, a dozen neutral vessels going directly thither, conveying troops of the enemy. Has she not a right to board them, and take out the illegal freight? Surely such conduct in the neutral vessels is an act of interference in the war, and, at all events, is an evil to remedy which the ordinary process of law would be too slow, and which must be dealt with by instant action—"Silent leges inter arma." Now, the American Minister must say that this course is not open, and that the captor must put a prize crew into each of those vessels, and send them into port for adjudication as prize? To do this would probably require 100 of his crew, and his orders might be to watch a ship of superior force, whom he dared not engage unless with a full crew, and perhaps at a disadvantage even then. Would such instructions be a fit matter to disclose in a prize court? Many similar cases might be put.

Secondly, such a rule would be to the disadvantage of honest neutrals, who, in general, take good care not to carry con-

traband of war, and, if such is smuggled on board their ships, have generally proofs of their own innocence of its presence there sufficient to satisfy any reasonable person. The taking such a vessel into port for adjudication under such circumstances could be productive of nothing but annoyance. To the sham neutral, indeed, the advantage of such a rule is obvious enough.

Thirdly. to the human race in general, war is at all times an evil, and each belligerent nation, as well as every nation which is honestly and truly neutral, has a direct interest in bringing it to a close as soon as possible. But a great obstacle to this would be created if the rules of the law of nations were such as to allow pretended neutrals to drive a flourishing trade between the belligerents, with the power of indirectly aiding either party at convenience or pleasure.

The British Minister, in his reply to the American Minister, on which we commented in our last number, does not dispute the position of the latter which we have been discussing. The English Minister's case did not, indeed, require him to do so; for his position is, that the Trent was not in any way violating the law of nations, so that any seizure of her or her freight was unlawful ab initio.

Such, as appears to us, is the juristical view of the question raised by this affair of the Trent. We have all along purposely refrained from considering the subject in any political or moral view, and now take leave of it.—*Jurist.*

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 "The Editors of the Law Journal, Toronto."

SPLITTING THE PLAINTIFF'S DEMAND.

(*Continued from page 67.*)

The Plaintiff in this case (*Grimbley* v. *Aykroid*) was a grocer, the Defendant a Railway Contractor. The men employed by the latter on the Railway, were paid partly in money, and partly in tickets or orders for goods. Three thousand of these tickets had been given by order of the defendant to the plaintiff who supplied the workmen accordingly, and on settling with them the contractors deducted these orders as so much money.

The defendant having refused to pay the plaintiff these tickets, the latter brought 228 actions upon them in the County Court, each as it would seem on the amount of the supplies to one workman. The question was whether under these circumstances the case came within the provision of the 63rd section (English Act,) against dividing any cause of action for the purpose of bringing two or more suits, or in other words, whether the splitting of a tradesman bill as had been done in this case was a dividing a cause of action within the meaning of the statute. *Pollock, C. B.*, after referring to the older authorities, all of which had been cited and commented on in the course of the argument, and to the judgment of Lord Tenterden in *R.* v. *Sheriff of Herefordshire*, 1 B & Ad. 672, proceeds thus: "The present case however does not proceed upon these authorities, but on the construction of the recent act 9 & 10 Vic, c. 95. The whole question turns upon the meaning of the term "cause of action." This term does not necessarily mean a cause of action on one single entire contract, for there may be one cause of action on several debts contracted at different times; and in by far the greater number of cases a count in *indebitatus* assumpsit, or debt is founded on many distinct contracts, as was pointed out in *Hesketh* v. *Faweett*, (11 M. & W. 360;) and one count may be considered one cause of action.

To provide that one cause of action on one entire contract should not be divided, would be unnecessary and surplusage; and though an argument that a clause in an act of Parliament if understood in one sense would be operative, —in another inoperative,—is not by any means a conclusive one, because it must be admitted clauses are often introduced *ex abundantia cautelâ*, yet it is of some weight; and the probability is that the Legislature, in enacting that a cause of action shall not be divided, meant a cause of action which but for the enactment would be divisable, and when it is considered to what abuses the narrower construction of the term would lead (which is strongly exemplified in the present case, in which 228 actions have been commenced, and 3000 might have been brought), we think we may safely conclude, that the term "cause of action" ought to be interpreted *one cause of action*, and not to be limited to an action, on one separate contract.

But on the other hand, if the term is to comprise all debts that might be included in one count,—debts for work and labor, goods sold, use and occupation, &c.,—though totally unconnected with each other, which might be included in one *indebitatus* count, would be prevented from being divided under this clause,—and if *indivisible*, and the creditor brought an action for any part he would virtually abandon all the remainder by the operation of the latter part of the 63rd section.

In such a case Mr. Justice *Coleridge* held that a similar clause in the Brighton Court of requests act did not apply, —the demand there being for three distinct things, the price of a horse, rent, and goods sold; but he made a distinction between that case and one where a debtor has a bill running on from day to day (*Neale* v. *Ellis*, 1 Dowl. & L. 163.) In such a case, though each item of goods supplied or work done constituted a separate contract, so that after the stipulated price became due the tradesman, could sue for one item, yet the understanding is undoubtedly, that it shall be united with other items and form an entire demand; and doubtless if after several other items were added to the first, the tradesmen were to bring separate actions for each as for a distinct debt, any superior court would deal with such a proceeding as vexations.

It appears then that a great inconvenience would follow, if the term "cause of action" were interpreted to mean *cause of action on one separate contract*,—and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one *indebitatus* count which, according to the modern practice may comprise any number of separate unconnected contracts, wherever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction some restriction must be put on the latter; and we think that we ought to hold that the 63rd section does apply (whether to all debts that could be comprised in one description in one count, as for "goods sold," we need not now decide), at all events to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract but to be continuous, so that one item if not paid shall be united with another and form one entire demand. If that demand exceed £20 it ceases to be within the jurisdiction of the County Courts; and therefore we think that on the facts before us, all the debts claimed fall with that description,—the total greatly exceeding £20,—and consequently they ought not to have been separated into different suits.

ANSWERS TO CORRESPONDENTS.

Most willingly we give publicity to the subjoined letter from Judge Robinson.

It is a radical defect in our Division Court system. This forced benevolence from Clerks and others—this begging from corporations or individuals for aid in supporting Courts of Justice. The public are taxed largely both in Upper and Lower Canada for Court accommodation, but not one shilling is provided for such purposes in the Division Courts.

In County towns the Councils are generally willing enough to make provision—indeed Sarnia appears to stand alone in its dollar economy. But the matter should not be left to whim or caprice, for the general public have as much if not more interest in these tribunals as in others of a higher jurisdiction.

As respects the Division Courts held in County towns the evil complained of might be remedied by a brief enactment striking out of section 2 of the U. C. Act, cap. 127, the words "other than the Division Courts," but this would not accomplish all that is desirable—there should be some general provision touching all the Courts to secure for them, as a matter of right, proper accommodation for their sittings.—EDS. L. J.

To the Editors of the Law Journal.

GENTLEMEN—May I trouble you by calling your attention to a serious defect in the administration of justice. The County Councils have the right of refusing to let the Division Courts be held in the Court Room of the County. In this County the Clerk of the Division Court held in Sarnia is obliged to pay $1 out of his own pocket every time the Division Court is held in the Court House. Perhaps you would be good enough to take notice of this in your journal. If attention were called to it a remedy might be applied.

Your obedient servant,

CHARLES ROBINSON, Co. J.

P. S.—The $1 charged is for cleaning, &c., of the room and goes to the attendant, but should not the public pay this, not a poor Clerk?

Sarnia, 17th March, 1862.

To the Editors of the Law Journal.

DEAR SIRS—There are many little amendments very much required to facilitate the better working of the Division Court system, and if the "Clerk's Conventions" had become general and properly continued, much good would have resulted in bringing about a more perfect and uniform system.

There is no doubt but during the present session of the Legislature some amendments will be made to the Division Court Act, and it is highly necessary that when the Act is overhauled that *all* the amendments necessary should be made, and the question is whether our Legislature will be in possession of all the alterations needed.

There are one or two matters I wish to draw your attention to for an explanation, as the *Law Journal* always comes to the rescue of the bewildered, and is the highest court of appeal for Division Court disputants. It would seem, according to the 124th section of the Act, that it is the duty of Clerks to summon a jury for *each* sitting of the Court, whether a jury has been demanded or not. I believe some Clerks always summon a jury for every Court, and the 132nd section of the Act still further confirms that a jury should be summoned for each Court, which says, "If the Judge wishes a jury to try any suit, the Clerk shall instantly return a jury of five persons present." Now, if no jury is summoned to attend the Court, it would appear that such selection is left entirely with the Clerk, a fine opportunity, certainly, for suitors to charge a Clerk with packing a jury. But if fifteen jurors are regularly summoned to attend each sitting of the Court, the process would be regular enough. On the other hand, if jurors are summoned and none required, how is the cost of summoning them to be paid? I don't know of any provision for such expense. Furthermore, it would seem very absurd to summon fifteen jurymen to attend a Court where they were not needed at their own expense.

There is another matter in connection with the jury system that requires altering; that is, in the mode of selecting them. The Act requires them to be selected from a copy of the Collector's Roll, commencing with the first name and going through the whole roll. Now, the Collector's Roll is alphabetically arranged. By this system persons of the same name, families, are sure to be summoned. I had an instance in my Court not long ago where fifteen jurors were summoned, and eleven out of the fifteen were of the same name, and either brothers or cousins, and when the five were sworn, four of the five were of the eleven. One of the suitors looked up at the Court and sarcastically said, "I don't know how I stand with this family." Now, where persons are selected in this way, I should think such circumstances would frequently occur in old-settled portions of the country.

I see by the 51st section of the Act, that if costs are not paid by the plaintiff in the first instance, a power is given to the Judge to order the amount to be levied by execution. How or where is a form of *fi. fa.* to be obtained for such cases?

Yours, &c., CLERK 6TH DIVISION COURT CO. NORFOLK.

[The 122nd section, as our correspondent suggests, is open to question, which ought to be finally settled by enactment; but we do not understand the words "summoned in rotation, beginning with the first," to mean that of necessity the Collector's Roll must be gone through with name for name in the order in which they are entered, for in the next section it says, "and if there be more than one such township or place within the Division beginning with *the Roll*" (not with *the first person* on such roll) "for that within which the Court is held, and then proceeding to that one of *the other Rolls* which contains the greatest number," &c.

The first part of the clause says that the jurors "shall be *taken* from the Collector's Rolls," &c. The after provision is how they are to be "summoned"

We are not aware that there has been a decision by any Judge on this point.

No form of order or execution has been framed by the Board of Judges. Unless applied for at the hearing and in presence of the party liable, we do not think a Judge would make an order absolute without a previous order to show cause. The remedy, therefore, by ordinary summons would be quite as easy a mode of recovering fees.

The 124th section cannot be isolated but must be read in connection with other provisions of the Act; and unless the Clerk's action is required under the 120th section, no jury need be summoned. It would be an intolerable burden to the public to have a jury in attendance at every Court, whether required or not. The jury called at the instance of a party to a suit and the fees for summoning and for attendance, &c., are chargeable only against him.

The 132nd section does not, in our view, show what our correspondent suggests—it says the Clerk shall return a jury "of five *persons present*," not five *from the jury panel*, or five of the jury in attendance at the Court, and is rather an argument the other way.

Disappointed suitors are ready enough to make unfounded charges against officers, but a Clerk who must have a general acquaintance in the neighbourhood will always be able to set such suggestions at defiance by selecting "first class men."—EDS. L. J.]

U. C. REPORTS.

ERROR AND APPEAL.

(Reported by ALEXANDER GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*

*(*Before the Hon. Sir J. B. ROBINSON, Bt., C. J.; the Hon. W. H. DRAPER, Q. B., Chief Jus., C. P.; the Hon. Mr. Vice-Chancellor ESTEN; the Hon. Mr. Justice BURNS; the Hon. Mr. Vice-Chancellor SPRAGGE; the Hon. Mr. Justice RICHARDS) and the Hon. Mr. Justice HAGARTY.)

HALL v. COLDWELL.

Mortgage—Dormant Equities—Statute of Limitations—Infancy

Held, that the Dormant Equities Act does not apply to cases of actual mortgage—that is, where the proviso for redemption appears on the face of the instrument creating the incumbrance.—such cases are to be dealt with under the 11th clause of the original Chancery Act.

So long as the mortgagor remains in possession of the mortgaged estate, the twenty years limited for him to redeem does not begin to run for so long as he holds possession, he is entitled to pay or tender the mortgage money and interest, and if in the meantime the mortgagee should take proceedings to dispossess him by ejectment, he could, at any time before judgment, stay proceedings by paying the amount due into court, with costs

In mortgage, as well as other cases, the disability on account of infancy is to be allowed for in the computation of the time allowed by the statute (chap. 88 of the Consolidated Statutes of Upper Canada) for the bringing of actions.

This was an appeal from a judgment of His Honor V. C. ESTEN, overruling the demurrer put in by the defendants.

The bill in the Court below was filed on the 20th October, 1859, by *James Coldwell*, against *Hezekiah J. Hall* and *John Maxwell*, setting forth that one Robert Coldwell, the father of the plaintiff, was, in the year 1835, the owner of lot number 104, in the town of Guelph, containing, by admeasurement, one quarter of an acre, with a valuable house thereon, erected by him: that on or about the 10th day of March, in that year, the said Robert Coldwell mortgaged the said lot and premises to the above-named defendant, John Maxwell, to secure £15, and interest, on the 4th February, 1837: that Robert Coldwell continued in possession of the premises until the time of his death: that sometime in the month of May, 1838, and while he was in possession of the premises, he died intestate, leaving a widow, and the plaintiff, his only son, him surviving: that at the time of the death of Robert Coldwell, plaintiff was an infant, under the age of two years: that plaintiff and his mother continued in possession of the premises for a short time after the death of his father, and until possession thereof was taken by defendant, John Maxwell: that some time in the year 1839, and about a year after the death of plaintiff's father, Maxwell having threatened proceedings at law upon the mortgage, entered into possession of the said lot thereunder, and took the rents and profits thereof, and so continued in possession, and in receipt of the rents and profits, until some time in the year 1842: that Maxwell did, sometime in the year last mentioned, make an assignment of his interest in the lot to the defendant, Hall, subject to the equity of redemption, as appears by the registration of another assignment, dated in the year 1853, reciting and purporting to confirm the said assignment made in the year 1842, which had not been registered, and is stated to have been burnt: that Hall entered into possession of the lot at the time of the assignment of the mortgage to him, in the year 1842, and had so continued in possession, and in receipt of the rents and profits thereof, at the time of filing the bill: that Maxwell and Hall had received from the rents and profits of the lot much more than the mortgage money and the interest thereon, and that the mortgage money and interest were over paid by rents and profits before plaintiff arrived at the age of twenty-one years: that at the time Maxwell entered into possession of the lot, there were good and valuable houses and buildings thereon, which were burnt down while in possession of Hall, that plaintiff is not aware whether the house and premises so burnt down were insured by Hall or not; but if not, your plaintiff submitted that he should have insured the said house and premises, as being a mortgagee in possession: that at the time of the death of his father, the equity of redemption of the mortgaged premises was vested in plaintiff, who was an infant of less than two years of age: and who became of the age of twenty-one years on the 21th day of November, 1857: and prayed the usual redemption decree.

To this bill the defendants demurred, and showed for cause of demurrer that the bill did not contain any matter of equity wherein the Court could ground any decree, or give the plaintiff any relief against the defendants; and for further cause of demurrer, that it appeared by the bill that the statute commonly known as the Statute of Limitations with respect to real property, was an effectual bar to the relief sought by the plaintiff in the suit; and also, that it appeared by the bill, that the equity sought to be thereby enforced, arose before the passing of the act to establish the Court of Chancery in this Province; and that the act passed in the 18th year of the reign of Her Majesty Queen Victoria, intitled "An Act to amend the Law as to Dormant Equities," was therefore also an effectual bar to the relief sought by the plaintiff: wherefore, and also for that, the defendant Maxwell was an unnecessary party to this suit, and for divers other imperfections, &c., the defendants did demur.

Upon argument the demurrer was overruled, with costs.*

From this order the defendants appealed, assigning as reasons of appeal:

1st Because it appears, upon the face of the bill, that before the filing thereof, more than twenty years had elapsed since Maxwell entered into possession of the lands and premises sought to be redeemed; and the provisions of the twenty-first and other sections of the Consolidated Statutes of Upper Canada, (4th William IV., chap. 1, sec. 26.) intitled "An Act respecting the Limitations of Actions and Suits relating to Real Property," &c., are therefore an effectual bar to any relief being decreed upon the said bill.

2. Because it also appears from the said bill, that the estate of Maxwell in the said lands and premises had become absolute at law before the fourth day of March, 1837; and that therefore the

* See 6 U. C. L. J., 141.

provisions of the eleventh section of the Act of the Parliament of Upper Canada, passed in the seventh year of the reign of His late Majesty King William the Fourth, intitled "An Act to establish a Court of Chancery in this Province, (Consolidated Statutes of Upper Canada, chap. 88, sec 27,) present a further bar to the relief sought, inasmuch as there are no circumstances therein appearing which would make it reasonable or just for such being decreed, and

3rd. Because it also appears from the said bill, that the claim or interest which the respondent seeks thereby to recover arose before the fourth day of March, 1837, and that therefore the provisions of the statute passed in the eighteenth year of Her present Majesty's reign, intitled "An Act as to Dormant Equities," (Consolidated Statutes of Upper Canada, chap. 12, sects. 59 and 60,) have effectually precluded any disturbance of the title of the appellants, which is valid at law notwithstanding any of the grounds or matters alleged in the bill.

In support of the decision of the Court below, the plaintiff assigned as reasons:

1st. That the Statute of Limitations is no bar to the relief sought by him.

2nd. That the said Court of Chancery, under section 11 of 7th William IV., chapter 2, was fully warranted, by the circumstances of the case, in making the said order.

3rd. That the Act as to Dormant Equities is no bar to the relief sought.

On the appeal coming on to be argued, *A. Crooks*, for the appellant, referred to *Barkworth* v. *Young* (4 Drew. 1 S. C. 3 Jur. N. S. 34), to show that a statutable bar might be relied on by demurrer. Here the right, he contended, had accrued before the 4th March, 1837, default having before then been made, and *Brown* v. *Cole* (14 Sim. 427) shows the right accrues on default being made.

That the Legislature finding the rule introduced by the Chancery Act insufficient, had introduced the 18 Victoria, known as the Dormant Equities Act, and intended to apply to mortgages as well as other cases. (*Attorney General* v. *Grasett*, 8 Gr. 130; *Wragg* v. *Beckitt*, 7 Gr. 222.)

Then the Statute of Limitations bars the plaintiff's right to recover. Twenty years had expired before the filing of the bill, and this plaintiff does not come within any of the exceptions mentioned in the disability clause.

The defendants are also entitled to the protection intended to be given to mortgagees, under the 11th section of the Chancery Act.

R. A. Harrison, and with him *Thos. Hodgins*, for the respondent.

It is not shewn that the 20 years had expired when bill filed; the intendment will be against the defendant, who might have answered and shewn distinctly how this fact was; but admitting that the 20 years had elapsed, then it is contended that it does not operate as a bar to the right sought.

It was not intended by the present Statute of Limitations to make any alteration in respect to disabilities which operated to protect parties rights before the passing of the act: thus, if the person entitled to the equity of redemption were under disability when the mortgagor took possession, the time would not begin to run. The defence intended to be afforded by the 11th clause of the Chancery Act cannot be taken advantage of upon demurrer; but if the Court should be of a different opinion, then it is contended that circumstances appearing upon this bill are wholly insufficient, and that mortgages are not within the provisions of the Dormant Equities Act.

They referred to *Baker* v. *Welton*, 14 Simons, 426; *Cope* v. *Doherty*, 2 De G. & J. 614; *Kearns* v. *The Cordwainers' Company*, 5 Jur. N. S. 1216.

The judgment of the Court was delivered by Sir J. B. ROBINSON, Bart., C. J.

The first half of the special preamble to the statute respecting Dormant Equities, 18 Victoria, chapter 124, forms no part of the clause of the Chancery Act in the Consolidated Statutes, U. C which contains the provision respecting Dormant Equities (Con. St. U. C., chap. 12, sec. 59). But it forms the 58th clause of that Act, and is sufficiently referred to in the 59th, to enable us to read it in connection with the latter clause. The 58, 59 and 60th clauses give us exactly the provision, I think, in effect, which was embraced in the Dormant Equities Act, while it stood by itself.

My opinion is, that in the case of an actual mortgage, that is, when the condition which relates to redemption is expressed in the deed, the Dormant Equities Act does not apply, but that the Legislature left such cases to be dealt with under the 11th clause of the original Chancery Act.

In that respect I agree with the Vice-Chancellor's judgment. It was obviously intended by the Legislature, I think, to leave the former proviso in regard to mortgages undisturbed, and if so, then we have only to consider how this case stands upon the Statute of Limitations.

The statements in the plaintiff's bill are that the mortgage money was payable on 4th February, 1857, and being unpaid, the estate of the mortgagee became on that day absolute at law; but the mortgagor, Robert Caldwell, was not disturbed in the possession, and continued to live, with his family, upon the premises till he died, which was sometime in the month of May, 1838; he died intestate, leaving a widow and this plaintiff, his only surviving son, the plaintiff being then under two years of age. They remained in possession of the premises till some time in the year 1839, and about a year after the death of the mortgagor, when the mortgagee, Maxwell, entered into possession, and took the rents and profits till some time in the year 1842, in which year he assigned his interest in the lot to the defendant, Hall, subject to the equity of redemption. Hall entered into possession in 1842, on receiving the assignment of the mortgage, and is still in possession.

I think it clear that the statute did not begin to run in the lifetime of the mortgagor, though the estate had become absolute at law, by his failure to pay on the day, for the mortgagor was all the time in possession, and had only to pay or tender the mortgage money; and if the mortgagee had attempted to dispossess him by ejectment, he could, at any time before judgment, have stayed proceedings by paying the amount due into court, with costs. He therefore had never occasion to bring a suit for redemption; and it is clear on the 36th clause of Statute 4, William IV, chap. 1, following what had before been the rule in equity, that the statute in this case did not begin to run till Maxwell took possession, at which time the equity of redemption was in the plaintiff, then an infant.

There is some difficulty in the case, from the want of a precise statement in the bill of the time when Maxwell took possession. If we should take it upon the statement that is made, that he certainly took possession before the 20th October, 1839, then 20 years had elapsed between his taking possession and the filing of this bill. The question is, whether, when the plaintiff has stated that Maxwell took possession about a year after the mortgagor died, which was sometime in May, 1838, he does in effect assert that he took possession before 20th October, 1859?

If we are not at liberty to gather this from the statement, as it is made, then the plaintiff cannot be held to be bound, and the defendant, instead of demurring, should himself have stated at what time he took possession, which he had the best means of knowing.

Assuming that on the principle that all statements ambiguously or doubtfully put in a bill, are to be taken, in the most stringent sense, against the plaintiff, we should hold that about a year from the month of May, in one year, must have expired before 20th Oct., in the next year, then it is contended that still plaintiff in this case is not bound, because of his disability from infancy until three or four years before the commencement of this suit. On the other hand, it is contended, that in the case of mortgagors and their heirs, there is no such exception on account of disability, and that the lapse of years is therefore a conclusive bar. But I think we must hold that in regard to equitable as well as legal interests, and in the case of mortgages as well as in others, the disability, on account of infancy, is to be allowed. We have to consider the 16th, 17th, 28th, 32nd and 36th clauses of the statute of 1854, chapter 1; or rather, taking these provisions as they stand in the existing statute, chapter 88 (Consolidated Statutes of Upper Canada), sections 1, 2, 21, 31, and 46. We have the general rule as regards actions for legal rights, in section 1; namely, that the action must be brought within 20 years next after the time when the right to bring the action accrued. In section 2, we are told

when the action shall be considered to have accrued. Section 21 makes the special provision in regard to mortgages: that a suit to redeem shall not be brought but within 20 years next after the time at which the mortgagee obtained possession of the estate mortgaged, or receipt of the rent or profits, unless when a written acknowledgment of the mortgagor's title, or of his right to redeem, has in the meantime been given. Sec. 31 provides, in effect, that a person claiming any land or rent, in equity, must bring his suit in equity, within the period during which he might have brought an action (at law) to recover, if he had been entitled at law to such estate or interest as he shall claim in equity.

And following all these provisions, comes the 46th section, which enacts, that if at the time at which the right of any person to bring an action to recover any land or rent shall have first accrued, as thereinbefore mentioned, such person shall have been an infant, then such person may, notwithstanding the period of twenty years may have expired, bring his action to recover such land or rent, at any time within ten years next after he shall have ceased to be under such disability.

The 21st clause, which specially relates to mortgages, does not, it is true, contain within it any exception on account of infancy or other disability, but that is because the sole object of that clause was to settle the question at what time the right to sue for redemption shall be taken to begin; that is to say, not from the time of the estate becoming absolute at law, as might without this clause had been contended, but from the time of the mortgagee entering into possession.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

AUSTIN v. SNYDER.

Interference with water privilege—Obstruction of race-way—Consol. Stats. U. C. ch. 47, sec 2.

The first count alleged that the plaintiff was possessed of lands near the river Otonabee, and by reason thereof had a right to the benefit of the water to work his mills on said land, and that the defendant, by throwing slabs, &c., into the stream, had wrongfully obstructed his enjoyment.

The second count stated that a certain race-way had been constructed from a dam on said stream to the said land of the plaintiff, by means whereof so much of the water as was necessary for the purpose of working the plaintiff's mill did and ought to flow through said race-way, but that the defendant wrongfully threw slabs and pieces of timber, &c., into the stream above said race-way, which sank, and prevented the water from flowing in its accustomed manner through said race-way to the plaintiff's land, and so hindered the plaintiff in his enjoyment of the said stream.

It appeared that the plaintiff's land on which the mill stood was not upon the stream, but that between it and the stream, along the race way, a tract of land intervened belonging to one R., from whom the plaintiff held a lease, giving him a right to use the water. Several other persons owned mills above the plaintiff, who were also sued by him at the same assizes, and it was impossible to ascertain how much, if any, of the obstruction was caused by the defendant, and how much by the others.

Held, that this evidence supported the declaration: that the plaintiff was entitled to recover; and that the uncertainty as to the amount of defendant's liability, formed no ground for disturbing the verdict, which was for $40.

Held, also, that as the injury complained of was caused by acts made wrongful by statute (Consol. Stats. U. C. ch. 47, sec 2), and such as the plaintiff could individually recover, for it was unnecessary to refer to the enactment in the declaration, the action not being for any penalty given by it,

The declaration stated that the plaintiff was possessed of certain lands and premises, with the appurtenances, adjacent and near to the river or stream called the Otonabee, and that by reason thereof the plaintiff then of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the waters of the said stream, for the purpose of working the mills of the plaintiff, erected and being in and upon the said lands and premises; and that the defendant, by throwing of slabs and pieces of slabs and other timber into the said stream, had wrongfully and injuriously obstructed the plaintiff in his use and enjoyment of the waters of the said stream for the purposes aforesaid.

In a second count the plaintiff stated that he was possessed of certain lands and premises adjacent and near to the stream or river called the river Otonabee, and by reason thereof was entitled to the use and flow of the said stream for the benefit and enjoyment of the said land and premises, with the appurtenances, and for the benefit and enjoyment thereof a certain channel or race-way was constructed from a certain dam on the said stream, made for the purposes of the said channel or race-way, to the said lands and premises of the plaintiff, and by means of the said channel or race-way so much of the water of the said stream as was necessary for the purpose of working the saw-mill of the plaintiff, erected and being in and upon the said lands of the plaintiff, then of right did flow, and still of right ought to flow, in and through the said channel or race-way to the said lands of the plaintiff; but the defendant, intending to injure the plaintiff in the use and enjoyment of the said stream for the purposes aforesaid, and by the means aforesaid, had wrongfully thrown and did wrongfully continue to throw into the said stream, higher up the same, and above the said dam and channel or race-way, slabs, and pieces of slabs and other timber which sank in the said stream, and into the said dam, at or near the mouth or entrance of the said channel or race-way, and by so sinking they obstructed and prevented the waters of the said stream from flowing in its natural and accustomed manner in and through the said channel or race-way to the said lands of the plaintiff; and by these means the defendant wrongfully and injuriously hindered and prevented the plaintiff in his use and enjoyment of the said stream for the purposes aforesaid, &c.

The defendant pleaded, 1st, not guilty.

2. That the plaintiff was not possessed of the lands and tenements as alleged.

3. That the plaintiff was not entitled to the benefit and advantages of the waters of the said stream or river, in manner and form, &c.

4. That the damage complained of was caused by constructing the dam mentioned in the second count in a careless and improper unsafe and unskilful manner, without providing necessary waste-gates to afford a passage for large quantities of slabs, bark, drift-wood, saw-dust and other substances, annually floating down the said river.

Issue was joined on these pleas.

At the trial at Peterborough, before Richards, J., it was proved that there were many mills besides that of this defendant above the plaintiff's dam: that the plaintiff's mills were obstructed in their working by an accumulation of slabs and pieces of slabs at the entrance from the river into his race-way seemed to be clear, and that he had suffered much damage from it, but it was difficult to prove certainly that a part of the injury was occasioned by any slabs thrown into the river at the defendant's mill, and impossible to ascertain for what portion of the injury the defendant could be held responsible. The jury could only endeavour to make from the evidence a probable conjecture. It appeared that the land in question was not actually upon the river, but near it, and that the land between it and the river, through which the race-way ran, belonged to one Rogers, who had executed a lease of the mill, with the appurtenances, and the right to use a certain quantity of water to drive the machinery specified, to the plaintiff and one Vanalstine, and that Vanalstine had assigned to the plaintiff.

The defendant's counsel moved as ground of non suit at the trial, that the plaintiff had failed to prove that he was entitled to the lands in the declaration mentioned, or to such an interest in them as gave him a right to the use of the waters as he alleged, or that he was, either by virtue of his possession of the lands or otherwise, entitled to the use and flow of the waters of the river *for the purposes and in a manner alleged*: (that is, that he had no right, by reason of any thing stated or proved, to have the waters of the river run into and through his race-way, which would be diverting them from the natural course of the stream.)

Leave was reserved to move for a nonsuit on these grounds, and the jury found for the plaintiff and $40 damages.

Read, Q. C., obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the law and evidence, on the ground that the defendant was entitled by the evidence to a verdict on his second, third, and fourth pleas. He cited *Beadsworth* v. *Torkington*, 1 Q. B. 782; *Brunton* v. *Hall*, Ib. 792; *Cawkwell* v. *Russell*, 26, L. J. Ex. 34; *Wood* v. *Waud*, 3 Ex. 748; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Mills* v. *Dixon*, 4 U. C. C. P. 222; *Tucker Paren*, 7 U. C. C. P. 269; *Mason* v. *Hill*, 5 B. & Ad. 17.

Adam Crooks shewed cause, and cited *Embrey* v. *Owen*, 6 Ex. 369; *Dickinson* v. *The Grand Junction Canal Co.*, 7 Ex. 299; *Whaley* v. *Laing*, 2 H. & N. 476; *Mason* v. *Hill*, 5 B. & Ad. 1;

Miner v. *Gilmour*, 12 Moo. P. C. C. 131; *Lord* v. *The Commissioners for the City of Sidney*, Ib. 481; *Chasemore* v. *Richards*, 5 Jur. N. S. 873; *Addison on Torts*, 10, 63 4; *Rogers* v. *Dickson*, 10 U. C. C. P. 481; *Northam* v. *Hurley*, E. & B. 665, Consol. Stats. U. C., ch. 47, sec. 2, ch 48.

The facts of the case more fully appear in the judgment.

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

The evidence upon the trial proved we think, that there was a great obstruction to the entry of the water of the river Otonabee into the race-way which led from the mill pond to the plaintiff's mill occasioned by slabs and parts of slabs thrown into the river at the mills above the race-way, some of them a long distance above. It was proved that the slabs and what are called grindings, which are parts of slabs which have been crushed into pieces before being thrown in, collected in large quantities at the end of the pond above and near to the plaintiff's race-way, and formed into a solid mass, the grindings filling up the interstices among the slabs.

The effect of this was to lessen the quantity of water in that part, to obstruct its passage into the race-way, and to force it on one side away from the race-way, and down the natural channel of the river.

That the plaintiff suffered great damage from the obstruction was proved clearly. His claim was confined to the year 1860

The difficulty was in making it clear for what portion of the injury the defendant, or any other proprietor of any other mills on the stream higher up the stream, could be justly held liable Several actions had been brought, and were tried at the same assizes, against other mill owners; each defended on his own ground and was in no manner responsible except for such injury as he had himself occasioned by the slabs that had been thrown in by himself or his workmen at his own mill.

It was impossible to shew clearly what proportion the defendant in each action had contributed to the grievance complained of. They clearly could not have been all made jointly liable, and it could be no reason why one of the wrongdoers should not be held individually liable for such wrong as he had done, because other mill-owners had individually committed similar wrongs.

If an arbitration had been held between the plaintiff and all the parties sued, an arbitrator would attempt to settle in the first place what damage the plaintiff had suffered on the whole, and then he might have endeavour to apportion as he best could upon the evidence what portion of the whole damage each should pay, but this could not be so easily done by different juries disposing of different actions. It may have been attempted, and perhaps it was, to take care that the verdicts in all the cases did not make up together an amount much exceeding the whole damage the plaintiff had proved.

Supposing any difficulty on that head avoided so far as it could be, then there was the difficulty of making out with any tolerable degree of certainty what proportion of slabs had come down from each mill especially when we consider that the grindings as they are called, could not well be traced to have come from one mill more than an other, though when whole slabs happened to be marked, and the mark known, they would afford some material for calculation.

It is to be assumed that the jury did as well as they could in the perplexity of the case, and took care to keep within bounds. We do not see that any good ground has been made out for disturbing the verdict so far as regards the amount of damages, or the sufficiency of the testimony to prove the defendant liable.

And that the defendants could all of them have avoided doing the injury complained of by burning the slabs, or otherwise getting rid of them, cannot be doubted. If they could, and have without necessity done a wrong to the plaintiff by throwing them into the river, and leaving them to go wherever the stream would take them, then they must be liable to make compensation for that wrong, which indeed this defendant does not, we think, dispute.

But he objects that the plaintiff has no right of action, for these reasons, that he his not what is called a riparian proprietor, his land not being adjacent to the river; that his race-way leads from the pond—in other words out of the river, for the pond it seems at that place is a natural basin, that had always been covered with water before any dam was there, though the water in the pond was not so deep: that between his race-way and his mill, which is a considerable distance below the pond, there is a tract of land of some width belonging to another party, and lying between his race-way and his mills, along the whole course of the race-way; so that what the plaintiff is in fact claiming is a right to divert part of the water of the river, and carry it through this race-way; and what he complains of is, that by the obstruction from the slabs thrown in, the entrance of his race-way or dam is to a great extent closed, and the water thrown off from it into the natural course of the river, to his great injury as owner or tenant of the mills below.

There are two actions, pending in the Court of Common Pleas by this plaintiff, Austin, against the owners of other mills, for wrongfully throwing slabs into the river above, and thereby contributing in part to the very injury that he complains of in this suit The declaration is the same in these actions as in this against the defendant Snyder, and upon the trial the same objections were taken to the plaintiff's right to recover upon the pleadings and evidence as have been taken in this.

The case of *Northam* v. *Hurley* (1 E. & B. 665) goes far, we think, to support the plaintiff's right to recover on the declaration as it is framed in the present case and in the others, though it is not exactly applicable, because in that case the plaintiff's land, as we read the case, was not upon the same stream as the defendants; but perhaps in substance these cases are not distinguishable from it It is true, as stated in this declaration, that the plaintiff was possessed of lands and premises *near the river*, and by reason of his possessing those lands he had a right to the advantages of the waters of the stream for the purpose of working his mill, for by his lease from Rogers he had, as it was shewn, a right to the use of the waters, as Rogers had, who owns the land all the way to the river; and under such a state of things the case of *Northam* v *Hurley* does seem to support the plaintiff's assertion, that by reason of the possession of lands near the river, he has a right to the use of the water, for Rogers could have taken a portion of the water of the river, and led it to his mills below, except as to any person above him who could truly complain of being injured by such diversion.

The Court of Common Pleas, upon the case argued before them, have come to the conclusion that the legal objections, either as to the form of declaration or as to the variance between the evidence and the declaration in regard to the right claimed by the plaintiff, are not entitled to prevail, and we have seen the judgment they are prepared to pronounce in the case (a) We incline to the same opinion, though in going through the many cases cited we have met with *dicta* of the learned judges which it did not appear to us easy to reconcile with the language of the court in *Northam* v. *Hurley*.

It is further to be considered, as applying to all these actions brought by the different plaintiffs, that the injury which the defendants are charged with is shewn to have proceeded from acts prohibited by our statute, Consol. Stats. U. C., ch 47, sec. 2, namely, throwing slabs and other stuff into a stream; and that the plaintiff, as an individual suffering a private and particular damage from the public wrong, is clearly entitled to sue for such damage. In suing upon that ground we do not consider that he is bound to make reference to the statute, for he is not suing for any specific penalty given by the statute, and we are bound to know that by the public law the act complained of is *in itself* unlawful; and the plaintiff has set forth, and has shewn, that by reason of his possessing land and a mill near the river he suffers a pecuniary damage from the unlawful act of the defendant

We do not differ from what we find to be the opinion of the Court of Common Pleas on the questions involved, and indeed it would be very embarrassing to have conflicting opinions in the two courts in actions by the same plaintiff depending on precisely similar facts.

In our opinion the defendant's rule should be discharged.

Rule discharged. (b)

(a) The cases referred to are *Austin* v. *Shaw* and *Austin* v. *Dickson*, not yet reported.

(b) There was another action brought by the same plaintiff against another defendant, Hughson, the declaration being the same as in this case The jury there found also for the plaintiff, and $20 damages, and a rule nisi obtained by *Eccles*, Q.C., for a nonsuit or new trial, was discharged for the reasons above given.

The Queen v. Roblin

Marriage of minors—Consent of parent or guardian—26 Geo. II., ch. 33.

It is illegal in this country as it was in England before the 26 Geo. II., ch. 33, to marry by license where either of the parties is under twenty-one without consent of parents or guardians, and the want of consent is a breach of the bond given on obtaining such license conditioned that there is no lawful cause or impediment to hinder the marriage.

Semble, however that the eleventh clause of the statute is not in force in this country, and that such a marriage therefore is not void.

(T. T., 25 Vic.)

Scire Facias, on a bond to the Crown, given by defendants Jehiel D. Roblin and Samuel Hull junior. *Plea*, never indebted. The plaintiff *took* issue on the plea, and suggested the following breach:

"And hereupon the said plaintiff suggests and gives the court here to understand and be informed, that the said bond in the said writ of *scire facias* mentioned was and is subject to a certain condition thereunder written, whereby, after reciting that whereas a license of marriage had that day been obtained for the purpose of joining together in holy matrimony John H. Stephen, of Napanee, in the counties of Lennox and Addington, gentleman, and Mary Ann Foote, of the same place, spinster, the condition was declared to be such that if it shall appear that there is no affinity, consanguinity, pre-contract, or any other lawful cause or impediment to hinder the said John H. Stevenson and Mary Ann Foote being joined together in holy matrimony, then the said obligation shall be null and void, otherwise to remain in full force and virtue. Nevertheless, for assigning breaches of the said condition of the said bond, the said plaintiff in fact saith that there was lawful cause and impediment to hinder the said John H. Stevenson and Mary Ann Foote from being joined together in holy matrimony, in this, that the said John H. Stevenson was under the age of twenty-one years, and was not a widower, and that John Stevenson, father of the said John H. Stephenson, then living, did not give his consent to his son being so married, contrary to the form and effect of the said writing obligatory, and of the said condition thereof."

The cause came on for trial at Kingston, before Richards, J. The defendant admitted the truth of the allegation in the suggestion mentioned, when a verdict was entered for the plaintiff, and damages assessed on the breaches at one shilling, subject to the opinion of the court whether on the case the plaintiff was entitled to recover.

A. Kirkpatrick and *Prince* for the Crown. *Richards, Q.C.*, contra.

26 Geo. II. ch. 33 (Imperial act); 14 Geo. III. ch. 83; 33 Geo. III. ch. 5; 38 Geo. III. ch. 4; 59 Geo. III. ch. 15; 2 Geo. IV. ch. 11; 11 Geo. IV. ch. 36; *Reyna* v. *Secker*, 14 U. C. Q. B. 604, were cited on the argument.

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

We assume from the case stated that John H. Stevenson was above the age of fourteen years and under twenty-one at the time he was married, and that it is unnecessary to the determination of the case to refer to the state of the law as it regards the marriage of a boy under fourteen years of age, or a girl under twelve. Both parties we assume were above that age when by law they would be deemed capable of giving their own consent.

Then as to the legal effect of Stevenson being under the age of twenty-one years. In the case of the *The King* v. *The Inhabitants of Hodnett*, (1 T. R. 99,) Lord Mansfield was required to give judgment in a case in which the point to be determined was the effect upon the legality of a marriage of the fact that the girl, who was illegitimate, was under twenty-one at the time of her marriage, and that there was no consent of parent or guardian. His lordship having to consider the effect of the statute 26 Geo. II. ch. 33, upon the question before the court, entered into this explanation. He said that before that statute clandestine marriages, which it was the object of that act more effectually to prevent, "were so far to be sure *practicable* that the courts would not void the contract, but still they were contrary to law." "The law of England," he said, "executed by ecclesiastical courts, prohibited it, and made it unlawful to marry any person in private; so that no clergyman of reputation dared to marry any person without license or banns. If they married with license, there was an oath that the parties were of age; or if under age, that they had the consent of parents or guardians. If by banns, it was *no objection* to the marriage that the parties were under age. All other marriages were illegal; but not being vacated," (that is, not being void,) "the practice still continued. Therefore this act was passed in order to prevent these illegal practices, and" (as he afterwards added,) "only made that less practicable *which was before illegal*."

When parties are married by banns, if either of them should be under age, the publication of the banns in the open manner required gives parents and guardians timely notice of the intended marriage, and an *opportunity* of forbidding it, and if they make no effort to prevent it their *consent* may reasonably be assumed.

When the *marriage* is by license, this *opportunity* of interposing is not afforded, and therefore before granting the license it is right to exact some security that the parties are of age, by which we mean of the full age of twenty-one years.

The law of England, we see, did require it before the 26 Geo. II. ch. 33, was passed, and nothing has been enacted in the province, to dispense with that precaution.

Then as to the English Marriage Act, 26 Geo. II. ch. 33, that part of it which made the marriage by license of a minor without the consent *of parents* or guardians absolutely void, has been repealed in England by the statute 3 Geo. IV. ch. 75; but that repealing act has no force in Canada, being passed since our constitution was given to us.

It is clear that the 26 Geo. II. ch. 33, had not in itself any binding force in this country, not merely because some of its provisions are in the nature of things inapplicable to us, and incable of being *carried out*, for that might not prevent other parts of the same act from being in force to which there might be no such objection, but because by the 18th clause of that statute it is expressly provided that nothing in the act contained shall extend "to any marriages solemnised beyond the seas." It is very clear that it was not intended to be in force in the colonies.

But when by our statute 32 Geo. III. ch. 1, the provincial legislature adopted the law of England as the rule of decision in these words, "that in all matters of controversy *relative to property and civil rights*, resort shall be had to the laws of England as the rule for the decision of the same," they adopted to the extent mentioned not merely the common law of England, but also the statute law, with the exceptions specified in the act, and with other exceptions, though not specified, of such laws as are clearly not applicable to the state of *things* existing in the colony, of which various examples might be cited.

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

The legislature of Upper Canada have so regarded this matter, as appears by the statute 33 Geo. III. ch. 5, sections 1, 3, and 6, 38 Geo. III. ch. 4, sec. 4, and 11 Geo. IV. ch. 36, in which they have recognised the English Marriage Act, in effect, though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnised. We find nothing in the ordinances of the Governor and council of the province of Quebec, nor any thing in the British statutes 14 Geo. III. ch. 83, or 31 Geo. III. ch. 31, or in any other British statute passed between the 26 Geo. II. ch. 33, and the time of our adopting the law of England, which can affect us in this matter, nor any thing in any British or imperial act passed since, which either extends to the colonies generally or to Canada in particular.

The royal instructions to the governors of Canada we know have given to them authority to issue marriage licenses, and such authority has been recognised by the legislature in the statutes we have referred to, and in others.

From what we have stated, then, we draw this inference—that by the law of England, as it stood before the 26 Geo. II. ch. 33,

as well as after, it was unlawful for any person to solemnise marriage otherwise than after publication of banns, between parties both or either of whom were under the age of twenty-one years, without the consent of parents or guardians. It was so far illegal that it was prohibited by law, although before 26 Geo. II. ch. 33, the marriage would not on that account have been absolutely void. Long before the 26 Geo. II., the canons required that no license should be granted to marry without publication of banns, but upon good caution and security taken, and the security was to contain among other conditions, this, that the parties to be married (if under age) had obtained the consent of their parents, (if they be living,) or otherwise of their parents or governors.—(Burn's Ecclesiastical Law, vol. ii., title. "Marriage.") And this law of England has been no further changed by the 26 Geo. II., than by making the marriage void which shall be solemnised without such consent.

Whether the 11th section of the act containing that provision was ever part of the law of this province, by virtue of our adoption of the law of England, may fairly be questioned. If it ever was it must be so still, as we have already mentioned, because the English statute repealing it is of too modern a date to be binding upon us by virtue of our statute 32 Geo. III. ch 1, and it has no relation to the colonies; but it would be difficult to satisfy ourselves, we think, that it ever has been in force in Upper Canada, on account of the impossibility of applying the 12th clause to the condition of things here. We could not therefore have the enactment respecting the consent of parents in its integrity, and as it would work great hardship to have the 11th clause in force without the 12th or any other provision as a substitute for it, we shall, perhaps, if we find it necessary in any case to determine the point, find it right to determine that neither of these clauses could be taken to form part of our law of marriage under our own adoption of the law of England by 32 Geo. III. ch. 1.

But whether we should hold that the 11th section of the 26 Geo. II. is in force here or that it is not, it is still true that the law of England, which we adopted, makes it illegal to solemnise a marriage of a minor by *license* without the consent of parent or guardian. Whatever authority we have for dispensing with publication of banns, by obtaining a license, must be taken, we think, to be accompanied with the direction respecting the consent of parents or guardians in case of minority.

The fact, therefore, of either of the parties being under age, and there being no consent of the parent, would be, in the words of the condition of this bond as set out in the record, "a lawful cause to hinder the marriage" of the persons mentioned in it, because it made it against law to marry them without such consent, whether the marriage would or would not be in this province absolutely void, as it would have been in England under the 26 Geo. II., while no part of it had been repealed.

The clergyman or minister who was requested to solemnise the marriage without publication of banns, and by virtue of the license, would rightly desire to avoid infringing the law, and to that end would rely on the security on which he would assume the license must have been obtained; and the public officer to whom the Governor has, with the sanction of the Queen and of the legislature, committed the duty of issuing marriage licenses, must equally desire to avoid giving a license to do what the law prohibits.

This shews that, whether the marriage for want of the consent of the parent would be void or not, there was, nevertheless, a legal sanction for taking such a bond as in this case is sued on.

Then it is admitted that what is suggested in the record as a breach of the condition is true, and the only question, besides what we have been considering, is whether the objection of want of consent of parents is within the condition of this bond, which makes no mention of that requisite in particular terms, but does require that there shall be "no affinity, consanguinity, precontract, *or other lawful cause or impediment to hinder the marriage.*"

We think the want of consent of the father of the minor, under the circumstances stated, was, as we have already stated, a lawful cause to hinder the marriage, for if the fact had been known we must assume that the license would not have been issued, as it ought not to have been by law, and so the marriage by license would not or should not have taken place, though if the license had issued and the marriage had taken place, it would not have been void.

In our opinion the postea should go to the plaintiff.

Judgment for the Crown.

THE QUEEN v. PLUNKETT.

Highway—Trespass Road—Grant—User—Rector's Power to dedicate.

For a period of nearly 50 years, there have been travelled roads through the Humber Plains, in the township of Etobicoke. These roads were not laid out by any public authority, but, in the absence of regular allowances, were used by the public at pleasure. They at times varied in their course, and were irregular in their direction. On 31st March, 1835, 700 acres, "with allowances for roads, as left by the survey of Deputy Surveyor Hawkins, and all other roads, now travelled," were granted to trustees for Christ's Church, Mimico, and subsequently by them transferred to the Rector. One such road crossed lot No. 1, in 4th range of Etobicoke, leased by the Rector to defendant. When the regular allowances were opened, he obstructed it.

Held 1. That the road had not, before the issue of letters patent, assumed the character of a legal highway; for that no right by dedication could be held to have been gained by the public passing over, while the fee was in the Crown.

Held 2. That nothing in the patent contained, made it a highway, but reserved to the public the easement which before the public had enjoyed.

Held 3. That the easement was the right to use the travelled roads, so long as the regular allowances were unopened, but not longer.

Held 4. That the permission of the Rector, for the time being, or his tenants would not bind his successors, owners in fee, so as to make a dedication against them.

Defendant was indicted at the last quarter sessions for York and Peel for a misdemeanor in obstructing an alleged highway in the township of Etobicoke.

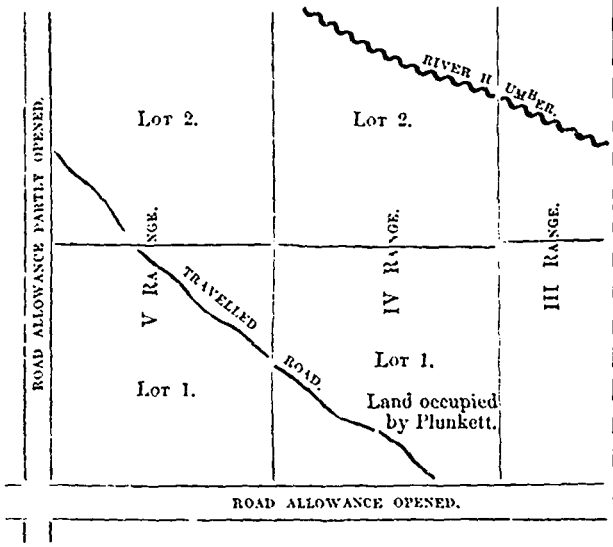
There were two counts in the indictment. The first charged the obstruction to be a ditch cut by the defendant across the alleged highway; and the second, a fence erected by him across the same alleged highway.

The highway was described in each count, as being "a certain road running through, over, and along lot number one in the fourth range of the township of Etobicoke, as surveyed by deputy surveyor Hawkins."

The defendant pleaded not guilty.

It appeared in evidence that for a period much exceeding twenty years there had been travelled roads in different directions through what is known as the Humber Plains, in the township of Etobicoke: that on the 31st March, 1835, the Crown, for the purpose of endowing the Church of England, at Mimico, called "Christ's Church," in the township of Etobicoke, issued letters patent, granting unto the Rev. Dr. Phillips, John William Gamble, and Thomas Fisher, (with a provision for the apportionment of new trustees, in the event of decease of any of the three,) 700 acres of land in Etobicoke, including lot number one, in the fourth range: all described by metes and bounds, "with allowances for roads, as left by the survey of the said deputy surveyor Hawkins, and all other roads now travelled;" to hold in trust for the endowment of Christ's Church, in the township of Etobicoke: Provided that whenever the Governor General should erect a parsonage at the Mimico, and present to such parsonage an incumbent, the trustees should, by deed, convey the 700 acres to the incumbent: that a parsonage was subsequently erected at Mimico, and Dr. Phillips appointed incumbent: that on 3rd April, 1835, William Gamble having been appointed a trustee in the place of the Rev. Dr. Phillips, he, and the remaining trustees, conveyed the 700 acres to the Rev. Dr. Phillips: that on the 15th January, 1845, the Rev. Dr. Phillips demised lot one, in the fourth range of Etobicoke, to Herod Noble, for the term of 21 years: that on the 15th November, 1851, Herod Noble assigned his interest in the lease to Richard Harrison: that the Rev. H. C. Cooper, having succeeded the Rev. Dr. Phillips, as incumbent, Richard Harrison surrendered the lease to him; and, on the 16th November, 1851, obtained a new one from him, for the further term of 21 years: that defendant Plunkett, at the time of the alleged obstruction, was in possession of lot number one, in the fourth range of Etobicoke, under Richard Harrison.

The road crossed defendant's land in the manner indicated in the sketch subjoined.



It was proved that at the time Plunkett took possession of the lot, the public were accustomed to cross by the travelled road. Several witnesses swore that it had been travelled from 20 to 50 years. It was sometimes a little varied in its course, but never materially where it crossed defendant's land. Mr. William Gamble swore, that, as pathmaster, he had directed statute labour to be performed on the road, besides expending money of his own, in improving it. The obstructions were clearly proved. It was also proved that the rector had made application to the township council to have the road closed up; but, for some reason or other, the council refused the application

The rector (Rev. H C. Cooper,) was called as a witness for the defence. He swore that he only allowed the old road to be used, as being a temporary road necessary for the use of the public until the regular allowances for road were opened and made good; and that his application to the council was made in the hope of peace, and not as an acknowledgment on his part that the public had any legal right to use the road as a highway.

The evidence shewed that the allowance for road to the south of Plunkett's land was opened through, and that the allowance to the west was opened so far north as to enable the public to travel to the city of Toronto without crossing Plunkett's lot; but it was sworn that the regular allowances were much longer than, and not so good to travel as the old travelled road.

It also appeared that a great part of the old travelled road had been closed up by the action of the council and otherwise; and that nothing had been done, except by Plunkett himself, to close up or obstruct that portion of it which crossed his lot.

It was objected on the part of the defence, as matter of law, that there was no proof of a highway over defendant's land, either by user or grant: that the public had only the right to cross defendant's lot so long as the regular allowances were unopened: that when these allowances were opened up, that right ceased: that there was no evidence of dedication, either by the trustees or rector, for in law they had no power to dedicate: that the letters patent did not make that a highway which was not one before, but only reserved to the public the easement which the public before then enjoyed: that, strictly speaking, the roads then travelled, had been, by the terms of the patent, conveyed to the trustees, and subsequently to the rector.

The court noted the objections, intimating its intention of reserving them for the consideration of one or other of the superior courts of common law. The jury, subject to the objections, rendered a verdict of guilty.

During last term the chairman of the court of sessions, stated a case for the opinion of this court, and the same was set down and argued.

M. C. Cameron for the prosecution.

R. A. Harrison for defendant.

Robinson, C. J.—It was intended, as I apprehend, that the court should give their opinion for or against the defendant, according as it appeared to them that the road obstructed, had or had not *the character of a highway*, at the time the defendant obstructed it; for there was clear proof of the obstruction.

We must have some regard to what has been the usual course of things in this country, for that bears materially on the question of intention to dedicate.

When the country was but thinly settled, land like the Humber plains, lay for a long time uncultivated and uninclosed. Being less productive than the hard-timbered land, it was in a manner neglected, and it being convenient to traverse a sandy plain of that kind in all directions people took the liberty of crossing where they pleased, sometimes to save distance by a cross road, and at other places to avoid any obstruction, even trifling, which made the proper public allowance less easy or agreeable to pass over.

It has been always well understood in such cases, that whenever the public allowances should be opened, and made fit for use, they would be adopted, according to the evident intention, and the "trespass roads," as they were commonly called, would be abandoned. According to the evidence, this has been done in other places near this defendant's property, and why should the case of the defendant be an exception?

I am clear that it would be contrary to reason to look upon what took place here as a perpetual dedication of the road. The public had not been permitted to use it on that understanding, but only till the proper allowances were opened, when, if not before, the proprietor or tenant of the land had a right, so far as any question of dedication is concerned, to inclose and enjoy it as he did his other property.

We see this done every where, and without contesting the right of the proprietor so to act. It would be very inconvenient and unjust, if, because the public had been from good nature allowed to go across a corner of a man's uninclosed land to save distance, the right to resume exclusive possession of it should be denied, when the public stand no longer in need of the indulgence.

The 313th section of the municipal act does provide that all roads on which statute labor *hath been usually performed*, shall be deemed public highways, unless when such roads have been already altered, or may be altered according to law. What Mr. Gamble stated in this case, did not amount to proof that statute labor had been *usually* performed on the road in question, but came very far short of it, and it appears to me besides, that as that road was only a temporary substitute for the proper allowance, which ran along the side of the lot, this road may, within the spirit of that clause, be fairly said to have been altered when the public allowance was opened, for which it had for mere convenience been substituted.

It is difficult to assign a clear meaning to the words in the patent, dated in 1835, to the Rev. Dr. Phillips and others, "with allowances for roads, as left by the survey of the said deputy surveyor Hawkins, *and all other roads now travelled.*"

At that time no doubt this trespass road was travelled, as others on the lots near it were, which have since been abandoned. According to the grammatical construction of the section, these roads would go with the land to the grantee, as they might do, and yet the easement continue.

Whether there was such an easement is the question which these words in the grant cannot, I think, affect.

In my opinion this road cannot properly be considered to have been a legal highway, so as to prevent its being inclosed by the owner of the lot when the public allowance, which had been laid out by the government in the original survey of the mill reserve was opened.

The reserving of the road from the patent, if the words used made it an exception, would not have the effect of rendering it a public highway within the 313th clause, as "an allowance made by a crown surveyor," nor under any other of the words used in that clause. No right by dedication can be held to have been gained by the public passing over while the fee was yet in the crown; and the permission of the rectors for the time being, or their tenants, would not bind their successors owners of the fee.

Burns J., concurred.

COMMON PLEAS.

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

DEMPSEY v. CARSON.

Replevin—Lien—Tender—Accord and satisfaction—When the property in a chattel passes on an agreement for a sale.

A. having taken a likeness for B., agrees to take in payment therefor $20 in cash and a cognovit for $50, payable at a future date. After receipt of the $20 and tender of the cognovit, and refusal of the defendants to deliver the picture, the plaintiff sues replevin

Held, that the agreement for payment as above was a waiver of the right of lien but did not amount to an accord and satisfaction.

(T. T., 25 Vic.)

Declaration against defendants that *they* unjustly detained from plaintiff two coloured photographic likenesses of John and Sarah Dempsey, value $20.

2nd plea.—That defendants are photographers; that before alleged detention plaintiff employed *them* to make two coloured likenesses of John and Sarah Dempsey for reasonable reward; defendants in pursuance of such employment did make the said likenesses and caused them to be coloured, and found the necessary material therefor; which are the likenesses in the declaration mentioned, and the reasonable reward therefor payable to plaintiff amounted to $25, whereof plaintiff had notice, but would not pay the same, which is still due defendants; wherefore they did not deliver said goods to plaintiff, but detained the same for a lien and security for the price thereof, until, &c., as they lawfully might.

Replication to 2nd plea.—Plaintiff says, after said likenesses were made, coloured, *and ready for delivery*, to wit, on the 26th of February, 1861, it was mutually agreed between plaintiff and defendants, that plaintiff should sign and execute a cognovit to be taken in the first division court of the united counties, in a cause wherein the defendants were plaintiffs, and the now plaintiff was defendant, for the purpose of paying and satisfying the sum of $70, payable on the 1st of April then next, *and that* plaintiff should pay defendants $20, parcel of the said sum on the 1st of March, 1861; and it was further agreed that the execution of the said confession and payment of the said sum should be accepted by the defendants in satisfaction and discharge of their claim against plaintiff for making the said likenesses, and in consideration thereof it was agreed that the defendant should deliver to plaintiff the said likenesses on, to wit, the 1st of March, aforesaid, and plaintiff says in pursuance of the agreement and in part performance thereof he did on the 26th of February, aforesaid, make and execute and deliver to defendants the said cognovit, and the same was accepted by them in part performance of the said agreement; and in further part performance of the said agreement, plaintiff on the said 1st of March, 1861, tendered and offered to defendants the sum of $20, which they refused to accept, and although requested so to do, refused to deliver to plaintiff said likenesses. To this replication defendants demurred. Judgment was given in the county court on the demurrer for the defendants. From this judgment the plaintiff appealed. The case was set down for argument during Trinity Term last.

Blevins, for plaintiff, referred to *Renald* v. *Walker*, 8 U. C. C. P., 37; *Wyatt* v. *Bank of Toronto*, 8 U. C. C. P., 164; *Smith* v. *Hobson*, 16 U. C. Q. B., 568; *Dunny* v. *Poyntz*, 4 B. & A., 568; *O'Rourke* v. *Lee*, 18 U. C. Q. B., 600; *Lake* v. *Biggar*, 11 U. C. Q. B., 170; *Simon* v. *Lloyd*, 2 C. M. and R., 187; 1b. 5 Ty. 701.

R. A. Harrison, contra, referred to *Brown* v. *Jones*, 17 U. C. Q. B. 50; *Hardman* v. *Bellhouse*, 9 M. & W., 506; Addison on Contracts, 238; *Bloxam* v. *Saunders*, 7 D. & R., 396.

DRAPER, C. J.—The definition of the word lien is enough to shew that the property in question does not belong to the defendants; for lien may be defined to be a right in one man to retain and hold something in his possession which belongs to another, until certain demands of him, the holder, have been satisfied and discharged. It is neither a *jus in re*, nor *jus ad rem*, and it may be waived by any act or agreement between the parties by which the right is given up. The defendants resist this action on the ground that they have a right to retain goods made by them for the plaintiff until they are paid for the making. The plaintiff asserts an agreement, partly performed on his part and accepted by the defendants, as a waiver of the lien. The defendants admit the facts, but set up in objection to their sustaining the conclusion of waiver, which the plaintiff deduces from those facts; 1st. That the replication sets up an accord without satisfaction. 2nd. That the premises in the replication could not in law be a satisfaction, though they had been agreed to and actually accepted as such.

The first two objections only present the same question in a different shape, and both confound the right of lien with a distinct thing, namely, accord and satisfaction. An innkeeper has a lien on the goods of his guest, but he has no right to detain such goods if he had previously agreed to give credit for the entertainment. The previous agreement prevents the lien ever attaching, though the debt incurred under it has neither been paid nor any accord and satisfaction of it; and such, I apprehend, would be the case if the goods still remained in the innkeeper's hands after the time the credit had expired, (see *Jones* v. *Thurlow*, 8 Mod. 172). And so, if a special agreement be afterwards made for payment and a security taken for the debt, which is payable at a distant day, the lien, though it had attached, is gone, (*Hewson* v. *Guthrie*, 2 Bing. N. C. 759, per Tindal, C. J.; *Cowell* v. *Simpson*, 16 Ves. 275).

The present case shews a lien existing, a new agreement waiving a present right of payment, an acceptance of a security in part performance of that agreement, and a tender of performance of the residue of that agreement. This is, I think, a clear waiver of the lien, though no accord and satisfaction of the original debt.

I think, therefore, the appellant is right, and that judgment should be given in the court below in his favour on the demurrer.

RICHARDS, J.—A good deal of discussion took place on the argument as to the time when the property passed to the buyer on a sale of chattels, and it may be as well to refer to some of the authorities. In *Dixon* v. *Yates*, 5 B. & A., at page 340, Parke J. observes:

"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. * * * Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chatel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract." In addition to this, however, where payment is to be made at once, the vendor has a lien on the chattel for the unpaid purchase money.

In Brown on the Common Law, at page 468, it is stated:

"When two parties intend an immediate sale of some specific chattel, and have definitively agreed upon its price, if the vendee thereupon tenders such price in payment, it is clear that the vendor will be bound, and that delivery of the chattel will not be necessary in order to pass the property therein to the vendee." *Dixon* v. *Yates* is referred to as authority for this proposition, as also Noy. Max 88, and Sheppard's Touchstone 225, which latter is quoted as follows:

"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he presently tender me my money, and I refuse it, he may take the horse or have an action of detinue." "Again, if I offer money for a thing in a market or fair, and the seller agrees to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another, or when I have bought it we agree that he shall keep it until I can go home to my house to fetch the money, in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another, and upon the payment or tender and refusal of the money agreed upon, I may take or recover the thing."

The present Mr. Justice Blackburn, in his very able work on the contract of sale, beginning at page 170, has a chapter under the following head:

"The effect of a bargain and sale is to transfer the property in the goods without any delivery; in this respect English law differs from the civil law." He then quotes at great length from Pothier, and reviews the English authorities, and fully sustains the doctrine just quoted at the head of the chapter.

Taking the facts of this case as stated in the pleadings, it would appear that at the time the bargain was made, the articles were not in esse, so that could not be said to be a sale of *a specific* chattel, but the subsequent agreement set up in the replication, and which is averred to have been partly performed, seems to me, taken in connection with the fact that the defendants allege that they retained the articles replevied for their lien, to shew beyond all reasonable doubt that what took place was equivalent to a sale on the terms mentioned in the replication, or to waiving the lien on those terms. The acceptance of the cognovit in part performance of the agreement would seem to set at rest any question that might arise on the Statute of Frauds, and the lien was gone by the tender of the balance of twenty dollars as agreed upon.—*Martindale* v. *Smith*, 1 Q. B. 389.

The defendant's error has arisen from not sufficiently distinguishing between a plea of accord and satisfaction set up as an answer to a claim for a pre-existing debt acknowledged to be due, and a tender of what was agreed to be paid as the purchase of a chattel, the property in which had passed to the purchaser by the bargain, and the possession of which the seller could only rightfully retain until he received what was agreed to be paid for it; and readiness and willingness to deliver what was so agreed to be paid, and a refusal to accept on the part of the seller is sufficient, especially when accompanied by a tender, to destroy the lien which the seller had for his unpaid purchase money.

I therefore think the defence fails, and that the appeal should be allowed, and that judgment should be given for the plaintiff on the demurrer to the replication.

Per cur.—Appeal allowed.

PARKER v. MCDONALD.

Covenant against acts of covenantor—Costs.

A. having mortgaged a lot of land to B., subsequently sold it to C., giving covenants against his own acts. B. subsequently foreclosed his mortgage, making C. a party to the suit, who employed a solicitor and incurred costs to the amount of £10 9s. 10d. which he claimed in an action he afterwards brought against A. for breach of his covenant.

Held that the costs were incurred by the voluntary act of C., and were not a necessary consequence arising from a breach of the covenant, and were not recoverable against A.

(T. T., 25 Vic.)

Declaration for breach of a covenant contained in a deed dated the 21st January, 1857. The covenant was, notwithstanding any thing by defendant done, &c., the defendant had in himself good right, full power, and absolute authority to convey lot 33, in range number one, as shewn on a plan of twenty-six acres, part of lot 25, south side of Bleam's road, in the township of Wilmot, with the appurtenances, to the plaintiff, and that defendant had not at any time theretofore done, committed, &c., any act, deed, matter or thing whatsoever, whereby the said lands were or might be affected or encumbered.

Breach—that defendant, before the making, &c., had mortgaged the said lands with other lands to J. V. L. in fee to secure payment of a large sum of money, which mortgage was in full force at the time of making the said covenant, and afterwards proceedings were taken in the Court of Chancery and the equity of redemption was foreclosed, and the title of the said J. V. L. became absolute in equity as well as at law, whereby plaintiff lost the land and his improvements thereon, and was put to expense in defending the Chancery suit.

Pleas—*Non est factum*. 2nd, that the lands were not at the time of the sale thereof by defendant to plaintiff encumbered. Issue.

At the trial in April last at Toronto, before the Chief Justice of Upper Canada, the deed declared on was proved, and also the mortgage as stated, executed by defendant before the covenant was entered into. It was also proved that this mortgage had been foreclosed. The plaintiff was, with others, served with the bill. He consulted a solicitor, but put in no answer. The solicitor, however, attended for him in the master's office until the final order, accounts were taken of payments on the mortgage in order to see what sum was due by defendant, and the plaintiff's solicitor attended while these accounts were taken. His bill against plaintiff for these services was £10 9s. 10d. The jury, under the direction of the learned Chief Justice, gave the plaintiff a verdict for the amount of his purchase money paid, and interest, and reserved leave for him to move to add the costs incurred by plaintiff in the Chancery suit.

In Easter Term, *R. A. Harrison* obtained a rule *nisi* accordingly to which, in the following term,

M. C. Cameron shewed cause. He cited *Hodges* v. *Litchfield*, 1 Bing. N. C. 492; *Parr* v. *Davis*, 1 L. T. N. S. 399.

Harrison, contra, referred to *Clark* v. *Robertson*, 5 U. C. Q. B. 370; *Plumer* v. *Simonton*, 16 U. C. Q. B. 220; *Stubbs* v. *Martindale*, 7 U. C. C. P. 52; *Rex* v. *Dewhurst*, 5 B. & Ad. 406.

DRAPER, C. J.—*Cullen* v. *Wright*, 8 E. & B. 647, comes nearer this case than any which I have seen. But there the court only held the costs of a suit in Chancery, in which the plaintiff had endeavoured to enforce the contract entered into by the defendant in the name of a third party who had not authorized him, to be recoverable, because they were a natural and direct consequence of the defendant's (implied) contract with the plaintiff, that he had such authority. Here the plaintiff, though made a party to the suit to foreclose, was not subjected to any costs of the mortgagee, the plaintiff in that suit, nor did he appear to or incur any costs in defending it; whether his position gave him any right to redeem is unimportant for the purposes of this inquiry. His solicitor told him he had no defence, *but* nevertheless attended the taking the accounts in the master's office for the protection of the plaintiff's interests. These costs claimed by the plaintiff, are those charged by this solicitor for those attendances. They certainly cannot strictly be deemed costs of the foreclosure suit; they do not appear to me to be the natural and direct consequence of the defendant's breach of covenant. They must, I think, be looked upon as incurred voluntarily by the plaintiff, and not as a damage unavoidably incurred. I think, therefore, the rule should be discharged with costs.

Per cur.—Rule discharged.

CORPORATION OF ESSEX v. PARK.

Treasurer of corporation—Separation of Counties—Sureties—Bond.

A treasurer having been duly appointed for three counties, (while united,) upon the separation of one from the other two counties.

Held that a new appointment was not necessary. Consol. Stat. U. C., ch. 54, sec. 159, 174, 51.

An action being brought by a corporation against the sureties of their treasurer, the defendants contended that in case money which had been collected by the treasurer and township duly charged as paid by him, was not demanded by the parties (the government) entitled thereto they were not responsible therefor.

Held that the liability of the treasurer was between the municipality and himself by having received the money as their officer, and his responsibility was not altered by the government not demanding the money.

(T. T., 25 Vic.)

This case was referred back to the arbitrators by rule of court, on the 29th of September, 1860, who took further proceedings in the matter, and in Hilary Term last, *Albert Prince* obtained a rule *nisi*, to set aside the award on the following grounds:

1. The want of any valid appointment of George Bullock as treasurer for the periods during which the defendant was his surety.

2. That as to the bond of 1850, there was no sufficient execution thereof by the defendant, but a conditional or qualified signature; that there was no defalcation while this bond was in force; that neither bond is sufficient in law to support the action; that the resolutions of the county council shew these bonds were not accepted nor intended to be the securities required by the statute.

3. The defalcations alleged are in funds which the plaintiffs are not entitled to recover against the defendant.

4. The auditing and allowing of the treasurer's accounts by the auditors and finance committee of the council preclude the plaintiffs' recovery for defaults prior thereto.

5. The arbitrator has not sufficiently complied with the rule referring back the award in finding the facts required by the court.

6. The arbitrator has improperly refused to inform the defendant of the items of defalcation alleged so as to enable him to answer the same.

7. The evidence on which the award is founded is insufficient to charge the defendant as is shewn by the arbitrator's answer to the question concerning the same.

8. The awarding costs of reference and award to be paid by defendant is an excess of authority.

The following additional objection was raised. Misconduct of the arbitrator in receiving illegal evidence of, and awarding on, matters in respect of which the evidence shewed there would be no legal claim against the sureties.

In Easter Term *Connor, Q. C.*, shewed cause. *M. C. Cameron* with him.

The defendant's counsel gave up the second objection, and stated they should not support the fourth, though, with a view to possible proceedings in equity, they would not formally abandon it.

DRAPER, C. J.—The defendant's first bond was given to the municipal corporation of Essex, Kent, and Lambton, and bore date 30th January, 1850. It recited that George Bullock, as treasurer, for Essex, Kent, and Lambton, had been called upon to give security, and was conditioned that he should faithfully perform all duties as treasurer, should receive and safely keep all moneys belonging to the counties, should pay all such sums as he should be directed by the order of the municipal corporation, should obey all by-laws, and as often as lawfully required should render just accounts for all moneys which should come to his hands as such treasurer, and should not suffer any misapplication or embezzlement of such moneys.

The defendant's second bond was dated the 30th January, 1851, and was given to the municipal corporations of Essex and Lambton, with a corresponding recital and a similar condition.

It was insisted there was no proof that Bullock had ever been appointed treasurer of Essex and Lambton after the county of Kent was set off as a separate county. There certainly was no proof to the contrary, and the recital to the second bond stated expressly that Bullock "as treasurer of the said united counties of Essex and Lambton has been required by the municipal corporation of the united counties of Essex and Lambton to give security for the faithful performance of the duties of his office, and more especially for the due accounting for and paying over all moneys which may come into his hands by virtue of his office." This recital is sufficient evidence both of his appointment, and that the municipal corporation had required him to give security. Besides the appointment of treasurer to these united counties being clearly shewn, I do not see that a new appointment was necessary. (*Vide* Consol. Stat. U C, ch. 54, sec. 169, 174, & 51.

Then as to the two items brought under our notice, the lunatic asylum tax for 1852, stated by the arbitrators to amount to £115 8s. 8d., and second, moneys received for sales of land in Essex and not credited to the plaintiffs for the Baby property.

As to the first, the contention on the part of the defendant, I understand to be, that inasmuch as the government are not claiming anything to be due from the plaintiffs, on account of the lunatic asylum tax, they (the plaintiffs) can have no claim on the defendant as surety for the county treasurer for it. The arbitrator states that he allowed £115 8s. 8d. charged in Mr. Bullock's books as paid to the government on account of such tax when it was not paid; that the sum was received by him as appeared by his books, and was not accounted for, except falsely. It may be true that the government have no claim on the plaintiffs for the money, but if the treasurer received it, he received it as the officer of the plaintiffs, and is accountable to them for it: but it was objected on the part of the defendant that the evidence on which the arbitrator founded his conclusion was illegal; that the entries in the books were not proof against the surety; that the mere verbal statements and explanations of Bullock were insufficient, and that he was not sworn.

There is no direct negative as to the question whether Bullock was sworn. An affidavit filed for the defendant states that the deponent did not see him sworn. The arbitrator states that he does not remember whether he was sworn or not. On the other hand the plaintiffs' solicitor swears that he was present when Bullock was produced as a witness before the arbitrator, and "saw him duly sworn before giving his evidence herein," and further, the arbitrator in an affidavit states, "that the statements of Mr. Bullock referred to in an affidavit filed on the other side, relative to Bullock giving evidence, was received by me with the consent of *Mr. Prince*, counsel for the defendant, as an admission by the defendant of the matters in such statements contained." I think this ought to be conclusive, and that as to this item, the third objection is not sustained.

It is different as to the other, as to which the arbitrator makes the following statement of facts. That in and before the year 1849, one J. B. Baby was treasurer to the plaintiffs, and was a defaulter, and that certain real estate of his in the county of Essex was sold in 1853, to liquidate the amount of the defalcation. That one John Sloan, the then warden, became purchaser for £588 6s. 11d.

That by a resolution of the municipal corporation of Essex and Lambton, Bullock was permitted to become the purchaser of said property by paying the purchase money aforesaid; and thereupon a deed was executed by Sloan to Bullock, and that it was not shewn to the arbitrator that this purchase money had ever been paid.

Taking this in the strongest point of view, it would not establish that Bullock was indebted to the plaintiffs in the purchase money of this lot of land, but that debt was due from him as an individual and not as a treasurer. To make it a debt due by him in the lattter capacity, it must be shewn that the money of his own was so appropriated as to become the plaintiffs, and even then a question might arise whether it would be such a debt as the surety is responsible for; but the facts stated, I have no doubt, do not shew that in this transaction any money came to the hands of Bullock as treasurer, and for the debt due by him on a purchase of land for his own use and benefit, the defendant, as surety in either of these bonds, is not liable.

The defendant's counsel waived supporting the fourth objection, and it is therefore unnecessary to consider it.

As to the fifth objection, I have referred to the new matter submitted to us by the arbitrator. I do not find anything omitted which it is now shewn either upon affidavit or during the argument should have been included. The synopsis of defalcation shews each several amounts in default, in each year separately, and the funds to which the moneys in default belonged.

The sixth objection is not now sustained in fact. No reference is made to it in the affidavits filed on this application.

The seventh objection is involved in the remarks made upon the third, and requires no further observation.

The eighth appears to be founded in mistake. The arbitrator, according to the copy of the award put in, does not award the payment of costs at all, but he assessed the costs of the award at £33 15s. 7d., not making any order as to their payment.

As to the last objection, it seems to me involved in the question as to the Baby estate chiefly, if not entirely. Upon this point at least it is unnecessary to say more. Upon the question of the Lunatic Asylum tax, the remarks made as to the evidence of Mr. Bullock, whether sworn (as the most direct evidence shews he was) or giving statements by way of explanation of the alleged defalcations, or of the meaning of entries, or accounting for the absence of entries in his books, explain the grounds upon which I think it cannot properly be said there was illegal evidence admitted to establish this part of the claim.

It follows from this conclusion, that the award that the verdict should be entered for £701 15s. 7d. is wrong, for there was no legal evidence to charge the surety with the sum of £586 6s. 11d. Though the principal owed that sum to the plaintiffs, it was not for anything that is shewn as treasurer, but in his individual capacity.

Unless, therefore, the plaintiff will consent to reduce the verdict to £115 8s. 8d., the amount of the lunatic asylum tax, the rule for setting aside the award must be made absolute.

Per cur.—Rule absolute.

CHANCERY.

Reported by RICHARD SNELLING, Esquire, Student-at-Law.

BANK OF MONTREAL v. THOMPSON.

Registered judgment—Execution against lands—Relation to date of registry.

1. *Held*, that a registered judgment binds the lands of the debtor at law from the time of registration, so that the Sheriff can deliver execution of them into the hands of whomsoever they may afterwards pass.

2. *Doe d. Dougall* v. *Fanning*, 8 U. C. Q. B. 166, and *Doe d Dempsey* v. *Boulton*, 9 U C Q. B 532, affirmed.
3. The dictum of BURNS, J., in *Thirkell* v. *Paterson*, 18 U. C. Q. B. 75, to the contrary doubted.

The facts appear in the judgment of his Honor V. C. ESTEN, before whom the cause was heard.

Edward Blake for the plaintiffs.

William Proudfoot for defendant.

ESTEN, V. C.—The facts of this case are these: one Shaw made a mortgage to Francis Gore Stanton, and then a mortgage of the same lands to one Gillespie, who transferred this mortgage to the plaintiffs. The defendant purchased the same lands, or rather all Shaw's interest in them, at Sheriff's sale, and afterwards acquired the first mentioned mortgage, and the present suit has been instituted against him by the second mortgagee for redemption or foreclosure, the bill insisting that by purchasing the equity of redemption of the lands he became liable to discharge both mortgages, and that having acquired the first mortgage and obtained an assignment of it, he cannot raise it as a shield against the second mortgage.

The answer states that the first mortgage was made to Stanton, as a trustee, to secure divers judgments which it mentioned; that one of these judgments was obtained by the defendant, Thompson, but in trust for one Powell; that he obtained an assignment of another of such judgments likewise in trust for Powell; that he held these judgments in this way at the time that he purchased the lands from the Sheriff; that after such purchase he acquired the beneficial interest in all the judgments secured by the first mortgage, including the judgments which he held in trust for Powell; that he then obtained an assignment of the mortgage from Stanton; that Benner, one of the judgment creditors, whose judgment the first mortgage was intended to secure, repudiated the trust and proceeded on his judgment, and having issued execution against the lands of Shaw, caused the lands in question to be offered for sale, when they were purchased by the defendant.

It is remarkable that the bill does not state the date of the registration of any of the instruments which it mentions, and that the answer, while it states the fact and date of the registration of all the judgments, nowhere states the date of registration of the mortgage to Stanton, and it ends by insisting that this mortgage must be deemed to be subsisting, that the defendant, Thompson, is entitled to the benefit of it, and that he is entitled to a decree of redemption or foreclosure against the plaintiffs as second mortgagees.

It is quite manifest, I think, that the defendant, Thompson, intended to represent himself as the purchaser of the equity of redemption. Had he intended to rely on his title as a purchaser under a judgment registered before the registration of the first mortgage, he would have been careful to state when the mortgage was registered, and he would not have insisted upon the priority of that mortgage over the plaintiffs, such construction being useless when both mortgages had become extinct through the purchase of the mortgage while under a prior registered judgment.

At the hearing, however, the deeds are produced and shew by the Registrar's endorsement upon them that they were registered. Some evidence is also offered of the registration of the judgments, or at all events of Benner's judgment, and from this evidence it appears that this judgment was registered before either of the mortgages.

I do not know now whether it appears otherwise than by the answer that any writ had been delivered to the Sheriff for execution on Benner's judgment, or that the sale in question was effected under such a writ. Supposing it to appear that the sale was effected under a writ upon a judgment registered before the registration of the mortgages, and supposing that fact to be material and to confer a paramount title, I think the Court cannot ignore it merely because the defendant has misapprehended his rights and has supposed himself to stand in a lower position than he really occupies. Suppose, for instance, the answer of a defendant to state a first mortgage with power of sale—then a second mortgage, then a third mortgage, and that the first mortgagee had exercised his power of sale and the defendant had purchased the estate under it and had afterwards acquired the second mortgage, and to insist that this mortgage was subsisting and prior to the third mortgage, the Court would consider that the defendant had acted foolishly and had wholly misapprehended his rights, but could not ignore the fact that the purchase under the power of sale contained in the first mortgage had then in fact extinguished the second and third mortgages and conferred on the defendant a title paramount to both.

The facts being stated and proved, the Court must recognise their legal effect, however much it may be misapprehended by the defendant himself. If the proof of the material facts is defective, I think the defendant ought to be at liberty to supply what is requisite on proper terms as to costs.

This leads me to the consideration of the question which has been raised and argued with much ability on both sides, namely, whether, after the passing of the 9th Vic., chap. 34, and before the passing of the 24th Vic., chap. 41, the Sheriff's deed conveyed the estate that the debtor had at the time of the registration of the judgment under which the sale was effected, or the estate that the debtor had at the time of delivering to the Sheriff for execution the writ under which the sale was performed.

Four cases were cited on this point—*Doe d. Dougall* v. *Fanning*, 8 U. C. Q. B 166; *Doe d. Dempsey* v. *Boulton*, 9 U. C. Q. B. 532; *Thirkell* v. *Paterson*, 18 U. C. Q. B. 75; *Wales* v. *Bullock*, 10 U. C. C. P. 155.

In the case of *Doe d. Dougall* v. *Fanning* and *Doe d. Dempsey* v. *Boulton*, the precise point arose and was decided. In both these cases judgments were registered, the deeds were executed to purchasers by the debtor, then the writ was delivered to the Sheriff and he proceeded to a sale under the judgments, and in both cases it was decided by the Court of Queen's Bench that the Sheriff's deed prevailed over the deeds to the purchasers, on the principle that under the 9th Vic., chap. 34, the Sheriff's deed conveyed all the estate that the debtor had at the time of registration of the judgments, and that that Act applied to the writ of *fi. fa.* against lands introduced by the 5th Geo. II., and then in use, and did not reintroduce the writ of elegit which the 5th Geo. II. is considered to have abolished, which question was expressly raised and decided in the case of *Doe d. Dempsey* v. *Boulton*. In the case of *Thirkell* v. *Paterson* this point did not arise at all. The only question there was whether a deed was void against a prior judgment registered before it, and it was decided that it was not, because the eighth clause of the 13th & 14th Vic., chap. 63, related only to subsequent judgments; the question whether the Sheriff's deed related to the date of registration or of the delivery of the writ did not arise, because both the registration and delivery of the writ were subsequent to the deed. Mr. Justice Burns, however, expressed his view generally of the operation of the several clauses of the Act relating to this point. His opinion was that the registration of the judgment created only an equitable charge, and that the Sheriff's deed did not relate to the registration so as to avoid mesne conveyances, but only to the delivery of the writ, although the purchaser would hold subject to the equitable charge. The case of *Wales* v. *Bullock* was considered to resemble the case of *Thirkell* v. *Paterson*, although it differed from it in the material circumstance of the registration of the judgment being prior to the deed, and upon the question of the relation of the Sheriff's deed the Court follows the opinion expressed by Mr. Justice Burns in the case of *Thirkell* v. *Paterson*. The point decided in *Thirkell* v. *Paterson* did not arise in *Wales* v. *Bullock*, but the question which it really presented had been expressly decided in the case of *Doe d. Dougall* v. *Fanning*, and *Doe d. Dempsey* v. *Boulton*, which were not cited, while the opinion of Mr. Justice Burns, which however much it might be entitled to weight, was in this respect extra-judicial, was followed as the rule.

Under these circumstances I should consider it my duty to follow the decision in the cases of *Doe d. Dougall* v. *Fanning* and *Doe d. Dempsey* v. *Boulton*, even if my opinion did not agree with it, which, however, it does to the fullest extent. The 13th section of the 9th Vic., chap. 34, is combined in the Con. Stat. with the second section of 13 & 14 Vic., chap. 63. This juxta-position lends some countenance to the construction that registration creates a mere charge in equity. But the 13th section of the 9th Vic., chap. 34, created no equitable charge when it first became part of the law of the land. The equitable charge was created

for the first time by the second section of the 13th & 14th Vic., chap. 63, four or five years afterwards. Between the 9th Vic., *chap. 34, and the 13th & 14th Vic, chap. 63, the equitable* charge did not exist—what, during this interval, was the operation of the 13th section of the 9th Vic., chap. 34? Doubtless it was as decided in the cases of *Doe d. Dougall* v. *Fanning*, and *Doe d Dempsey* v. *Boulton*, to cause the judgments to attach upon the lands from the time of registration so as to render it liable to execution into whatever hands it might afterwards come. No other meaning can be attached to the third clause. When it was first enacted it created no equitable charge whatever; it authorised the Sheriff to offer for sale the estate belonging to the debtor at the date of registration, and that was its only operation. The law continued in this state until the passing of the 13th & 14th Vic., chap. 63, which created this equitable charge for the first time. It did not, however, vary the operation of the 9th Vic., chap. 34; the remedy it gave was cumulative, and it likewise subjected to the payment of debts various interests which were not before liable to execution. The 13th section of the 9th Vic, chap 34, enacted that registered judgments should bind lands in this Province in the same manner as docketed judgments bind lands in England. Now the precise effect of a docketed judgment was to bind the lands into whatsoever hands they might afterwards pass so that the Sheriff could deliver execution of them as if the intermediate conveyances and incumbrances did not exist. The same effect must have resulted from registration of judgments in this Province. It is said that no such intention can be collected from the provision of the 9th Vic, chap 34. But it appears to me, with great deferenee, that no other intention can be attributed to the Legislature than what I have mentioned. It appears to have been considered that such a construction would be attended with great inconvenieace. But what greater inconvenience exists, in case of a judgment, than in case of a mortgage with power of sale? Such a mortgage may remain dormant for years, during which the property may pass through twenty hands, and the power of sale may be exercised and all the intermediate conveyances defeated, some of which may be Sheriff's deeds If a judgment be registered it is notice to all the world; any one purchasing the estate affected by it will see it paid off out of his purchase money or require the estate to be released from it, and if he neglect these ordinary precautions he must blame his own folly. I have no doubt that while the practice of registering judgments continued, a registered judgment bound the lands at law from the time of registration, so that the Sheriff could deliver execution of them into the hands of whomsoever they might afterwards pass.

In deciding this I follow the cases *Doe d. Dougall* v. *Fanning*, *Doe d Dempsey* v. *Boulton*, both, because I think they were rightly decided, and because I am satisfied that the Court of Common Pleas would have followed them in the case of *Wales* v. *Bullock* had they been cited. The opinion of Mr. Justice Burns, expressed in the case of *Thirkell* v. *Paterson*, although entitled to he greatest respect, being only an exposition of his views on the general operation of the Acts, was unnecessary to the decision of that case.

Supposing it to appear, therefore, in the present case, that the Sheriff's sale was under Benner's judgment, and that this judgment was registered before either of the mortgages, I think the defendant acquired a title paramount to them both. It is true that he thought he was purchasing the estate subject to both the mortgages, and he paid, it is said, only twenty shillings for it, but he intended doubtless to purchase whatever he could get, which he thought, however, was only so much. The Sheriff could sell neither more nor less than the estate that Shaw had at the time of the registration of Benner's judgment, and Thompson could purchase nothing more nor less. The sale is not impeached and must operate according to its legal effect so long as it is suffered to stand. Whether it can be maintained is another question, which it would be premature and out of the place at present to discuss

The learned counsel for the plaintiffs asked leave, if my judgment should be against him, to amend the bill for the purpose of impugning the sale. But such a bill would be substantially a new bill, and I think the proper course is to dismiss the present bill without costs, in consequence of the uncertain state of the authorities, and without prejudice to any other suit which the *plaintiffs may be advised to institute.*

I do not think that the defendant, at the time that he purchased from the Sheriff, was a mortgagee so as to be within the protection of the clause of the Act. This provision is a very singular one and not to be extended beyond the letter. It seems to contemplate a purchase by a mortgagee from himself, and that although he may purchase the equity of redemption at a Sheriff's sale, and pay so much less for the estate in consequence of the existence of the mortgages, and must be deemed therefore as undertaking to discharge them both, he may hold the second mortgage at arm's length. I certainly would not extend this power to a person who was not a mortgagee at the time, but became so afterwards, and this was the case, I think, with the defendant, Thompson. The protection must at any rate be confined to all judgments belonging to Powell, and of them he was a mere trustee

I think the objections to the registration ought not to prevail, but that Thompson is bound by the submission in his answer, and that the decree should be for redemption.

Decree for redemption.

PRACTICE COURT.

Reported by RODT. A. HARRISON, Esq., *Barrister-at-Law.*

IN THE MATTER OF THE ARBITRATION BETWEEN AMOS A. WRIGHT ET AL., AND THE CORPORATION OF THE COUNTY OF GREY.

Clause of reference—Power to revoke—When allowed.

On an application by a party to be allowed to revoke a submission to arbitration, the discretion of the court to which the application is made ought to be exercised in the most sparing and cautious manner.

The court in this case, considering the balance of conveniences and inconveniences to the parties, the unsatisfactory language used in the contract between the parties, the uncertainty as to what was intended by the clause of reference, the ample powers with which the Courts and Judges are armed for the purposes of compulsory references, allowed the clause of reference to be revoked

March 3, 1862.

On the 13th January, 1860, Messrs. Wright & Co. entered into a contract with the Corporation of the County of Grey, for the purpose of gravelling and improving certain roads in the county. The contract recites a by-law of the Corporation, passed on the 28th January, 1859, authorizing the raising, by way of loan, the sum of £50,000, to be expended upon the roads mentioned in it. Messrs. Wright & Co. tendered to do the work for $200,010, payable in debentures of the Corporation, which tender the Corporation accepted. The work was to be done according to certain plans and specifications attached to the contract; one half of the work to be finished in one year, and the other half in two years from the date of the contract; payments were to be made monthly, by delivering debentures of the Corporation, according to the work done from time to time, to be estimated and certified by the Chief Engineer of the county.

The contract contains this clause: "And it is also agreed between the parties hereto, that no extras shall be allowed for, unless by the order of the Chief Engineer of the parties of the second part, or some of his assistants, and the ordering of any extras shall in no way invalidate the covenants contained herein, but the said extras shall be deemed to be included in said covenants; and should the parties of the second part see fit to make any alteration in or addition to the said works, including the extra works, they may do so, upon giving to the parties of the first part written instructions for the purpose, signed by their Chief Engineer; but it is understood, that should the work be lessened in some place or particular, that the parties of the first part shall be allowed, under the said Engineer's directions, to do work elsewhere, or in some other particular, so that including extras, the amount of the work to be done shall amount to the said sum of $200,010; and it is understood, that the estimates for extra work shall be returned monthly"

The contract contains this further clause: "And also, that the parties of the second part shall pay to the parties of the first part, for the extra works that may be ordered, according to the schedule of prices hereunto annexed; and that the parties of the first part shall allow to the parties of the second part for any deductions

that may be made in the work, by order of the said Chief Engineer, of the parties of the second part, or otherwise, according to the *schedule of prices* hereto annexed; but the parties of the first part shall not be entitled to receive any payment for extras until the works in respect of which they shall be made shall have been certified by said Engineer, and the amount of extras in excess of deductions only shall by allowed; and it is understood, that the Engineer shall estimate for extras and deductions, and certify the same monthly, as previously provided, for his estimating and certifying for the work under the contract.

The contract further contains this provision: "And to prevent all disputes during the progress of the works, it is hereby agreed that the Chief Engineer of the parties of the second part shall, in all cases, determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation to be paid therefor. But if any differences shall arise between the parties of the first and second parts, during the progress of the works, or after the completion of the contract, then after the said completion, the same shall be referred to the award of Walter Shanley, whose award shall be final."

The contract then concludes with this provision: "And it is hereby agreed, that all extra work ordered to be done by the Engineer, or his assistant, in excess of the work hereinbefore referred to, shall be paid by the parties of the second part to the parties of the first part, notwithstanding anything to the contrary contained in this agreement."

It appeared that in 1860 some of the members of the Corporation had heard that the contractors were making the expense of the work much greater than the sum appropriated, and the committee of the County Council, appointed for the purpose, instructed the Engineer that he was to guard against the total cost of the work exceeding the $260,010 debentures.

In the month of January, 1861, the County Engineer notified the contractors that the intention of the Corporation was to stop the works when the cost of the work reached the sum of $200 010

On the 1st February, 1861, the County Council passed a by-law that their Warden be authorized to notify the contractors that the County Council intended that the whole work should not, including extras, exceed the contract price, $200,010, and that when that amount of work should be done, the Council would consider the contract at an end.

This by-law was communicated to the contractors, on the 25th March, 1861, and a long correspondence took place between the contractors and the Warden of the County, on the subject of the construction of the contract, and about the amount of work done up to that time. The contractors claimed they had done work exceeding the $200,010, and the County Engineer says that the work done up to the 5th April, 1861, was $177,000, or thereabouts.

The County Engineer swore that he continued on making monthly estimates of work done up to September, 1861, and that upon the 17th of that month, the work done by the contractors reached the contract price $200,010. Up to this period, the contractors had not rendered any account demanding any particular sum for excess, but merely stated they had done work largely in excess of the contract.

On the 18th September, the contractors notified the Warden that they considered, under the former notice they had received, that they were to discontinue the completion of the contract, and they desired to be informed what course the Council intended to pursue.

On the 27th September, the committee met, and a communication was made to the contractors, asking them to furnish an account of their demands, if they considered that work had been done to the amount of the contract, and to state what further sum would be required to finish the contract after the expenditure of the $200,010. In reply, the contractors state, that they cannot give an account of what work they had done, as it would take two months to make a final measurement.

On the 9th October, the contractors gave the Council an approximate estimate of what would be required, in order to finish the work contracted for, making it $20,520. On the same day, the County Council resolved to abide by the notice which had been given to the contractors on the 25th March previous, and that resolution was communicated to the contractors.

More correspondence took place between the parties, which it is *not necessary* to allude to.

On the 12th December, 1861, a Judge's *fiat* was obtained, that the submission stated in the paragraph above quoted from the contract, beginning with the words—"if any difference," &c., should be made a Rule of the Court of Queen's Bench, and the same was accordingly made a rule of court on the same day.

On 18th December the arbitrator, pursuant to appointment, attended at the Rossin House in the city of Toronto. Mr Osler, a barrister, appeared for the County of Grey and Mr Robert A. Harrison appeared as counsel for the contractors. Nothing was done at this meeting. The arbitrator, at the request of Mr. Osler, adjourned till 31st December.

On 31st December the arbitrator again attended the Rossin House according to appointment Messrs. M C Cameron and Harrison appeared as counsel for the contractors, and Mr. Osler again appeared for the County. The Warden of the County was also present. A great number of witnesses were in attendance on the part of the contractors. Mr. Harrison opened the case for the contractors, and was about to call his witnesses when Mr. Osler begged for delay in order that particulars of the claim advanced by the contractors might be furnished, and thereupon engineers for both parties meet if possible in order to narrow the ground of dispute. The contractors objected to the adjournment and urged that they had many witnesses in attendonce at great expense. The Warden offered to pay the expenses of these witnesses. Attention was then directed to the fact that the submission was silent as to the costs of the reference. The contractors desired to have the costs abide the event, but the Warden and Mr. Osler desired to have them in the discretion of the arbitrator. The contractors at length yielded, and the following agreement was indorsed on the Rule making the submission a Rule of Court:—

"It is agreed between the parties in the within Rule that the costs of the reference arbitration and award shall be in the discretion of the arbitrator, and that this agreement be embodied as part of the submission.

"Toronto, 31st December, 1861.

(Signed) "ROBERT A. HARRISON,
(for contractors.)

(Signed) "F. OSLER,
(for county)."

When this agreement was signed, all costs being in the discretion of the arbitrator, the expenses of witnesses in attendance were not exacted.

On 1st January, 1862, the arbitrator ordered the contractors to furnish a statement of their claim to the County, and adjourned the reference till 22nd of same month.

On 22nd January the arbitrator attended the third time, and a great many witnesses were in attendance on the part of the contractors. Mr. Stephen Richards and Mr. John Creaser, junior, appeared as counsel for the County, and Messrs M C. Cameron and R. A. Harrison again appeared as counsel for the contractors The Warden was also present. Mr. Richards repudiated the authority of the Warden and Mr. Osler as to what had been done by them at the previous meeting. He raised a number of objections against the arbitrator proceeding, contending among other things that the contract contained no actual reference but only an agreement to refer, and that there were no matters in difference between the parties. Notwithstanding the arbitrator proceeded with the examination of a witness whose examination lasted several days. Mr. Richards and Mr. Creaser were present all the time under protest, but cross-examined the witness at great length.

On 28th January the County Council met and passed resolutions repudiating what had been done by the Warden and Mr. Osler, and authorizing the Warden to resist the claim of the contractors.

The contractors, in their written demand furnished on 4th January, pursuant to the order of the arbitrator, claimed from the Corporation that they were entitled to the sum of $409, 064 61c, crediting the Corporation with $70,084 71c., as received in debentures on account of the contract and debentures received, as on account of extra work $125,925 29c. Some other credits were given, and they claimed a balance over and above everything, as due from the Corporation, $191,556, 61c.

Among other claims there were the following:—

1. An item of $600 for travelling expenses, incurred in going to *Quebec to have defect in debentures removed by Act of Parliament.* 2. Eleven per cent discount on $125,925 29c. debentures, sold to pay for account of extra work done, which was to have been paid in cash, amount $13,851 88c. 3. One year's interest taken from $200,000 of debentures due 1st January, 1860, contrary to contract, amount $6000. 4. Various sums of interest claimed upon the coupons detached from the debentures. 5. Twenty-five per cent damages for loss of interest, for loss and damage of the work being hindered, loss in providing funds to carry on the work, and various other matters, amounting to $31,481 32c.

S. Richards, Q. C., obtained a rule, calling upon Amos Wright and others, to shew cause why the Corporation of the County of Grey should not have permission to revoke the reference or submission contained in the agreement or articles of agreement, dated the 13th January, 1860, made between the said Wright and others, of the first part, and the Corporation of said County, of the second part, and which submission was ordered by a Judge in Chambers to be made a Rule of the Court of Queen's Bench; and why the Corporation should not have leave to revoke the power and authority of Walter Shanly, as arbitrator, under said reference, submission and rule of court, on the ground that there are several important legal questior arising and existing between the parties, which should be decided by one of the superior courts of common law, or upon the ground that the alleged submission does not amount to a reference, but at most, is only an agreement to refer, and that no differences had arisen within the meaning of the alleged reference to be referred to Mr. Shanly. Other grounds were mentioned in the rule not necessary to be mentioned here.

M. C. Cameron and *R. A. Harrison* showed cause. The application is one to the discretion of the Court, and that discretion should in every case where invoked be used in the most sparing and cautious manner. (*Scott* v. *Van Sandau*, Q. B. 192.) A very strong case must be made out to warrant the exercise of such a discretion—nothing short of misconduct on the part of the arbitrator. (*Faucett* v. *Eastern Counties R. Co*, 2 Ex. 344; *James* v. *Attwood*, 7 Scott, 841; *In Re Woodcraft*, 9 Dowl. P. C., 538; *Pape* v *Duncannon*, 9 Sim. 177; *Wilson* v. *Morrell*, 15 C. B., 720.) The mere apprehension that questions of law will arise with which the arbitrator, a layman, may not be competent to decide according to strict law is not of itself a sufficient ground for the application. (*Fuller* v. *Fenwick*, 3 C. B, 705.) No case has gone that length. That is a matter for consideration at the time of making the reference, and the reference here is an integral part of the contract. Now that the work is done the parties who are benefited by that work should not be allowed to alter the contract to the prejudice of the other parties. It is contended, however, that there is no actual reference but only an agreement to refer. The language imports a present reference of future differences, if any, that may arise. It is a prospective reference and one which is usual in building and other contracts. (*Livingston* v. *Ralli*, 5 El. & B., 132; Russ, 2 Ed., 726.) As such it has been made a Rule of Court. If not a reference, application should be made to set aside the Rule of Court, not to revoke the reference which is now a Rule of Court. Besides here the County by their acts have treated the clause as an actual reference. Their counsel appeared on two occasions at least and submitted to the arbitration. He adopted the Rule of Court and was a party to its amendment in regard to costs. The County cannot now be allowed to say he acted without authority. If he exceeded his authority and they in consequence are damnified, he is responsible. (*Flaviell* v. *Eastern Counties R Co.*, 2 Ex., 344; *Chambers* v. *Mason*, 5 C. B. N. S., 59) To allow the reference to be revoked after what has taken place would be to enable the County to commit a fraud on the contractors. If the arbitrator exceed his authority the remedy will be an application to set aside his award. The Court has no right to anticipate in such a matter to the prejudice of either party.

S. Richards, Q. C., supported the Rule, and adverting to the facts of the case at great length citing *Scott* v. *The Corporation of Peterborough*, 19 U. C. Q. B., 463.

BURNS, J.—I do not think there is shewn any acquiescence on the part of the Corporation, since the submission has been made a rule of court, which precludes them from asking the interference of this court to relieve them from the reference, if there be sufficient reason for so doing in other respects. The Corporation has been hurried on by the steps taken by the other side; of course such steps were open to them, and no fault is to be found with their setting the law in motion, with as much celerity as possible; but then, when we see that on the other hand the Corporation were acting in some measure in the dark, for no demand was furnished *to them until the arbitrator directed that it should be done.* I must not hold them to be assenting to the acts of the other side.

We must go back to the contract to define the position of the parties, and collect from that whether the discretion now asked in this application should be granted. I fully agree in the force of what is said by Lord Denman, in *Scott* v. *Van Sandau*, 1 Q. B., 102, "that the discretion of the court to which this appeal is made, ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays" In all probability, in any action to be brought upon the contract in question, a reference will most likely be ordered, but then that would take place under all the safeguards as to legal questions which the court would cast around the parties. And if the case is to go to a reference, there can be no doubt that the gentleman named in this contract is most competent to decide such matters, and the court, upon whom the responsibility would rest of referring it, could not do better than refer the matter to Mr. Shanly. The Corporation do not object to a reference to him of any matters connected with the work done or the manner of doing it, or of any damages which the contractors may legally claim; but what is objected to is, that a reference of everything to him of all questions, legal or equitable, should be indiscriminately made, as it stands as now referred.

When I carefully read the whole contract, I am rather inclined to adopt Mr. Richards' argument, that it amounts to an agreement to refer, in the event of certain things occurring, rather than an actual reference. The parties have selected the few words embodied in the rule, and have considered those the submission, and so they asked for an *ex parte* rule of court making it a reference. We see, however, what precedes that sentence is, that to prevent all disputes during the progress of the works, it was agreed that the Chief Engineer of the County should, in all cases, determine the amount or quantity of the several kinds of work, and the amount of compensation to be paid therefor. Then what follows looks very like this: if there should, during the progress of the work, be a dispute about what the Engineer should determine, either during the progress of the work, or after the completion thereof, of any of those matters of which he is made the judge, then that such matters should be referred to Mr. Shanly to determine, and his decision should be final. If the reference to Mr. Shanly is to be construed in this limited sense, then it is clear that matters had not progressed the length which were necessary in order to invoke his authority to determine them. It is not necessary for me to construe the agreement between the parties, and if I did, then the contractors would undoubtedly be much dissatisfied with that view.

The contractors, on the other hand, have given the widest interpretation possible to the last sentence, and have treated the agreement to refer to Mr. Shanly, as including every possible thing which might arise upon the contract, legal as well as equitable. The question therefore is, whether that is right and that it was so intended to be; for if so, then undoubtedly the court would carry it out, and would act wisely in so doing. I cannot bring my mind to that conclusion, however; I still see in the way the previous agreement, that the Chief Engineer was the person who should determine the amount and quantity of the several kinds of work, and the amount of compensation to be paid therefor. The parties surely never intended to forego that agreement, but yet the contractors have not in any way embodied that in their reference to Mr. Shanly.

The construction put on the agreement to refer to Mr. Shanly by the contractors is inconsistent with the previous agreement

that the amount and quantity of the work and the compensation should be determined by the County Engineer, unless the *contractors* concede that Mr. Shanly should be governed in respect of that matter as a court and jury should in the first instance. But if they concede that point in so far as affects the question of amount and quantity of the work, there still remains the other question in dispute between the parties. On the one hand the contractors contend that they were bound to finish and complete the roads named in the contract by a certain time, and that they have a right to do this no matter at what cost nor how far the expense may exceed the contract price, and a large sum is claimed by way of damages for stoppage of the work because the Corporation does not assent to this proposition. On the other hand the Corporation contend that the contractors knew that only a certain sum had been appropriated by the rate payers of the county—that the contractors had entered into a contract to do the work for that amount, and that the same should not be exceeded by extras or otherwise, and that whenever the expenditure exceeded that amount there was no authority to go beyond it without a new agreement with the contractors and a reference to the rate payers of the county to sanction a further expenditure of money upon the roads.

The question is whether such a matter as that comes fairly within the meaning of the contract. Supposing I adopt the construction put upon it by the contractors, that is, that the words "if any differences shall arise between the parties of the first and second parts during the progress of the works," open up all and every question which might possibly arise between the parties as the subject of reference to Mr. Shanly, the work has not been completed, consequently there is no question of that kind arising after the completion of the contract. No doubt all parties at the time of entering into the contract contemplated the finishing of the work by the contractors, or if they failed to do it, then by the Corporation themselves doing it and charging the expense to the contractors, for that is provided for by the contract. Nothing whatever is said about what shall be done in the event of the Corporation stopping the work or preventing the contractors from finishing it.

I am not called upon in this application to determine the question definitely between the parties, and I should be sorry it would be understood I have said anything having that tendency. All I am asked to do is to place the parties in such a position that the various questions may be argued and disposed of by the court. In answer to that it is said that the Corporation will not be precluded from bringing up the questions they desire to do on an application to set aside the award for excess of jurisdiction on the part of the arbitrator. It is very true that some of the points desired to be raised and as suggested by myself might be so raised and tested. But then, again, if the arbitrator proceeded and the Corporation made the best defence they could, they might be met with the objection of acquiescence on their part to the proceedings. And if they protested and did not appear, and relied upon the objections to the award, they might be met with the observation, why was not an application made of the nature of the one I am now disposing of.

When I consider the balance of conveniences and inconveniences to both parties, the unsatisfactory language used in the contract, for it is not a well-drawn contract by any means, as to what the parties intended should be referred to Mr Shanly, and what his powers should be under such a very meagre expression as this, *if any differences shall arise*, and further, when I consider the ample powers the Courts and Judges are now armed with for compulsorily referring matters, I think I shall do justice to both sides by freeing them from this present reference to Mr. Shanly. If the present reference were proceeded with I foresee a long course of litigation, at great expense to the parties. Should an award be made and afterwards set aside, then all that had been done would be futile and the parties be just where they were.

I would suggest that both sides should agree upon a case to be submitted to the Court for its opinion upon any legal question, with power to the Court to remit all questions of compensation to Mr. Shanly.

In the meantime, however, I must grant the Corporation permission to *revoke the submission* to Mr Shanly, and so much of the rule as asks for that will be absolute.

All that remains is, upon what terms that should be granted. It does not appear to me that the Corporation should pay the costs of making the submission a rule of Court, for that was done *ex parte*, nor of expenses incurred by or before the arbitrator, for if a rule or summons had been asked for, calling upon the Corporation to shew cause why the submission, as the contractors construe it, should not be made a rule of Court, I am convinced that no Court or Judge would have made such a doubtful agreement as that contained in the contract, with the materials now before me, a rule of Court, and therefor whatever expenses have been incurred by or before the arbitrator the parties causing it must take the risk of. Then, with regard to the expense of this application. I have before me a contract containing a clause about referring matters to arbitration of a doubtful character as to what powers the arbitrator should have under it. In order to get rid of it the Corporation have to come to the Court to ask the Court to interfere and enable them to do so. The other side oppose the application, and I suppose they are entitled to the costs of the opposition.

The rule which has been obtained will therefore be made absolute so far as permitting the Corporation to revoke the submission to Mr. Shanly upon payment by the Corporation of the costs of the rule.

Per our Rule absolute.

COMMON LAW CHAMBERS.

Reported by Robt. A. Harrison, Esq., *Barrister-at-Law.*

Samuel Clark, Judgment Creditor, v. Andrew M. Clark, Judgment Debtor; John D. Ham and John Stevenson, Garnishees.

Consol. Stat., U. C., cap 22 sec. 238, et seq—Order to attach debt—Payment by garnishee before order to pay how far a discharge—Setting aside attaching order.

A garnishee is not discharged by payment of the money to the judgment creditor merely upon the attaching order without an order to pay.

But if the garnishee, upon being served with the summons to pay, forthwith pay the money into court, he is free from further responsibility.

Where it was made to appear that the debt sought to be attached was *bona fide* assigned before the issue of the garnishee order, the order was, on the joint application of the judgment debtor and his assignee, set aside.

(Chambers, 11th January, 1862.)

A summons was obtained on the application of the judgment debtor and one Shibley, calling on the judgment creditor and the garnishees to shew cause why an attaching order of the 18th October, 1861, should not be set aside, on the ground that the debt sought to be attached had been assigned by the judgment debtor to Sibley before the issue of that order; and why all proceedings subsequent to the said order should not be set aside on the same ground, and on the ground that no notice of the attaching order was given to the judgment debtor; and why the judgment creditor should not pay the costs of the application.

A summons had been issued calling on the judgment debtor and the garnishees to attend and shew cause why the garnishees should not pay the debt due by them to the judgment debtor to the judgment creditor. This summons was not shown to have been served on the judgment debtor. It was issued on 11th November, 1861, returnable on 16th November, 1861; and apparently no order was ever made upon it. No entry of any further proceeding could be found.

The original writ of summons was issued in this cause in July, 1860, and served on 20th September of same year. On 12th November, 1860, the plaintiff recovered judgment for £239 9s. 7d., and a writ of *fi. fa.* issued against the defendants' goods, which was returned *nulla bona.*

By the affidavits of the judgment debtor, Andrew M. Clark, and T. Shibley, it appeared that a bill in Chancery was filed about ten years ago by A. M. Clark against the garnishees, to which they put in no answer; and the court ordered that the deputy master at Kingston should take an account of what was due from the garnishees to A. M. Clark; that the deputy master reported, and the garnishees appealed, and the appeal was dismissed with costs;

that A. M. Clark was largely indebted to Shibley ($848), and Shibley demanded security, whereupon A. M. Clark, on 26th September, 1860, executed an assignment of the money due, as reported by the deputy master in Chancery, from the garnishees to the judgment debtor.

Both A. M. Clark and Shibley swore that the assignment was made in good faith, and for the purpose of securing the debt so justly due to him.

A. M. Clark swore that he had no notice of the application for "a garnishee order in this matter."*

In reply it was sworn that the clerk for the solicitor in the Chancery suit obtained a copy of the attaching order on the day it was granted, and expressed his apprehension lest, in consequence of that order, the solicitor should lose his costs.

The garnishees made affidavits shewing that on 28th September, 1861, a decree in Chancery was made by which they were declared to be indebted to A. M. Clark in £239 14s. 2d., to be paid to him on 1st November, 1861; that they were served with the attaching order, and about 13th November last with the summons to pay over; that before the 14th November last they had no notice or knowledge of the assignment to Shibley; and Stevenson swore that having no cause to shew against this summons, he, after consulting his legal advisers, on 14th November, 1861, paid to the judgment creditor £254 5s., in full satisfaction of the judgment against A. M. Clark, and that he made this payment fearing that if he did not an execution would be issued against him.

DRAPER, C. J.—The attaching order under the 288th section of Con. Stat. U. C., cap. 22, does not, according to *Holmes* v. *Tutton* (5 El. & B. 65), do more than render the judgment creditor a creditor having a security for his debt, and does not give the judgment creditor any lien.

This case, however, arose between the judgment creditor and the assignees of the judgment debtor, who had become bankrupt after the granting of the order.

In *Turner* v. *Jones* (1 H. & N. 878) there is a strong intimation that the garnishee is not discharged by payment of the money to the judgment creditor, merely upon the attaching order, without an order to pay.†

The statute (sec. 297 of our act) enacts that payment by, or execution levied upon, the garnishee *under any proceeding as aforesaid* shall be a valid discharge to them as against the judgment debtor to the amount paid or levied, although the proceeding should be afterwards set aside or the judgment be reversed. But the words "under any proceeding as aforesaid" obviously refer to the preceding enactment (sec. 290), if the garnishee does not forthwith *pay into court* the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor; or if he does not appear upon summons, then the judge may order execution to issue.

The very first part of this section points out to the garnishee his proper course—namely, to pay the money into court, which being done, he is free from further responsibility; but these words in no way point to a payment to the judgment creditor without further order.

In *Cooper* v. *Brayn* (3 H. & N. 972) the garnishee, after a a summons had been issued on him to shew cause why he should not pay (but which was erroneously intitled, and no order consequently made thereon) paid the debt to the official assignee of the judgment creditor, who had become insolvent, and the payment was protected.

The case of *Hirsch* v. *Coates* (18 C. B. 757) sufficiently establishes that an attaching order has no effect or operation upon debts of which the judgment debtor has divested himself by assignment.

Upon these facts, and upon these authorities, I should have no hesitation in deciding that the garnishee was wrong in paying the money to the judgment creditor without an order; and that upon proof of an assignment of the debt (*bona fide* of course) no such order would be made.

The only remaining question is, whether I should thereupon grant an order setting aside the attaching order of 18th October, 1861.

On the best consideration I can give the matter, I have determined to grant such order. It never could have been meant by the Legislature that a judgment creditor should, by attaching a debt which is an *ex parte* proceeding, tie the hands of others who assert a right to that same debt, indefinitely, until he pleases by asking for an order to pay it to himself, afford an opportunity of trying who has the better title to it. And yet such might be the consequences, as service of the attaching order binds the debt in the garnishee's hands. I think the case of *Wintle* v. *Williams* (3 H. & N. 288) affords a solution of the difficulty. The judgment creditor must, as Chief Baron Pollock says, "go on or retire, and pay the costs." Here he issues a summons, and as he has got the money, he has allowed it to lapse not serving it on the judgment debtor, and though serving it on the garnishee, not proceeding with it. He offers no statement on affidavit contradicting the assignment or impeaching its validity. He rather leaves to the garnishee the task of supporting the payment made by them; and unless the judgment debtor and his assignee take this course they will have to take proceedings in equity, and I suppose would be met by the answer that the debt is attached in law if they applied to enforce the decree.

I think, therefore, I should make the order.

Order accordingly.

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* Meaning probably the attaching order.

† See also *McConnel* v. *The Corporation of Yorkville*, 21 U. C. Q. B. 163.—EDS. L. J.

WILLIAMSON v. WILLIAMSON.

Pleas—wrongly intitled—not nullities.

One of the Christian names of one of the parties to a cause was omitted in the style of cause placed at the head of pleas filed in the cause, and plaintiff signed judgment treating the pleas as a nullity. The judgment was set aside.

(March 11, 1862.)

On 14th December, 1861, Jane Eliza Williamson demanded dower of James Williamson, the tenant of a part of lot 12 in block 40, in Sir Allan Napier Macnab's survey in the city of Hamilton.

On 23rd January, 1862, a declaration with notice to plead was served according to Con. Stat. U. C., cap. 28. In the declaration and demand of plea, demandant was described as Jane Eliza Williamson.

On 8th February, 1862, pleas were filed and served by John Barr, attorney for tenant. These pleas were intitled "Jane (omitting Eliza) Williamson, demandant, and James Williamson, tenant." They were three in number, 1 *ne unques accouple*; 2—*ne unques seizte*; and 3—no demand of dower one month before action.

The attorney for defendant treated these pleas as a nullity, signed judgment in default of a plea, and served the attorney for the tenant with notice of assessment.

R. A. Harrison obtained a summons calling upon demandant to shew cause why the interlocutory judgment and all subsequent proceedings should not be set aside with costs upon the ground that pleas had been filed and served before the signing of such judgment.

J. Dunne shewed cause, contending that the pleas not being properly intitled in the cause were nullities, and that being pleaded without leave, defendant was at all events entitled to sign judgment.

R. A. Harrison submitted—That the pleas were not nullities by reason of the omission simply of one Christian name of demandant in the style of the cause, demandant's attorney knowing full well what was intended; and that the pleas were directed to separate material traversable allegations contained in the declaration, and did not therefore require leave of a judge before pleading same.

RICHARDS, J., referring to *Dale qui tam* v. *Beer*, 7 East 333; Anon 7 D. & R., 511; Chit. Arch. 8 Edin., 266, made the summons absolute without costs.*

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* See also *Averill et al* v. *Cameron*, 3 O. S. 176.—EDS. L. J.

COUNTY COURT CASES.

In the County Court of the United Counties of Frontenac, Lennox and Addington, before his Honor JUDGE MCKENZIE.

DONNELLY v. FLETCHER.

Certificate for costs—when granted—discretion.

Where plaintiff in good faith brings his action in a County Court, and had fair and reasonable grounds for supposing that he would recover a larger amount of damage than he could recover in the Division Court, although the jury award him damages within the jurisdiction of the Division Court, the case is a proper one for the exercise of the Judge's discretion in granting a certificate for County Court costs. (March 15, 1862.)

At the last sittings of the Court this case was tried, and a verdict rendered in favor of the plaintiff for $25 damages.

Upon the evidence produced on the part of the plaintiff, he made out a strong case for larger damages than he could have recovered in the Division Court.

The defendant produced evidence to show that the plaintiff conducted himself in the defendant's house at Napanee, which was a tavern, with much impropriety.

Draper moved for a certificate for County Court costs under section 328 of C. L. P. A. *O'Reilly* opposed the granting of the certificate, the amount of verdict being within the jurisdiction of the Division Court.

MACKENZIE, Co. J.—According to the Plaintiff's evidence, if the jury had given him £25 damages, instead of $25, they would have done only right. The defendant's witnesses proved facts in mitigation of damages. But it is clear the jury did not believe all they said or they would have given a verdict for the defendant on the second plea. I think the witnesses for the plaintiff were more reliable than those for the defendant.

The question for me to decide is whether "the cause was a fit one to be withdrawn from the Division Court and brought in the County Court."

I find, in a very excellent article, written on certificate for full costs, in the 7th volume of the *Upper Canada Law Journal*, page 221, the following sensible remarks: "Some persons, relying upon English cases, which are not always applicable, suppose that the amount of the verdict is conclusive, so as to prevent the giving of a certificate. There can be no greater mistake. So, to read our enactment would be to make it absurd and inconsistent. If a plaintiff in good faith and on probable grounds seeks to recover an amount beyond that which the jury award him, he has a right to the exercise in his favor of the discretionary power vested in the judge. The object of the enactment is not to inflict injustice, but to punish wilful contravention. Wherever it appears to the satisfaction of the judge, that the plaintiff did sincerely urge, and upon reasonable grounds, a claim for debt or damages greater than could be recovered in the inferior court, although the jury may have given the verdict for a sum within the jurisdiction of the inferior court as to amount, it is usual for the judge to certify. Where there is no precise computation to be formed on the evidence, and where the evidence would have warranted a verdict beyond the mark as well as below, it would be hard indeed, that the plaintiff should be compelled, at the risk of losing his costs, to relinquish a large portion, of what he may fairly claim, lest the jury, preferring the testimony of one witness to another, or forming an arbitrary estimate of their own, may bring the verdict within the lower jurisdiction. The Legislative power never intended to work such hardship. So to construe the act is to convert a remedial measure into one of oppression."

Although the above observations from a very useful journal, cannot carry with them the weight of judicial authority, still in my judgment they are to the point, and they certainly convey my own idea as to the manner in which the discretionary power given to the judge should be exercised in reference to the granting of certificates for full costs.

In the present case I think the evidence well warranted the jury in giving three times the amount of damages which they have given. The defendant is an innkeeper. He was under the influence of liquor at the time of the outrage complained of. The outrage was committed in his own house. His own house was a tavern. The plaintiff was almost helpless by reason of liquor. The weapon he used was a murderous one, and the language he uttered manifested a great disregard for consequences.

I think from the evidence that the plaintiff had brought his action in this court in good faith, and that he had fair and reasonable grounds for supposing that he would recover a larger amount of damages than he could recover in the Division Court, although the jury have awarded him a smaller amount.

The statute directs that the judge who presides at the trial shall decide the question of certificate of costs in open court immediately after the verdict has been recorded. From this I conclude that the judge shall decide upon the evidence, and what shall pass before him at the trial, whether the cause be a fit one to be withdrawn from the Division Court or not.

I think, from the evidence, and what passed before me at the trial, that I am bound to exercise the discretionary power vested in the judge in favor of the certificate for County Court costs, as the plaintiff, in my opinion, had brought his action in this Court in good faith, and had reasonable and probable grounds for claiming a larger amount of damages than he could recover in the Division Court.

Certificate granted.

PATTERSON v. SNOOK.

Certificate for Costs—Difficult questions of Law.

In cases within the competence of the Division Court, if one of the judges of the Superior Courts would grant a writ of certiorari by reason of anticipating the determination of a difficult question of law to remove the cause if commenced in a Division Court, it is proper for the Judge of the County Court to certify for County Court costs. (March 18, 1862.)

This was an action on the Common Counts for money paid, lent and received. Pleas—never indebted, payment, and set-off. Verdict for the plaintiff, $77 80.

The action was brought for money received by the defendant as attorney for the plaintiff. The set-off was composed of, among other things, two bills of costs. One of the bills of costs was for the conducting of a suit in the Queen's Bench for plaintiff's wife, before she married the plaintiff.

Sir Henry Smith moved for a certificate for County Court costs. *Mr. Snook* opposed the granting of the certificate, contending the suit was a fit one to be brought in the Division Court.

MACKENZIE, Co J.—The case of *Donnelly v. Fletcher*, just decided, explains the principle upon which a certificate for full costs should be granted when the action is instituted in this court in good faith, a plaintiff having reasonable and probable grounds for claiming a larger amount of damages than he could recover in the Division Court.

The case of *Hyland v. Warren*, decided by me two years ago, and reported in the 6th volume of the U. C. L. J., at page 116, decides that the jurisdiction of the Division Court is restricted to $40 in actions brought to recover purely and simply uncertain, unliquidated damages, depending on matters of opinion whether the cause of action arose out of tort or breach of agreement.

The present case presents another point not noticed in those cases, namely, the right of bringing a suit, in amount within the jurisdiction of the Division Court, in the County Court, when, in all probability, a difficult question of law will arise at the trial.

By the 61st section of the Division Courts Act, it is enacted: "In case the debt or damages claimed in any suit brought in a Division Court amounts to forty dollars or upwards, and in case it appears to any of the judges of the Superior Courts of common law that the case is a fit one to be tried in the Superior Courts, and in case any judge thereof grants leave for that purpose, such suit may, by writ of certiorari, be removed from the Division Court into either of the Superior Courts, upon such terms as the judge thinks fit."

In the case of *Nugent v. Chambers*, 3 U. C. L. J., 108, Mr. Justice Burns ordered the writ to issue on the ground that a difficult question of law might arise at the trial in reference to the liability of a husband for necessaries furnished to his wife. In the case of the *Cataraqui Cemetery Company v. Burrowes*, 3 U. C. L. J., 47, Mr. Justice McLean ordered the writ to issue because it was alleged that, in all probability difficult questions of law would arise on the trial as to the powers conferred by the act of incorporation. In the the case of *Ridley v. Tullock*, 3 U.C L.J., 14, Mr. Justice Hagarty ordered the writ on the ground that, in

all likelihood, questions of law as to the application of the statute of limitations would arise on the trial. And in a number of other cases the judges of the Superior Courts had ordered cases to be removed from the Division Courts to the Superior Courts on the ground of a probability of difficulty or grave questions of law arising at the trial.

The word "fit" is used in the 61st section of the Division Courts Act; also in the 328th section of the C. L. P. A.

Now it apears to be in accordance with law and common sense, that the principles laid down by the judges in granting a certiorari to remove a suit from the Division Court should be applied by the County Judge, in the granting of certificates of County Court costs. I am inclined to think that as a general rule in cases within the competence of the Division Court in which one of the judges of the Superior Courts would grant a writ of certiorari by reason of anticipating a difficult question of law to remove the cause that the County Court Judge, if such suit were brought before him in the County Court, should grant a certificate.

When a plaintiff anticipates a difficult question of law in a cause within the competence of the Division Court is it not more consistent with justice and good sense, that he should bring his suit in the more speedy and cheaper jurisdiction of the County Court, than to leave it to the defendant to remove it to the Superior Court, where he will be subject to delay and enormous expenses? By instituting such suits in the County Court, either of the parties has an appeal to the Superior Courts from the decision of the County Court, which is a more speedy and cheaper course than to resort to the writ of certiorari.

In the present case a very difficult question of law has arisen as to the application of certain sections of the Act respecting separate rights of property of married women to the claim set up by the defendant in one of his bills of costs; and also upon the relation of attorney and client, and the duty of an attorney in conducting suits. I think upon this ground alone that I should grant the certificate for County Court costs. Moreover the plaintiff had to prove a claim over 100 dollars, though it had been reduced by a contested set-off. Certificate accordingly.

In the County Court of the County of Wentworth, before his Honor JUDGE LOGIE.

WILLIAMSON v. DUNNE.

C. L. P. Act, s. 112—Action on a note and common counts—Several pleas without leave.

To a declaration containing a count on a promissory note and the common counts defendant pleaded—1. A plea denying consideration for the making of the note. 2. Payment. 3. Set-off.

Held, properly pleaded without leave.

On the 9th day of October last declaration was filed in this case.

First count on a promissory note.

Second, common counts.

Defendant filed and served pleas as follows:—

1. James Dunne, the defendant, in person says that he never received any consideration from the plaintiff for the promissory note in his declaration mentioned, and that the said promissory note was made by the defendant at the request and for the accommodation of the plaintiff.

2. And for a second plea the defendant says that before action he satisfied and discharged the plaintiff's claim by payment.

3. Set-off and claiming a balance recoverable by defendant.

The plaintiff signed judgment as for want of a plea, thereby treating defendant's pleas as a nullity, the same having been pleaded without leave of the Judge.

Defendant took out and served on plaintiff a summons to shew cause why the judgment so signed should not be set aside with costs, on the ground that the same had been improperly signed, pleas having been duly filed and served in time by defendant to plaintiff's declaration.

On the return of the summons it was argued on the part of the plaintiff that the pleas so pleaded should not have been pleaded together without leave of the Court or Judge, inasmuch as the first plea could not be taken as a plea in denial, but as a special plea in confession and avoidance of the note declared on, especially as the other pleas pleaded were to the whole declaration and not confined to any particular count in the declaration; therefore judgment was rightly signed.

Defendant, in support of his summons, argued that the matters alleged in the first plea, must when taken together, be considered as a denial of the note, and if a denial only, the pleas pleaded together were proper pleas and allowed by and under one statute.

LOGIE, Co. J., after taking time to consider his judgment, decided that the first plea, when taken and considered as a whole, must be looked upon as a denial of the note, and consequently, under section 112 of Common Law Procedure Act, such a plea was properly pleaded with the other pleas of payment and set-off without leave, and accordingly made an order setting aside the plaintiff's judgment and all subsequent proceedings with costs.

GENERAL CORRESPONDENCE.

Township Councils—Roads and Bridges—Expenditure of Township Moneys.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN—Wishing to ascertain the legality of appropriating the Municipal Funds to various Wards or Divisions, allowing each councillor to give his order on the Treasurer, will you please answer the following questions in the *Law Journal* for April, 1862:—

1st. Is it legal to appropriate money to wards or to divisions in a township not divided into wards—for instance, to ward or division No. 1, $400; ward or division No. 2, $400, &c., &c., without defining the manner in which it has to be laid out, leaving it in the power of the councillor of such ward or division to spend as he thinks best for the improvement of roads and bridges in his ward?

2nd. Is it legal or proper for the councillor or person superintending to receive jobs as duly performed and give his order on the Treasurer for payment thereof?

3rd. Should not all accounts be submitted to the Council for their approval, and all orders on the Treasurer signed by the Reeve or Head of the Corporation?

The practice of appropriating money in such a way is very common, (some go even further, handing the money to the councillor on its appropriation, he producing receipts therefor at the end of the year from parties purporting to have done work to the amount on roads and bridges) appointing one of the members to lay out the money as he sees fit. This, we think, is wrong, as it gives too much power to one man, who may lay out the greater portion of the moneys appropriated in one year for his own personal benefit or that of his friends.

I am, Gentlemen, yours respectfully, W.

[1st. It is the duty of Township Council to repair roads and bridges. The law enables the Council to raise money and to expend it for that purpose. No direction is given as to the mode in which it shall be expended. That is left to the discretion of the Councils. The mode suggested by our correspondent is the one in common use. We cannot say that it is positively illegal, but this we may say that it is pregnant with mischief.

2nd. This depends entirely upon the action of the Council. If the Council in its wisdom authorize such a mode of procedure there can be no legal objection to it. If not the best mode, the remedy rests with the Council to adopt a better one

3rd. This also rests with the Council. There is nothing in the Municipal Institutions Act to say that all accounts shall be submitted to the Council for approval before payment, but there is nothing in the Act to prevent the Council declaring that the same shall be done. It is usual, however, in Municipalities where there is much to be done to leave the decision of such matters to committees. This is especially the case in cities. There is not so much reason for it in the case of Township Councils.

We heartily condemn the practice to which our correspondent alludes. It is the nursery of much of the jobbing which disgraces our Municipal system.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. AUSTEN v. MARTIN. *April* 24, *May* 22.

Will—Trust for sale of freeholds—Disclaimer by trustee—Sale and conveyance by the heir at law—Power to give receipts—Vendor and purchaser—Specific performance—Title—Costs.

A testator, at his death, was entitled to certain freehold property, subject to a mortgage thereof in fee. By his will he demised all his real estate to a trustee on trust to sell, and hold the proceeds upon certain trusts. After his death, the devisee in trust disclaimed the trusts, and the heir at law of the testator (who was also his personal representative), with the concurrence of the mortgagee, sold the property, free from the mortgage, and in exercise of the trus for sale contained in the will, and, in his double character of real and legal representative, joined with the mortgagee in conveying the same to the purchaser.

Held, that the whole of the legal and beneficial interest in the property sold passed to the purchaser by the conveyance of the heir at law and mortgagee, and that he, on reselling the property, could shew a good title without the necessity of a new trustee of the will being appointed to confirm the previous sale.

In a purchaser's suit for specific performance the court, at the request of both parties, and on an assurance that the only question in dispute was one of title, which the court was asked to decide, made a declaration that the defendant could shew a good title without directing a reference as to title on the settlement of the conveyance, at Chambers.

V. C. S. *May* 23.

THE MARCHIONESS OF LONDONDERRY v. BAKER.

Pleading—Res judicata—Sufficiency of plea.

Plaintiff filed a bill, to which a demurrer was allowed, with leave to amend; no amendment was made, and the bill stood dismissed. Subsequently she filed a bill in another court in the same matter, and praying the same relief, but allegations of actual fraud. Defendant pleaded that this bill was for the same matter as the former was for. *Held* that the plea was bad, for not averring that the allegations in support of the matter were the same as in the former bill.

V. C. W. HARE v. WESTROPP. *June* 10.

Will—Construction—Absolute gift.

Testator, after directing payment of his debts and legacies, gave to his wife all the property, whatsoever and wheresoever he possessed, at his death. This gift was followed by a gift of all his residuary estate whatsoever and wheresoever, real and personal, whether in possession, reversion, remainder, or expectancy, in trust, to permit his wife to have the use and enjoyment during her life, and after her death amongst the children absolutely.

Held, that the will was not void for uncertainty, and that the wife took for life with remainder to her children.

M. R. HOLLAND v. ALLSOP. *April* 18, 30. *May* 2.

Will—Construction—"Surviving" read "other."

The word "surviving" in a will read "other" upon a consideration of the whole scope of the will.

L. J. FORD v. TENNANT. *June* 1.

Practice—Plea for want of parties—Personal equity—Judgment creditors—Solicitor and client.

In a suit by the representative of a client against his solicitor to obtain the benefit of a purchase by the solicitor of a charge on the client's estate, it is not necessary to make the judgment creditors of the client parties.

V. C. S. WILKINS v. HOGG. *May* 8.

Trustee—Breach of trust—Indemnity clause.

A testatrix, by her will, declared that each trustee should be answerable only from losses arising from his own defaults, and not for involuntary acts, or for the acts or defaults of his co-trustees or co-trustee, and particularly that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any money for the general purposes of the will, or for any definite purpose authorized by the will, should not be obliged to see to the due application thereof, nor be rendered responsible by express notice of misapplication of the monies; but this clause should not restrict the right of any trustee to require an account from his co-trustee, or to make him replace monies misapplied Two trustees entrusted the trust fund to a third for investment, and he immediately misapplied it.

Held that the two were not liable to make good the fund.

L. J. *April* 27, 29. *May* 7.

CLAYTON v. CLARKE.

Practice—Infant—Administrator—Next friend—Costs.

Where a bill is filed by an infant against his trustees and guardians, and a decree is made for the usual accounts, the court will not at the same time direct an inquiry whether any and what benefit has accrued to the infant from the institution of the suit.

It is a *prima facie* benefit to an infant to be made a ward of court, and to have his property secured and duly administered.

The court will take into consideration the motives which actuated the next friend in instituting the suit, and if it appears that the next friend had other motives than the benefit of the infant, the court will deprive him of his costs.

V. C. S. RE PELL'S WILL. *June* 20.

Will—Substitutional gift—Period of vesting.

On a gift to such of several legatees as should be living at the death of a tenant for life, "and the issue of such of them as should be then dead leaving issue," *Held*, that on the death of one of the original legatees, his share vested absolutely in his issue, though they did not survive the tenant for life.

V. C. K. AYLWIN v. WITTY. *June* 11.

Principal and surety—Policy of insurance—Covenant to pay premiums—Lien—Surety.

D. and P. join in a covenant in a mortgage deed (as sureties) to pay the premiums on life policies, forming part of the securities, and by a contemporaneous interest, to which they are not parties, the equity of redemption is assigned in trust for the benefit of the creditors of the mortgagor. D., who signs the trust deed as a creditor, being called upon to pay the premium on one policy, applies to B to do so for him, and assigns to B. the policy; and B covenants to pay future premiums. The mortgage is paid off, B. pays the premiums, and the policy is sold by the trustee of the creditor's deed, under a power contained in it. A creditor's suit being instituted; on the question whether D. and P. are entitled

as against the other creditors to a lien upon the produce of the policy, *Held*, that as between D. and B., and B. and the creditors, such creditors are not entitled to take the money without making payment in satisfaction of the premiums paid by B.

L. C. & L. L. J. *March* 16, 20. *May* 7.

MARRIOTT v. THE ANCHOR REVERSIONARY CO

Mortgage of ship—Duties and liabilities of mortgagee in possession—Postponement of sale—Right of using mortgaged property.

A mortgagee in possession of a ship is not chargeable, if, in the prudent exercise of a fair discretion, he abstains from selling her; but if a sale cannot reasonably be effected, though he is entitled to employ the ship at the risk of the mortgagor in the ordinary course of business, and in such a manner as a prudent man would use her if she were his own property, yet, if he employs her imprudently, or in a trading speculation, he is chargeable with the value of the ship at the time when he took possession of her. (*Dissentiente* on this point, TURNER, L. J., who considered that the mortgagee should only be charged with what the vessel ought to have earned if she had been chartered in the ordinary course, and with any damage which she had sustained beyond ordinary wear and tear.)

M. R. THOMPSON v. THOMPSON. *June* 7.

Will—Construction "surviving"—Period of survivorship—Death of tenant for life.

Bequest of leasehold property (described in the will as copy hold) in trust for the testator's wife for life, and at her death to be disposed of for the benefit of his surviving children, share and share alike.

Held, that the period of survivorship must be referred to the death of the tenant for life.

V. C. K. NICHOLSON v. NICHOLSON. *May* 29.

Joint Stock Company—Bonus—Capital and income.

In the deed of settlement of an insurance company there is a provision that before a dividend shall be declared a reserve fund shall be set apart of not less than £2 per cent. of the annual interest of the sum advanced, to be appropriated as a sinking fund until the whole capital is raised as a permanent fund. The funds are accumulated, although no reserve fund is actually set apart, and bonuses are triennially divided. The company then amalgamates with another company, and the shareholders have the option of receiving £5 per share on paid up capital, or having an allotment of the shares and also of receiving a share of the surplus assets. N., a married woman, is entitled to the income of ten shares, which are settled on herself for life, with remainder to her children, and has received the bonuses. On the amalgamation taking place the trustees of N.'s settlement receive the £50, and the share of N. of the surplus claiming such surplus as capital, whereas N. claims it as income, and files a Bill for a declaration to that effect.

Held, that the share of the surplus assets is capital, and subject to the trusts of the settlement.

M. R. *April* 25, 26—*May* 25.

HANNAH v. HODSON.

Vendor and purchaser—Conveyance of reversionary interests—Legal estate outstanding—Bill to complete the conveyance—Fairness—Onus probandi—Pleading—Impeachment of deed by answer—Cross bill.

The father and mother of a family induced their children to join with them in conveying to a purchaser certain property which was held under a will in trust for the parents for life successively, remainder to the children equally. The children received none of the consideration money, although it was expressed to be paid to them as well as their parents. The trustee of the will objected to the transaction, and refused to convey the legal estate to the purchaser. A Bill filed after the death of the surviving tenant for life against the trustee and the children for a conveyance of the legal estate was dismissed.

Where a father and son join in conveying for value property settled on the father for life, remainder to the son in fee, it is necessary, to support the conveyance, that everything should be straightforward, also that it should be complete, and not rest *in fieri*, and the burden of proof of fairness lies on the party afterwards seeking to have it completed.

Where a party to a deed comes to the Court to have a deed and the transaction it represents completed, the deed may be impeached by the answer of the defendants, and a cross bill to set it aside is not necessary.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

THE HONORABLE SIR JOHN BEVERLY ROBINSON, Baronet, C. B., to be Chief Justice of Upper Canada, to be the presiding Judge of the Court of Error and Appeal for Upper Canada, according to the statute 24 Vic. cap. 30.—(Gazetted March 15, 1862.)

THE HONORABLE ARCHIBALD McLEAN, one of Her Majesty's Justices of the Court of Queen's Bench in Upper Canada, to be the Chief Justice of Upper Canada, in the room and stead of the Honorable Sir John Beverly Robinson, C.B. resigned.—(Gazetted March 15, 1862.)

THE HONORABLE PHILIP MICHAEL MATHEW SCOTT VANKOUGHNEET, Q. C., to be Chancellor of Upper Canada, in the room and stead of the Honorable William Hume Blake, resigned.—(Gazetted March 19, 1862.)

THE HONORABLE JOHN HAWKINS HAGARTY, one of the Judges of Her Majesty's Court of Common Pleas in Upper Canada, to be one of the Judges of Her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of the Honorable Archibald McLean, appointed Chief Justice of Upper Canada.—(Gazetted March 19, 1862.)

THE HONORABLE JOSEPH CURRAN MORRISON, Solicitor General for Upper Canada, to be one of the Judges of Her Majesty's Court of Common Pleas for Upper Canada in the room and stead of the Honorable John Hawkins Hagarty, appointed a Judge of Her Majesty's Court of Queen's Bench in Upper Canada. (Gazetted March 19, 1862.)

SOLICITOR GENERAL.

THE HONORABLE JAMES PATTON, to be Solicitor General for Upper Canada, in the room and stead of the Honorable Joseph C. Morrison, resigned.—(Gazetted March 29, 1862.)

QUEEN'S COUNSEL.

THE HONORABLE JAMES PATTON, to be one of Her Majesty's Counsel learned in the Law in Upper Canada.—(Gazetted March 29, 1862.)

NOTARIES PUBLIC.

HENRY IRSKINE IRVINE, of the city of Hamilton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

ALFRED FISHER, of Sarnia, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 15, 1862.)

WILLIAM JOHNSON, of Colborne, Esquire, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

THOMAS McNAUGHTON, of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

THOMAS DOUGLAS LEDYARD, of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

GEORGE MURPHY, of Toronto, Esquire, Barrister-at-law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

JOHN KEITH GALBRAITH, of Bowmanville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

WILLIAM DANIELL, of London, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

GEORGE JAMES WELLER, of Lindsay, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

FEATHERSTONE OSLER, of the city of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 22, 1862.)

CORONERS.

WILLIAM JOHN KLOPHELL, Esquire, Associate Coroner, County Brant.—(Gazetted March 14, 1862.)

WILLIAM JOHN KLOPHELL, Esquire, Associate Coroner Town of Brantford. (Gazetted March 15, 1862.)

GEORGE R. WELDEN, Esquire, Associate Coroner, County of Hastings.—(Gazetted March 22, 1862.)

REGISTRARS.

DAVID S. SHOEMAKER, Esquire, to be Registrar of the North Riding of the County of Waterloo.—(Gazetted March 15, 1862.)

WARD HAMILTON BOWLBY, Esquire, to be Registrar of the South Riding of Waterloo.—(Gazetted March 15, 1862.)

TO CORRESPONDENTS.

"CHARLES ROBINSON, Co. J."—"CLERK 6TH DIVISION COURT, Co. NORFOLK"—Under "Division Courts."

"W."—Under "General Correspondence."