DIARY FOR JULY.

1. Thurs. Dominion Day. Long Vac. beg. Last day for Co. Clks. fin. to exam. Assm. Rolls, &c.
4. SUN.. *6th Sunday after Trinity.*
5. MON.. Co. Ct. (exc. York) Term beg. Last day for notice of trial for Co. Ct. York. Heir and Devisee sittings commence.
10. SAT.. County Court Term ends.
11. SUN.. *7th Sunday after Trinity.*
13. Tues.. General Sessions and Co. Ct. sit. Co. York.
18. SUN.. *8th Sunday after Trinity.*
20. Tues.. Heir and Devisee Sittings end.
22. Thurs. *St. Mary Magdalene.*
25. SUN.. *9th Sunday after Trinity.*

The Local Courts'

AND

MUNICIPAL GAZETTE.

JULY, 1869.

THE ACT AMENDING THE DIVISION COURTS ACT.

We do not agree with our correspondent LEX that the day for the ordinary sittings of the court is necessarily the return day of the summons—within the intention of the amendment act of last Session,—that does not seem to have been the construction placed upon the act by the Board of County Judges, as indicated by their rules; nor can we allow the explanation vouched for by our correspondent as a proper test of its meaning, whatever might have been in the mind of the legal gentleman who framed the act. Such solutions would never be considered as of any weight in legal circles. Acts of Parliament speak for themselves after their framers are dead and unable to speak of their meaning. Under the Imperial Act 30 & 31 Vic. cap. 142, the form of summons is essentially the same as the special summons prescribed by our Board of County Judges,—the court day is not by that Act considered or made the return day; on the contrary, the summons in that particular, consists simply of a notice to the defendant; that unless at least six days before the day of appearance he returns to the registrar of the court at his office the notice for which a form is subjoined, he will not afterwards be allowed to make any defence to the plaintiff's claim,—that the plaintiff may, without giving any proof in support of his claim, proceed to judgment and execution; and if the defendant does give the notice of his defence within the time specified he must appear at the court day on the day and at the place named for the sittings, when and where the cause will be heard. If the notice is not given the registrar, without the intervention of the judge, signs judgment at the end of one month.

Under the acts which were in force in England previously to the passing of 30 & 31 Vic. cap. 142, the return day of the summons was without doubt the court day, but now, "*at the option of the plaintiff*," he may cause a summons to issue, in an English County Court suit, in the "*ordinary form*," for a cause of action coming within its provisions, or a "*special summons*" such as we have described. Under the acts which were in force in this Province before the last Session of the Legislature the day of sittings was without doubt the return day here, but the Board of County Judges very possibly, having the summons by special indorsement under the Common Law Procedure Act,—the change of practice introduced under it, and the Imperial Statute in amendment of the County Courts procedure in England, and the rules and forms prescribed for carrying its provisions into effect before them when they formed their rules and forms, might have been induced to the conclusion that the Provincial Legislature aimed at the introduction into our Division Courts of a mode of procedure similar to that recently introduced into the English County Courts system from which ours is copied.

With regard to the work of the Board of County Judges it is well understood that whatever rules have been passed so far are only provisional; it is not therefore quite fair to condemn by anticipation what they may finally decide upon with reference to the whole subject of our correspondent's communication until their work has undergone full consideration, the duties to be performed savour somewhat of legislative powers, at least as regards details, subject however, to the revision of the judges of the Superior Courts of Common Law, and after the new rules and orders shall have passed through the scrutinizing ordeal of the two sets of judges, our correspondent may fairly anticipate that all interests will be duly weighed with a single eye to carrying out the intentions of the legislature.

SELECTIONS.

LIABILITY OF THE FIRM FOR THE ACTS OF A PARTNER.

The question under what circumstances the receipt of a client's money by one member of a firm of solicitors constitutes a receipt by the firm so as to render them jointly and severally liable therefor, is a question which involves not only some consideration of the law of partnership, but also of the general relations between solicitor and client. It is a fundamental axiom of the law of partnership, that the act of one partner does not bind the rest, unless it fall within the general scope of the partnership. Where it is sought to charge the firm with liabilities occasioned by the act of a single member, the first question is, whether the act which occasioned the liability relates to the partnership. If it does, then it is well settled that the act of the single partner binds all the others (*Hope* v. *Cust*, 1 East 53).

In those unfortunate cases which sometimes occur, where a suit is instituted to make the partners in a firm of solicitors liable for moneys misappropriated by a defaulting partner, the chief question is, whether the money so misappropriated came to the hands of the defaulting partner in the ordinary course of the business of the firm. If it did, then the firm are liable. And this, as we shall presently see, may lead to nice questions as to what is the ordinary course of business of a solicitor *qua* solicitor, when he is not acting in pursuance of any special authority given to him by his client.

As a general proposition it has been said that it is not in the ordinary course of a partnership business of solicitors to receive money for their clients. This point was raised in *St. Aubyn* v. *Smart* (16 W. R. 394, 1095), where a client who was entitled to a share in a fund in court gave a power of attorney to the firm of solicitors who had acted for him in the matter to receive the money. The power was a joint and several power, and one of the partners to whom it was forwarded availed himself of it to obtain the money, which he paid into his own account and afterwards absconded. The Lords Justices, affirming Vice-Chancellor Malins, held that this money must be treated as having come into the hands of the firm in the course of their business as solicitors, it being the ordinary course of business at the end of a litigation for the solicitors to receive the fruits of that litigation for their clients. The case went a good deal on the knowledge of the transaction which the firm were constructively deemed to have possessed; but is at any rate an authority for it being in the ordinary course of business for solicitors to receive money for their clients, when that money is the fruit of the litigation they have conducted to a successful issue. We shall presently see that the general proposition above stated must be accepted with considerable modification.

It is not within the scope of the ordinary business of a solicitor to receive money from a client for the general purposes of investment (*Harman* v. *Johnson*, 2 E. & B. 61). But it seems that if money be deposited with one partner by a client of the firm for the purpose of being invested in some particular security, and the partner misapply the money, the other partners may be made jointly and severally liable to account for it, on the ground of the transaction being within the ordinary course of business of solicitors.

Thus in the well known case of *Blair* v. *Bromley* (5 Ha. 556, 2 Phil. 354), the client had handed a sum of money to a partner in the firm for the purpose of being invested on a particular mortgage. The recipient partner presently represented to the client that the money had been so invested, and paid him regularly what professed to be the interest on the mortgage, until the partner became bankrupt. It was then found out, twelve years after the transaction took place, that the recipient partner had misappropriated the money. It was argued in that case that it was no part of a solicitor's ordinary duty to receive money to lay out on mortgage for his clients. That may be so where no particular mortgage security is in contemplation. But in *Blair* v. *Bromley* the representation was that a particular security was in contemplation. That being so, to receive a client's money for the purpose of being invested on it was within the ordinary course of business, and the defaulting partner had power to undertake on behalf of the firm the transaction which he professedly undertook on their behalf; and, therefore, his unfortunate partner, though he had had no opportunity of knowing anything of what was being done, was necessarily held liable for the acts of the other no less than six years after the partnership had come to an end.

Vice-Chancellor Wood, in *Bourdillon* v. *Roche* (6 W. R. 618), considered at some length the position and duties of solicitors in this respect. The decision was that it is no part of a solicitor's business *quâ* solicitor to receive on behalf of his clients money coming to them upon payment of a mortgage debt, or to retain such money for the purpose of investment generally. For a specific investment, we have already seen, it is quite in the ordinary course of business so to retain it, as the money in fact merely passes through his hands, and he is not the custodian of it, unless during the limited period which precedes the re-investment of the fund. In *Bourdillon* v. *Roche*, where a mortgage had been paid off and the money was retained by the defendant's partner for re-investment, and misapplied by him, the bill, which sought to make the defendant liable as well as the estate of the partner who misapplied the money, was dismissed as against the defendant, upon the ground that there was no evidence that the money was received for the purpose of being invested on any specific security, and, therefore, that the transaction was not within the ordinary range of business of a solicitor.

The receipt of money to be laid out on a specified security is said to be within the ordinary course of business, but the receipt of purchase-money on a vendor's behalf not. *Viney* v. *Chaplin* (6 W. R. 562), which is the authority for the latter proposition, and is explained by the Vice-Chancellor in *Earl of Dundonald* v. *Masterman* (17 W. R. 548, L. R. 7 Eq. 504), only goes to this, that a solicitor as such has *not*, as against his client, authority to receive that client's money; but it does not touch the question now before us.

The cases appear to come to this, that a solicitor who acts strictly in his professional capacity does not receive money on behalf of his clients, unless to be invested in a *specific* security or applied in a particular manner. *Atkinson* v. *Mackreth* (14 W. R. 883), was a case where one of a firm of solicitors received a sum of money from a client, part whereof was to go in payment of their bill of costs, and the residue was to be applied towards effecting an arrangement with the client's creditors. The solicitor misappropriated the money. It was argued that the purpose for which the balance of the money was given—viz., the arrangement with the creditors—was a general purpose analogous to the case of money being handed to a solicitor for investment generally, which is a scrivener's business, and not a solicitor's. The Master of the Rolls, however, held on demurrer that the liability was joint and several, thus admitting that the undertaking to apply the balance as above mentioned was within the scope of a solicitor's business.

In *Withington* v. *Tate* (17 W. R. 247) the question was whether a mortgagor was fairly entitled to assume that the mortgagee's solicitor was the proper person to receive the money as agent for the mortgagee. Lord Romilly, M. R., held that he was not, and on appeal Lord Hotherly, C., took the same view, that the mortgagor had paid the money on his own wrong, inasmuch as he was not authorised to pay it to the solicitors.

St. Aubyn v. *Smart* is noticeable for the question which arose in it as to the jurisdiction of the Court in these cases. That there is a remedy at law in most cases is certain, but, where the lapse of time has barred this, there is still a remedy in equity, provided there had been misrepresentation leading to the fraud complained of. In *Blair* v. *Bromley* the misrepresentation was made in 1829, and the discovery of it was not made until 1841, while the partnership had been dissolved upwards of six years. At law, therefore, the remedy was gone. But in equity, in the opinion both of Sir James Wigram and Lord Lyndhurst, the effect of the misrepresentation was the same as if it had been made on the day when the fraud originated by it was found out; and that the right to relief against the several partners was not gone by reason of the firm having been dissolved more than six years before.

In the latest case on this subject, the *Earl of Dundonald* v. *Masterman*, the Earl, in the course of an arrangement of his affairs, in which the defendants' firm were his professional advisers, remitted a bill for a large sum to England, which bill was endorsed to the member of the firm who had throughout taken charge of the Earl's affairs, and by him discounted. The balance of the amount so obtained was misapplied by the partner in question, who absconded; and the suit was instituted to make the remaining partners liable for the acts of their former partner. As in *St. Aubyn* v. *Smart*, the defendants were precluded from making out that the plaintiff had employed the defaulting partner, and not the firm, by the circumstance that the bills of costs were made out in the name of the firm, and discharged by payments made to them. The main question was, as in the other cases, whether it was within the ordinary business of the firm so to receive money for a client, and the Vice-Chancellor, following the foregoing cases, was clearly of opinion that it was. The bill was transmitted to England for the purpose of providing a fund to pay the creditors; it was endorsed to the defaulting partner; he discounted it. The cheque thus obtained was made payable to the order of the firm, and the defaulting partner obtained the money, part of which he appropriated by using the firm's name in endorsing the cheque. It was one of those unhappy cases where some one or other innocent person must suffer, and the remaining partners suffered because they had placed confidence in him, and held him out to the world as a person for whom they were responsible.

Another branch of the case, somewhat resembling *Coomer* v. *Bromley* (5 DeG. & Sm. 532), requires a passing notice. Two of the three partners—the defaulting and another—were trustees of a trust deed executed by the Earl, and a portion of the proceeds of the bill was paid to them. The Vice-Chancellor, as in *Coomer* v. *Bromley*, held that this money was paid to them as trustees, and not as members of the firm, and that the partnership was entitled to be discharged in respect of it. The first branch of the case resembles *Atkinson* v. *Mackreth*, to which we have already referred, although the circumstances are more complicated. What we deduce from the cases above, of which we have given an imperfect summary, is, that the scope of a solicitors business does extend to the receipt of money for *specific* objects, but not for general purposes, and that to receive money for arrangements with creditors, paying legatees, paying into court, and in short, for any specific purpose connected with the professional business then in hand, are within the scope of a solicitor's ordinary duty quite as much as they undoubtedly are at the present day within his every-day pratice.

It must not be forgotten that solicitors now act far more as general family agents than they formerly did. This fact will have to be borne in mind in considering the older cases, which were decided in days when the public required far less of the profession than they do now, that

there is hardly a conceivable form of business, that a solicitor may not be called on to supervise or undertake on behalf of his client.—*Solicitor's Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

JUSTICE OF THE PEACE—QUALIFICATION—Con. Stat. C. ch. 100, sec. 3, prescribing the qualification of Justices of the Peace, does not require them to have a legal estate in the property; it is sufficient if the land, though mortgaged in fee, exceeds by $1200 the amount of the mortgage money.—*Fraser* qui tam v. *McKenzie*, 27 U. C. Q. B. 255.

INSOLVENCY—DEED OF COMPOSITION.—A deed of composition and discharge under sec. 8, sub-sec. 4, of the Insolvent Act of 1864, purporting to be between the insolvents of the first part, and a majority of the creditors, of $100 and upwards, of the second part, was *Held* invalid, because not executed by the insolvents.

Such a deed to be operative must provide for the separate creditors of each partner as well as those of the firm.

A purchase of goods by persons unable to pay their debts in full, is not fraudulent within sec. 8, unless such inability is concealed from the creditor with intent to defraud him.—*In the Matter of Garratt & Co., Insolvents*, 27 U. C. Q. B., 266.

COMMON SCHOOLS — ARBITRATION—CONTRACT WITH TEACHER NOT UNDER SEAL—C. S. U. C. CH. 64, 23 VIC. CH. 49, SEC. 12—PLEADING.—*Held*, on demurrer to the avowry and cognizance set out below, that there is no right to arbitrate under the Common School Acts (C. S. U. C. ch. 64), unless the contract of service is entered into by the trustees with the employee in their corporate capacity, and evidenced by their corporate seal; and unless the contract has been so entered into, the person discharging the duties of teacher has no legal *status* as such.—*Birmingham* v. *Hungerford*, 19 U. C. C. P. 411.

MUNICIPAL ELECTION—IMPROPER CONDUCT OF RETURNING OFFICER—ELECTION BY ACCLAMATION.—At a meeting called to receive nominations for municipal councillors, one party, as they alleged, made their nominations at twelve o'clock, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. The returning officer did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour so to make nominations, when in fact there was less than half that time. At one o'clock the returning officer, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates to be nominated, declared that the persons nominated at the opening of the meeting were duly elected by acclamation. The other side, who were waiting as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested against this, and desired to nominate the opposition candidates, (of whom the relator was one,) which the returning officer, however, refused to receive as being too late.

Held, 1. That the election must be set aside, and a new election ordered.

2. That the relator was a candidate and voter within the meaning of sec. 108 of the Municipal act, although he had not been nominated or voted, for the returning officer could not by his illegal acts divest him of his rights in that respect.

3. That the names of the candidates should have been submitted to the meeting *seriatim* after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation.

4. That the returning officer had acted improperly and contrary to the spirit of the law, and was therefore ordered to pay the costs.—*Reg. ex rel. Corbett* v. *Jull*, 5 Prac. Rep. 41.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

MORTGAGE—ABSENCE OF COVENANT TO PAY—LIABILITY.—Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt.

A mere promise to pay such money in consideration of forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be:

Held, however, that in this case the evidence of such latter promise, set out below, was unsatisfactory; and the jury having found for the plaintiff, a new trial was granted.—*Jackson and wife* v. *Yeomans*, 27 U. C. Q. B., 307.

TOLLS—ILLEGAL DEMAND OF—CONVICTION FOR—EXEMPTION.—Con. Stat. U. C. ch. 49, sec. 89, which makes it an offence to "take a greater toll than is authorised by law," does not apply to the case of taking toll from a person who is altogether exempt.

If it did, a conviction for such offence should state the ground of exemption, and the fact of such exemption being claimed.

In this case the defendant passed through the gate on the 10th January, the collector giving him credit, as was usual between them. On the 20th they had a settlement, and this toll was then demanded and paid. *Semble* that a conviction for such demand, if legal, could not be supported.—*The Queen* v. *Campion*, 27 U. C. Q. B. 259.

NORTHERN RAILWAY CO. — OBLIGATION TO FENCE—20 VIC. CH. 143.—The plaintiff, by permission of one H., put his cattle into a pasture field of H., adjoining defendants' railway, and the evidence went to shew that they escaped thence into an adjoining field, occupied by one J., and thence on the track, where they were killed by a train passing. The plaintiff sued, alleging that the horses escaped from the field where they were pasturing by reason of defects in the railway fences.

Held, affirming the judgment of the County Court that he could not recover, for the horses were not in the field from which they escaped by the owner's permission.

The preamble to 20 Vic. ch. 143, which applies to this company the clauses of "The Railway Act" with respect to fences, has not the effect of extending their liability beyond that of other companies subject to the same provisions.—*Wilson* v. *The Northern Railway Company of Canada*, Q. B., H. T., 274.

Lord Eldon, when he was handsome Jack Scott of the Northern Circuit, was about to make a short cut over the sands from Ulverstone to Lancaster at the flow of the tide, when he was restrained from acting on his rash resolve by the representations of an hotel-keeper. "Danger, danger," asked Scott, impatiently; "have you ever *lost* anybody there?" Mine host answered slowly, "Nae, sir, naebody has been *lost* on the sands, *the puir bodies have been found at low water.*—*Jeaffreson.*

ONTARIO REPORTS.

QUEEN'S BENCH.

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

MCLEAN AND THE CORPORATION OF THE TOWN OF ST. CATHARINES.

Municipal corporations—Markets—29 & 30 Vic. ch. 51, sec. 296. sub-sec. 12—31 Vic. ch. 30, sec, 32.

The corporation of a town by by-law enacted that no butcher, huckster, or runner, should buy or contract for any kind of fresh meat, provisions, &c., such as were usually sold in the market, on the roads, streets or any place within the town, or within one mile distant therefrom, between certain hours in the day:

Held, clearly unauthorized, for their power (under 29 & 30 Vic. ch. 57, sec. 296, sub-sec. 12, as amended by 31 Vic. ch. 30, sec. 32), extends only to butchers living in the town or within a mile of its limits.

The rule *nisi* to quash the by-law was entitled "In the matter of —— appellant, and —— respondent;" *Held* no objection.

[27 U. C. Q. B. 603.]

James Miller obtained a rule calling on the corporation of the town of St. Catharines to shew cause why the second section of their by-law, passed on the 15th April, 1868, entitled a by-law to amend by-law No. 20, relating to the market of the town of St. Catharines, should not be quashed with costs, upon the ground that the corporation had no power to restrain the buying of or contracting for the articles in the said second section mentioned, in the manner therein stated, by all or any of the persons at the places therein stated.

In support of the application the affidavit filed was entitled in this court, and in the matter of James McLean, appellant, and The Corporation of the Town of St Catharines, respondents.

The second section of the by-law in question enacted that no butcher, huckster or runner should buy or contract for any kind of fresh meat, provisions, eggs, and all articles required for family use, and such as are usually sold for family use, and such as are usually sold in the market, on the roads, streets, or any place within the town, or within one mile distant from the outer limits thereof, on any day before the hour of nine o'clock, a.m., between the first days of April and November, or before the hour of ten o'clock, a.m. on any day during the remainder of the year.

Harrison, Q. C. shewed cause, referring to *Fennell* v. *The Corporation of Guelph*, 24 U. C. Q. B. 238; and he took a preliminary objection that the affidavit was improperly entitled as in a cause, and styling the applicant appellant and the corporation respondent.

Kerr supported the rule.

MORRISON, J., delivered the judgment of the Court.

As to the preliminary objection the case of *Hargreaves* v. *Hayes*, 5 E. & B 272, followed by the judgment of our Court of Common Pleas in *Re Burrowes* 18 C. P. 502, disposes of the first branch of the objection, and the case of *In re Imeson and Horner*, 9 Dowl. 651, shews that words such as appellant and respondent may be treated as surplusage.

Then as to the by-law in question, there can be no doubt that the corporation has exceeded its powers. The authority under which the

municipality assumed to act is contained in the 296th section of 29 & 30 Vic. ch. 51. Sub-sec. 12 of that clause, as amended by 31 Vic. ch. 30, sec. 32, enacts, that the council of any town, &c., may pass a by-law "for preventing and regulating the purchase of such things" (those mentioned in the preceding sub-sections, and which are the articles referred to in the by-law in question), "by hucksters, butchers or runners *living* within the municipality, or within one mile from the outer limits thereof."

It is quite clear from the language used that sub-sec. 12 applies, and was only intended to apply to butchers, &c., residing in the town, or within a mile from its limits, and purchasing within the limits of the town, and not, as assumed by the framers of this by-law, to apply to any butcher, &c., whether a resident of the town or elsewhere, buying or contracting for any of the things referred to within a mile of the town. Such a by-law is quite inconsistent with the rights and jurisdiction of the neighbouring municipality.

One can understand the Legislature having in view butchers, &c., living within a mile of cities and towns, who may deal in the articles mentioned in the statute, or purchase them within the limits of such corporations, and in such case giving authority, as they have done, to the councils of cities and towns to regulate the purchasing within their limits by such non-residents in common with the butchers, &c., residing therein; but that is quite another thing from authorizing the making of by-laws to prevent and regulate the purchasing of articles outside of the limits of the city or town by persons living in the adjacent and other municipalities, all of which this by-law assumes to do, for its provisions are wide enough to embrace hucksters, &c., living in the city of Toronto buying and contracting for any of the things enunciated within a mile of St. Catharines.

Rule absolute with costs.

CHANCERY.

Reported by ALEX. GRANT, *Barrister-at-Law, Reporter to*

LIVINGSTONE v. THE WESTERN INSURANCE CO., [IN APPEAL].

Fire insurance—Mortgage.

A fire policy, in favor of a mortgagor, contained a clause providing that in the event of loss under the policy, the amount the assured might be entitled to receive, should be paid to A. L., mortgagee.

Held, by the Court of Appeal that this clause did not make A. L. the assured; and that a subsequent breach by the mortgagor of the conditions of the policy, made it void as respected A. L. as well as hiself. [SPRAGGE, V.C., dissenting.]

[15 Chan. Rep. 9.]

This was an appeal by the defendants from the decree of the Court below, as reported, 14 Chan. Rep. 437.

Mr. *Blake*, Q. C., and Mr. *D. A. Sampson*, for the appellants, contended that the decree was erroneous and ought to be reversed, on the grounds that the right, if any, of the plaintiff in the Court below, against the appellants under the policy in the pleadings mentioned was, according to the true construction of the policy, a right merely to receive what, if any, insurance moneys might, under the policy, become payable to the insured, Francis Porte; that under the conditions of the policy the same was avoided by the other insurance effected by Porte in the pleadings mentioned, and therefore no insurance moneys ever became payable to Porte, and that no insurance moneys ever became payable under the policy to either Porte or the plaintiff.

Mr. *McLennan*, for the plaintiff, submitted that the decree was right, on the grounds that the intention of the parties and the effect of the instrument in question was to insure the plaintiff to the extent of his interest in the property; that the plaintiff's insurance could not be affected by any acts of the mortgagor in contravention of the terms of the policy.

DRAPER, C. J.—On the 3rd June, 1865, Francis Porte mortgaged a house and some land, in the first concession of the township of Kingston, to Archibald Livingstone, to secure payment to the latter of $300, with interest at seven per cent. within two years. The mortgage deed contained a covenant that the mortgagor should, during the continuance of the security, insure the premises and keep them insured for at least $300, and should on the making or renewing any and every policy of assurance, assign the same to the mortgagee; and it was agreed that if the mortgagor did not fulfil this covenant, the mortgagee might effect the insurance at the expense and charge of the mortgagor.

On the 15th August, 1865, the plaintiff Livingstone having previously spoken to Mr. Shaw, who was agent for the defendants at Kingston (telling him that he wanted Porte to insure the premises; that he wanted Porte to insure to secure his mortgage), paid such agent $4.50 as premium on an assurance to the extent of $300, and obtained an interim receipt, which refers to the property to be insured as described in application No. 870, but contains nothing to shew the name in which the policy was to be granted, nor the interest of the party to be assured. The agent had applied several times to Porte, telling him that the plaintiff desired him to insure to secure the mortgage, and Porte made the application and then the plaintiff paid the premium, and received the interim receipt. Upon this the appellants (the defendants below) granted a policy to Thomas Porte, against loss by fire, on the property mentioned in the application, which policy was delivered to the plaintiff, and was in the ordinary printed form, except that immediately following a written description of the premises, was further written: "In the event of loss under this policy the amount the assured may be entitled to receive shall be payable to A. Livingstone, mortgagee."

Among other conditions indorsed on this policy there was one (the 6th) to the effect that in case of subsequent assurance, notice thereof must be given in writing at once, and such subsequent assurance indorsed on this policy, or otherwise acknowledged in writing, in default whereof the policy would become of no effect.

Francis Porte did, however, after this policy was granted, and without the knowledge of the plaintiff, effect an insurance with the Hartford Fire Insurance Company on the same property, of which insurance no notice was given to the defendants.

There was parol evidence that the defendants had a rule to insure owners only, and that if

applications were made in the name of a mortgagee for insurance, they were returned at once and cancelled.

On the 5th December, 1865, the house was damaged and destroyed by fire to the amount of $300.

In May, 1866, the plaintiff filed his bill, praying that the policy might be reformed by substituting the name Francis for Thomas, and that he might be declared to be entitled to be paid the amount of the loss or damage sustained by him as mortgagee, and that the Western Assurance Company, the appellants, might be ordered to pay the same to him.

The cause was heard first before SPRAGGE, V.C., who decided it in the plaintiff's favor. It was afterwards reheard before the Chancellor and both the Vice-Chancellors; and the Court, the Chancellor dissenting, affirmed the decree with costs.

There is no room for doubt that the name Thomas was inserted in the application and consequently in the policy by the mistake of the defendants' agent, and was properly changed to Francis. The application to insure was made by Francis, who was owner and occupant of the premises.

The bill asserts that Livingstone made the application for insurance, to which assertion the interim receipt gives some apparent support, for the premium is acknowledged to be paid by him, and no other person is named in the receipt, but the premium is stated to be received on an insurance on property, described in application No. 870, and though the application was not put in evidence, yet the evidence of Mr. Shaw contradicts the assertion that the plaintiff was the applicant.

It shews that his instigation and pressure upon Porte, made through Mr. Shaw, procured an application to be made by Porte, and that the money for the premium was paid by the plaintiff, but the act of applying was incontestably that of Porte, who is recognized as the owner and occupier of the building, and is, in connection with the ownership and occupation, designated as the "assured." It is also a matter of obvious inference from the parol evidence, coupled with the contents of the policy, that the appellants were aware that the relation of mortgagor and mortgagee existed between Porte and the plaintiff, and that Porte was willing or even desirous that the insurance should be a security to the plaintiff for his mortgage money, and I think it exceedingly probable that the appellants were informed that Porte was bound to obtain an assurance for that object, and with that knowledge agreed that whatever money became due under the terms of the policy should be payable to the plaintiff.

It cannot be asserted on the evidence that Livingstone was the applicant for the insurance or that Porte was not. Given then a covenant entered into by A. to procure and effect an insurance on a house belonging to A., and the grant of a policy to A., founded upon an application by A. to insure that house. Upon these facts, who is the assured? I cannot conceive a doubt but that A. is. Add to these data, that the assurers have made it a settled rule in the conduct of their business not to grant a policy to assure the interest of a mortgagee; that A. in his application, after stating that he is owner and occupant, subject to a mortgage to B., and that he desires that if any sum shall become payable to him (A.) under the policy, the assurers will pay that sum to B., without further reference to or authority from him (A.), and the assurers agree to this, will not these words, "the amount the assured shall be entitled to receive shall be payable to B.," simply but unequivocally express the intention and desire of the assured, and the undertaking of the assurers to give effect to it? If Porte had assigned this very policy, as he covenanted to do, will it be asserted that (the assurers consenting) the assignment had nothing to operate upon because Porte was not the assured. It is to the absence of that assignment, and to Porte's breach of the said condition indorsed on the policy that this litigation is owing. I should have added, probably, to Porte's inability to make compensation for his breach of the covenant to assign.

The construction of the words "the amount the assured may be entitled to receive shall be payable to A. Livingstone, mortgagee," for which the plaintiff contends is, that they make Livingstone or shew that he is "the assured." It seems to me, if it rests on these few words, to be reasoning in a circle, starting thus: Livingstone is the assured because he is to receive the money; and returning, Livingstone is entitled to receive the money because he is the assured. If the construction rests on a more general view, then we find that the assurance is on a building "owned and occupied by the assured." Who owned and occupied it? Francis Porte. Whom do the Company at the beginning of the policy declare they insure? Francis Porte. So far at least Francis Porte, not the plaintiff, is the assured. I do not see any inaccuracy of expression in what follows. Surely the owner of the building insured, the applicant for the insurance, the person who is declared by the Company to be insured by them, is with perfect accuracy called the assured; and it is to the assured that the indemnity for loss by fire is to be made, not necessarily by money, but in the option of the Company, by repair or rebuilding. The inaccuracy, therefore, if any, is in the construction put on the words "payable to A. Livingstone." They import an undertaking on the part of the Company to pay the money, which is Porte's under the policy, to Livingstone, Porte's mortgagee; and as the policy was granted solely on Porte's application, I infer that Porte requested and authorized this disposition of the money which he might be entitled to receive; and I think this is doing far less violence to the language used, than to make the plaintiff the assured, when he never made any application for insurance, and when his interest was one on which the Company would not grant a policy.

I do not mean to say that this undertaking of the Company made to Porte, and, as I infer, at his request, gave the plaintiff no right to the money, but in my humble judgment it was not as the assured.

Entertaining then the opinion that Porte was the assured, it follows that the conditions of the policy were to be observed and kept by him. A violation of the sixth condition has, it appears, taken place, and the consequence is, the policy became of no effect.

Therefore, in my opinion, the decree should be reversed, and the plaintiff's bill dismissed with costs.

I should add that I have considered the case of *Burton* v. *The Gore Mutual Insurance Company*, 12 Grant, 156. The fact that there was an assignment in that case may be sufficient to distinguish it, but if not, it would require more consideration than I have yet given to it, before I could follow it to the extent necessary to decide this case in favor of the plaintiff.

SPRAGGE, V.C., said that in disposing of this case originally he had proceeded mainly on the case of *Burton* v. *The Gore District Mutual Insurance Co.*, from which he had found it impossible to distinguish the case, and subsequent consideration had failed to convince him that he was wrong.

GWYNNE, J.—Admitting that the policy may be rectified by the insertion of the name of "Francis" instead of "Thomas" Porte, I entirely concur in the judgment delivered by his Lordship the Chancellor in the Court below, that the bill should be dismissed with costs.

The bill does not pray any rectification of the policy by the insertion of the plaintiffs' name as the insured; nor if it did, would such a prayer be granted, for in that respect, it is utterly denied by the defendants that there was any mistake, and unless the mistake be mutual there can be no rectification.

When rectified, however, by the insertion of the name of "Francis" Porte, the policy then becomes a contract between the Company and him, the terms and conditions of which avoid the policy in the event which has happened—and in the face of such forfeiture the plaintiff cannot succeed without an alteration in the terms of the contract, which no court has any power to make to the prejudice of one of the contracting parties.

Per Curiam.—Decree of Court below reversed, and the plaintiff's bill dismissed with costs.—[SPRAGGE, V. C., dissenting.]

IN THE COUNTY OF NORFOLK.

IN RE KILLMASTER V. PONTING.

The various objections raised and arguments used by counsel will appear in the judgment.

WILSON, J.—After carefully considering the numerous objections raised by Mr. Foley, of counsel for the tenant, to the preliminary proceedings in this matter, with the answers made by Mr. Tisdale in reply, and having examined also the various authorities to which my attention was directed, I have come to the conclusion that although the affidavits filed, are only inceptive, and intended merely to show a *prima facie* case, they may still be attacked, and the preliminary proceedings set aside upon sufficient grounds being shown, at any time before the taking of the inquisition.

Among the objections raised by Mr. Foley, the one referring to the jurat of the affidavit made by the landlord, appeared to be important, but on examining the rules of court and many decisions bearing on this point, it appears to me, by a fair construction of the language used, that the jurat in this case does contain in effect, all that is required by the rules of court. The argument advanced by Mr. Foley to the effect that "the legal title to actual possession is necessary to the landlord" is incontrovertible, but neither the papers filed, nor the evidence show to my satisfaction that he had parted with it. The mere fact that Killmaster had entered into a written agreement to sell, and had bound himself, at a future day, and on the performance of certain conditions to convey the land to one Smith, and to give him possession by the 1st of April, does not deprive the landlord of his legal right to the premises. It was asserted that the title to the possession, had passed to Smith, in consequence of this agreement to sell and a bond for a deed having been executed by the landlord, but as Mr. Tisdale pertinently remarked, if Mr. Foley's argument was carried, it would necessarily lead to this—that the only case in which a landlord could eject his overholding tenant under this Act, would be where he had no tenant ready to go in at the expiration of the term of the overholding tenant! The interpretation clause (sec. 13), making the term "landlord" include "the person entitled to the possession of the land," of course can only mean the person entitled to it at law as against the tenant, it does not, and never could be intended to confer upon an incoming tenant, the right to take proceedings under the Act, in his own name, against the overholding tenant—which would be the necessary result of Mr. Foley's argument.

Without referring further to the preliminary objections raised by Mr. Foley on behalf of his client, and taking into consideration all the evidence before me in the matter, I cannot avoid coming to the conclusion that with reference to that part of the farm (some 22 acres) which the tenant, not only ploughed but sowed with fall wheat, apparently with the full knowledge and consent of his landlord, that he (the landlord) is not entitled to recover, and that therefore the tenant has a right to continue in possession of at least that part of the farm. As to the residue of the premises, I cannot say, from all that has taken place between the parties, that the tenant has *no color of right* to continue the possession for the remainder of the year. There are several facts proved which go to show that there was an honest dispute between the parties on the question of the tenant giving up possession in April, such as—the fall ploughing; the agreement that the tenant should be paid for it; the non-payment and non-tender thereof up to this moment; the provision in the agreement for sale between Killmaster and Smith in reference to this, and to the obtaining possession; the attempt at a settlement and compromise, thereafter, and other circumstances, all tending to establish the fact, that there was a *bona fide contention* between the parties; under all these circumstances it does not appear to me that I would be justified in exercising the summary jurisdiction given me by the statute; I must therefore leave the landlord to his ordinary remedy by ejectment.

The judge is not to try any issue between the parties, he is merely to ascertain whether the tenant is wrongfully overholding, without any *right or color of right* to continue in the possession. There were several other points and objections raised in this case, but as the landlord, to

my mind, fails on the substantial grounds above stated, it is unnecessary now for me to determine them.

Case dismissed.

BOWLBY v. OWEN.

Under same Act.

WILSON, Co. J.—In this case it was proved that an action of ejectment for the recovery of the same premises is now pending between these parties. I do not find that this is a ground of defence or answer to the present proceedings, but it is, I think, a ground for staying proceedings in the present matter, until the action of ejectment has been either determined or discontinued, and the costs thereof paid. When the proceedings in ejectment have been thus determined, the present proceedings may be continued. I think it is quite clear that the statute does not intend that concurrent proceedings should be taken in ejectment and under the statute respecting overholding tenants.

Proceedings stayed.

MEM.—The action of ejectment having been tried and a verdict found for the plaintiff, I ordered the present application to be dismissed with costs.

IN THE FIRST DIVISION COURT OF THE COUNTY OF ELGIN.

TWEEDALE v. APPLETON.

Interpleader—What articles exempt from seizure under 23 Vic. Cap. 25, Sec. 4, sub-sec. 6—Right of Judgment debtor to dispose of goods so exempt.

HUGHES, Co. J.—I have delayed this judgment beyond the time I allotted to myself for the purpose, because the authorities upon the question involved with regard to the tools seized are not very direct, and the American case referred to in the argument might be very valuable if we had had the American statute to compare with our own and the full report of the case to read. By the 151st Sec. of the Division Court Act, the bailiff was authorized to seize and take any of the goods and chattels of the debtor, excepting his wearing apparel and bedding and that of his family, and the tools and implements of his trade to the value of $20, which to that extent were exempted from seizure. By the 2nd Sec. of the Act 23 Vic. Cap. 25, so much of the 151st Sec. as exempts certain chattels from seizure under executions issued under the first named Act is repealed, and in lieu thereof the following words are substituted and are to be read after the word "excepting" in the said section, viz.: "*Those which are by law exempt from seizure.*" Then the 4th Section of the repealing Statute provides that "the following chattels are hereby declared exempt from seizure under any writ issued out of any Court whatever in this Province," viz.: 1st. The bedding; 2nd. The apparel; 3rd. The furniture; 4th. The provisions; 5th. The animals (as are specially and respectively limited in the 1st, 2nd, 3rd, 4th and 5th sub-sections; then, 6th. "The tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of $60." Nothing, however, (by Sec. 5) is to exempt the seizure in satisfaction for a debt contracted for such identical chattel, &c., and the debtor by Sec. 6 "may select out of any larger number the several chattels exempt from seizure under this Act." The goods seized in this case are described as 1 pair of bellows, 1 vice, 1 drill, 1 anvil, 2 crow-bars, 1 box tools and sundries, 1 box tools, sledges and hammers, 1 cramp, 1 stove and pipes, and 1 wheelbarrow: all these were claimed by the said Daniel Markell under the particulars filed, he sets up a sale thereof to him by the judgment debtor after the execution issued, because they were articles legally exempted from seizure, and such as he could dispose of at any time. I must state that I have not had the same ease in dealing with this question that some might express, because very strong reasons have been pressed upon me for holding, 1st. That no other person but the debtor himself can claim an exemption for the tools from seizure where he has parted with the possession and use of them for purposes of his trade, under the authority of *Regina* v. *Davidson*, 21 U. C. Q. B. 41. 2nd. Whether the selling of the tools by a debtor does not manifest an intention to abandon their use and so subject them to seizure, on the principle that the statute was only intended to exempt them from seizure for the purpose of enabling him to maintain himself and his family by his ordinary occupation as a means of subsistence; and the selling of them is the same in principle as where the debtor has absconded from his dwelling in this Province, leaving beds and bedding and other articles which would have been exempt from seizure in ordinary cases, if he had been residing with his family, has been held not to exempt them when they are no longer in his use, but only in the use of his family, whom he has left behind. Sir John Robinson, in the case referred to, said, "There are several expressions in the statute which lead to that conclusion, but perhaps on further consideration I might come to a different conclusion on that point." The question was not therefore fully decided, because the case turned upon an entirely different point of law. In the case of *Davidson* v. *Reynolds*, 16 U. C. C. P. 140, it was decided that a horse ordinarily used in a debtor's occupation, of the value of $60 or under, could properly have been selected by him as exempt from seizure under the 6th sub-section as a chattel. The debtor in that case had driven away the horse in question (with another) on the pretence of finding security, and sold it, so that the Sheriff who had seized it was unable to produce and sell it to satisfy the execution. The Court decided that the debtor having taken the horse it might be held that he had selected that as he had a right to do; but this decision mainly turned upon the point as to whether a horse might be considered as a chattel within the meaning of the 6th sub-section of the 5th section, and does not seem to carry us very far with the question involved here. If it were a question of intentional fraud between the claimant and the judgment debtor, there might be no difficulty in disposing of the case. As it is I can find no reason to look upon the claimant as any other than a *bona fide* purchaser for value, although I am inclined to think the evidence justifies me in believing that the judgment debtor parted with his tools for the express purpose of defeating the judgment creditor's claim. In the absence of

any decided case in our own Courts, I think I must follow the suggestion in *Anthony* v. *Wade*, (Court of Appeals of Kentucky), as digested in Vol. 3 of *Local Courts' Gazette*, 73; and hold "that the owner of property which is exempt from execution has under our Statute the right to sell such property at his pleasure, and that such sale passes the absolute title to the purchaser without rendering the property liable to execution for the debts of the owner." Although I was inclined to think at first that the words "*ordinarily used in the debtor's occupation*" was intended to exempt merely such goods as were in actual and daily use, and that when he had manifested an intention to abandon their use by selling them, that they *ipso facto* became subject to seizure for the payment of his debts, I am, however, now inclined to think that those words in the sixth paragraph of the fourth section are merely descriptive, intended by general language to take in articles of various kinds suited to the debtor's occupation, as the anvil, bellows, hammers, &c., of a blacksmith; the bench, planes, saws, &c., of a carpenter, the horse of a pedler, the loom, shuttles, &c., of a weaver, and such like. The words "*ordinarily used*" should be read ordinarily required or employed in the particular occupation. I do not think now that they have reference to the actual employment of the chattels by the debtor. That their use is to restrict the sense of the broad term chattels; if the word "*Chattels*" were not used the 6th head of the 4th section would read thus, "tools and implements of the debtor's occupation to the value of $60," and that, as respects tools is the proper reading of the section, the words "*ordinarily used in*" being solely applicable with the words "*or chattels.*" If exempt then from seizure the execution could not bind them in the debtor's hands or in the hands of the claimant, as he could (without, *i. e.* in the absence of intentional fraud), make a valid sale of them to whomsoever he pleased, for he was free to sell them, and a *bona fide* purchaser is protected. A workman, of course, is not bound to keep the same tools all the days of his life, nor a pedler the same horse which would be exempted, after he is broken down, or if he for any reason thinks, as pedlers do sometimes think, he could better himself by an exchange or sale: indeed, a man might be so necessitous as to require to pawn or sell his tools to procure food for his family, and a hundred things might occur to shew that this view is correct, and that urged by the judgment creditor might lead to if pushed to its legitimate conclusion. I think, therefore, as the intention of the Act was to benefit the poor debtor, I must give the statute the most liberal construction in his favour. I therefore decide that the one pair of bellows, 1 vice, 1 drill, 1 anvil, 2 crowbars, 1 box of tools and sundries therein, 1 box tools, sledges and hammers and 1 cramp were the tools and implements of the debtor's trade, and were and are the goods and chattels of the claimant Daniel Markell; and I also decide that the 1 stove and pipes, and the one wheelbarrow were not the tools or implements of or chattels ordinarily used in the judgment debtor's occupation, and that they were not and are not the goods or chattels of the claimant, Daniel Markell; and as to the costs of the said interpleader, I do order, that, because the claimant set up his claim to more goods and chattels than were really his own, each party do bear and pay his own costs of the said interpleader.

ENGLISH REPORTS.

HUDSTON v. THE MIDLAND RAILWAY COMPANY

Railway company—Personal luggage—Carrier.

A took a first-class return ticket by railway from N. to L. and back, subject to the following condition: "Luggage: first-class passengers are allowed 112 *lbs.* . . of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge." A. on his return journey brought with him on the railway a spring horse," which he had bought for the use of his children. The toy weighed 78*lbs.*, and was an improvement on the old "rocking-horse," being about forty-four inches in length and standing on a flat surface. The company refused to carry this toy unless a sum of 2*s.* 6*d.* was paid. A., under protest, paid the amount, and then brought an action in the county court. The learned judge decided in favour of the company, on the ground that the article in question was not personal luggage.

On appeal to this Court,

Held, that the judgment of the county court judge was right [Q. B., 17 W. R. 705.]

Appeal from the County Court at Derby.

The appellant sought to recover damages from the respondents in conseque ice of their refusing to carry a "spring horse" as and for his personal luggage.

On the hearing of the case before the county judge at Derby it was proved that the appellant (who was a stock-broker) on the 10th March, 1868, took a first-class return ticket from Beeston, near Nottingham, to King's-cross, and that he took no luggage with him, but while in London he bought, for the use of his children, a child's toy called a "spring horse," weighing 78 lbs. It was an improvement on the old rocking-horse, being about forty-four inches in length, and standing on a flat surface. On the return journey, however, the respondents refused to allow the appellant to take this toy with him as his personal luggage, and demanded a charge of 2s. 6d. for its carriage. The appellant objected, but subsequently paid the charge under protest. On the railway ticket so issued and delivered to the appellant there was the following printed condition—"This ticket is issued subject to the regulations and conditions stated in the company's time-tables and bills."

The following were the regulations referred to in the foregoing condition so far as concerned the matter in question:

"Luggage: First-class passengers are allowed 112 lbs., second-class 100 lbs., and government passengers 56 lbs. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge. All excess of luggage above the weight allowed will be charged for according to distance."

Before the learned judge at the County Court the appellant contended that according to the terms of the respondent's contract with him, as set forth on the railway ticket referred to, and in the time-tables and bills published by the respondents, he was entitled as a first-class passenger to take the "spring horse" in question with him, and have the same carried as his personal luggage free of charge, it being under the allowed weight and not within the restriction in the respondent's bills, "of merchandise or other articles carried for hire and profit." The

respondents have a fixed tariff for excepted articles, but that tariff does not appear in their acts or public time-tables. The respondents contended that the spring horse did not come within the meaning of the words "personal luggage," inasmuch as it was not for his personal use and convenience as a traveller, but was an article for the carriage of which they were entitled to charge according to their usual custom and that of other specified railway companies.

On the 11th May the learned judge gave judgment for the respondents upon the ground that the horse in question was not such an article as a passenger would usually carry with him, but gave the appellant leave to appeal.

The question for the opinion of the Court is whether under the above circumstances the appellant was entitled to take with him the spring horse in question free of charge, or whether the respondents were entitled to charge for the carriage of the same.

Macnamara, for the appellant.—The question is whether this toy is personal luggage. The Court will construe this regulation against the company and in favour of travellers. It must be taken that the company are cognizant of the habits and wants of travellers. The decided cases on that point show that it is impossible to draw a definite line, but the words personal luggage must be construed with reference to those things that are usually carried by travellers in each particular case; thus, sailors going to a seaport it is submitted may take their bedding, or the cricketer his cricket things, the fisherman his fishing tackle, or the sportsman his gun. The company here have used words of exclusion; they have therefore placed a meaning upon the words personal luggage—that is, articles which a traveller carries with him, not being merchandise nor for profit, is personal luggage. In *Phelps* v. *The London & North-Western Railway*, 13 W. R. 782, 34 L. J. C. P. 259, where an attorney took with him certain document and bank notes (which were held not to be personal luggage) for use in certain causes in a county court, Chief Justice Erle in his judgment says—"But still the habits of mankind must be considered to be within the cognizance of the railway company, so that anything carried according to usage for personal use would be a matter for which the company would be responsible as luggage of a traveller on a journey." [LUSH, J.—No doubt personal luggage means more than what a passenger requires for his own personal use and convenience on a journey; the difficulty is to define what it does include.] A liberal construction, therefore, should be put upon the regulation, and will include different things at different times, according as the wants of travellers vary. For instance, if a family goes to a watering place the toys of the children may be taken as personal luggage. [HANNEN, J.—Should you say a four-post bed was personal luggage?] In *Cahill* v. *London and North-Western Railway Company*, 9 W. R. 653, 10 C. B. N. S. 154, the luggage consisted of merchandise; the same observation applies to *Belfast Railway Company* v. *Keys*, 9 W. R. 793, 9 Ho, of Lds. 556. He also cites, Angell on Carriers, 3rd ed. s. 115; Story on Bailments, 6th ed. s. 499.

A. Wills (*J. C. Carter* with him), for the respondents.—The court must look at the nature of the thing carried. This is in the nature of furniture; if this may be carried as personal luggage why may not a table, or chair, or bed. [LUSH, J.—What do you say to a bath?] Perhaps it might; but take the case of a person daily travelling to town on business; in this way he might furnish his house. He also relied on the cases cited on the other side, and the note to Story on Bailments, 6th ed. s. 499. This is not an article that is usually carried by travellers under ordinary circumstances; it was not for the traveller's personal use or convenience.

Macnamara in reply.—This is not furniture, but a child's toy. It is personal luggage if carried for the traveller's own use or for his family. The size of the article is immaterial, as it is within the weight allowed.

LUSH, J.—I am of opinion that the judgment of the county court judge must be affirmed. It must be taken that the company intended by their regulations to express the same thing as was expressed by their own Act of Parliament, although they have used a different phraseology. The regulation was that passengers should carry a certain weight of luggage, not being merchandise or other articles carried for hire or profit free of charge. Now it has been contended that the articles excluded by this rule are only those articles which are carried for hire or profit, and that if a thing is ordinarily carried by passengers, within the proper weight, such an article is personal luggage. I admit that it is extremely difficult to frame a definition which shall embrace all that is included within these words. I cannot say that I am satisfied with any definition yet given, but at all events the interpretation put on these words by the respondents is too narrow—namely, that it embraces only those things that the traveller takes for his own personal use and convenience while travelling. I am not inclined to put so narrow a limit to the words. The words "ordinary luggage" mean something more than what a passenger wants for his own personal use and convenience. It describes a class of articles, and has reference to a description ordinarily and usually carried by passengers as their luggage. Taking this to be the meaning of the regulation it is intended to have regard to those things which are usually carried by them. The article in question goes beyond that limit. This was an article called a child's toy. It was a spring horse substituted for an improved rocking horse, 78 lbs. in weight and 44 inches in length, and cannot come within the meaning of a toy, which is someting to be carried in the hand; nor that of personal luggage in the sense I have mentioned, namely, that description of luggage which passengers usually carry.

HANNEN, J., concurred.

HAYES, J.—I quite agree. I think the interpretation to be placed on these words must vary according as the habits and wants of travellers change. Pistols in America may be the ordinary luggage of travellers there, but at the present time they are not so here. It is said that this is a toy for a child, but it seems to me to be more like a horse; instead of the child carrying it, the horse is to carry the child. It would require a special carriage for it, a horse-box in

fact. The weight is quite exceptional, and without laying down any definition it is sufficient to say that this is within it.

Judgment for respondents.

UNITED STATES REPORT.

SUPREME COURT OF WISCONSIN.

EMMA SCHNEIDER v. THE PROVIDENT LIFE INSURANCE CO.

An "accident" within the meaning of a policy of insurance means an event which happens from some external violence or *vis major*, and which is unexpected, because it is from an unknown cause, or is an unusual result of a known cause.

Negligence of the person injured does not prevent it from being an accident.

Therefore in an action on a policy of insurance against accident, the negligence of the insured is no defence.

A policy of insurance against accident contained a clause against liability for injury resulting from the assured "wilfully and wantonly exposing himself to any unnecessary danger." The assured attempted to get on a train of cars while in slow motion, and fell and was killed.

Held, that the negligence was not wilful or wanton, and the company were liable.

This was an action on a policy, by which Bruno Schneider was insured against injury or death by accident. The policy contained a clause that the company should not be liable for any injury happening to the assured by reason of his "wilfully and wantonly exposing himself to any unnecessary danger or peril."

The assured attempted to get on a train of cars after it had started, but was moving slowly, but fell and was killed. On the trial the plaintiff was nonsuited, on the ground that the evidence showed the case to be within the exception as to wilful exposure to danger.

The opinion of the court was delivered by

PAINE, J.—The position most strongly urged by the respondent's counsel in this court, was that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident" which has never been established either in law or in common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, when it can readily be seen afterwards that a little greater care on their part would have prevented it. Yet such injuries having been unexpected and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, "Accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the assured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause; or is an unusual effect of a known cause, and therefore not expected."

An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene, a hundred times without injury. The next time the gun is discharged, or the lamp explodes. The result was unusual, and therefore unexpected. So there are undoubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore when an injury occurs it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald* v. *The Railway Passengers' Assurance Co.*, 26 E. Law & Eq. 432, not as a direct authority, but as containing an implication that the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident; that was a railway accident, and the only question was, whether the injury was occasioned by an accident of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence if it had existed.

The general question as to what constituted an accident was considered in two subsequent cases in England. The first was *Sinclair* v. *The Maritime Passengers' Assurance Co.*, 3 El. & El. 478 (E. C. L. R. vol. 107), in which the question was, whether a sunstroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, &c., and while admitting the difficulty of giving a definition to the term accident which would be of universal application, they say they may safely assume "that some violence, casualty, or *vis major* is necessarily involved." There could be no question in this case that all these were involved.

In the subsequent case of *Trew* v. *Railway Passengers' Assurance Co.*, 6 Hurl. & Nor. 839, the question was, whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held that if the death was occasioned by drowning, it was accidental within the meaning of the policy. And in answer to the argument of counsel they said: "If a man fell from a housetop, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted

from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases."

There was no suggestion that there was any question to be made as to the negligence of the deceased, and yet the court said: "We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of the policy, whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

Now either of these facts would seem to raise as strong an inference of negligence as an attempt to get upon cars in slow motion. Yet the court said that although the drowning was occasioned by either one of them, it would have been a death within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark except upon the assumption that the question, whether the injured party was guilty of negligence contributing to the accident, does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and if so, whether it was within any of the exceptions.

This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence falling short of "wilful and wanton exposure to unnecessary danger" would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

The question therefore remains whether the attempt of the deceased to get upon the train was within this provision, and constituted a "wilful and wanton exposure of himself to unnecessary danger?" I cannot think so. The evidence showed that the train having once been to the platform, had backed so that the cars stood at some little distance from it; while it was waiting there the deceased was walking back and forth on the platform (of the depot). It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, or as fast as a man could walk, he attempted to get on and by some means fell either under or by the side of the cars and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left, would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger within the meaning of the policy.

The judgment is reversed, and a *venire de novo* awarded.—*American Law Register.*

CORRESPONDENCE.

Appeals before the General Sessions of the Peace.

To the Editors of the Local Courts' Gazette.

Gentlemen,—An important point of practice relating to appeals to the Sessions, arose in several cases at the General Sessions of the Peace, held by George Duggan Esq., in July, 1869, in the County of York.

The question was, whether in case of an appeal taken from the conviction of a Justice of the Peace, in an assault and battery case, or in any case where appeals are allowed, the recognizance to prosecute, should be entered into within the four days, or other period given by Statute in which to serve the notice of appeal—or, whether if the recognizance be entered into at any time before the trial takes place it is sufficient. The Consolidated Statutes of Upper Canada, at page 963, allude to the manner of giving notice and its requisites in certain cases.

The Consolidated Statutes of Canada, at page 1034 5, also allude to appeals from summary convictions. The above statutes of Upper Canada and Canada require a recognizance to be given in certain cases therein mentioned.

The Statute of Canada, passed in 1866, chap. 50, sec. 4, says that the appellant *shall in all cases, whether in custody or not, enter into a recognizance to prosecute.*

But none of these acts or statutes mention when the recognizance is to be entered into, whether within the time allowed to appeal or not. The practice in the County of York, where appeals are more numerous than in any other County of Canada west, has been somewhat fluctuating. It has not been positively decided that the recognizance must be entered into within the four days allowed for appealing, according to the first mentioned act, or

within the three days mentioned in the Consolidated Statutes of Canada before referred to. The words in these acts are *wide enough* to allow of the entering into the recognizance at any time before the court day. But then this inconvenience arises in that case, that the respondent may not know whether the appellant will do so. The better construction would be to require the appellant to give security at once, within the time allowed to appeal.

The point came up at the said Sessions before Judge Boyd, and also before Judge Duggan. The former thought (at least after that Court) the court would hold that the recognizance should be entered into within the period given to appeal. Judge Duggan did not decide the point. The Deputy Clerk of the Peace, on examination, said the late Judge Harrison had decided that the recognizance must be given within the periods allowed to appeal in. The Statute of Upper Canada, at page 963, says the notice of appeal must be served within four days after the conviction, and in regard to recognizances mentions that they are *to be given in certain cases*, but does not make the entering into them a *condition* precedent to the appeal.

The Statute of Canada, at page 1034, says, the appeal is to be taken in three days after conviction, but does not say the recognizance is to be entered into as a condition precedent, only that in certain cases the recognizance must be given. The Act of 1866, chap. 50, sec. 4, says, "In all cases of appeal, when the appellant is not in custody, he shall enter into a recognizance, with two sufficient sureties, *in manner* provided by the act respecting appeals in *cases of summary convictions*."

Here it is not made a condition precedent.

The English Statutes in some cases make the entering into the recognizance a condition precedent. The matter is discussed in *Dickenson's Quarter Sessions*, under the head "Appeals."

But I could not see that the point involved in our statutes was decided, because the wording of the English Statutes is different.

There is (looking at our Statutes) this difficulty in the way. Suppose a prisoner in gaol and convicted. He appeals say in three or four days, but does not give bail. But shortly before the court meets, he wishes to give bail, although after the three or four days to appeal in, can it be said he shall not have the right to do so? Or in other words, although he has given the necessary notice he cannot carry out his appeal, because he did not get out of gaol on bail.

This would be certainly a strange anomaly. He was a prisoner and had the right to appeal but could not then give bail—but afterwards could—yet the latter omission prevents his appeal from being heard.

Would not the rule be that in favor of a criminal's rights, the acts if doubtful should be so construed as to be beneficial for the prisoner or the person accused? As the matter stands in the Sessions at Toronto the Court would (and virtually has) decided that the recognizance should be entered into within the period given to appeal.

Can you, Messrs. Editors, throw any light on this question?

C. M. D.

Toronto, July 23, 1869.

Remarks on the garnishee clauses of the new Division Court Acts.

To the Editors of the Local Courts' Gazette

Gentlemen,—I have to add to my former remarks on this Act, a few more that may be interesting to those who are concerned in carrying out its provisions. Indeed, on reflection, I have changed my views as to sec. 5, sub-sec. 4, and sec. 9 of the act. It will be remembered that clause 4 says, that any person having a debt against another (not as yet in judgment), and the debtor having a claim against a third person, the first person may issue a summons against the debtor and the third person garnishee, and upon proving his debt against his debtor, may hold the garnishee to pay the debt thus proved, if he owes it to his debtor. I had thought that an affidavit must be made, *as a condition precedent* to the issuing of the garnishee summons by the creditor, stating that his debtor owed him a certain sum, and that the garnishee on the other hand owed the debtor. But this seems not to be necessary upon examining the Act, nor is it necessary even if *there is a judgment* already obtained (for which see sub-sec. 4. Section 6 requires an affidavit to be made where there is a judgment, if an order to attach is required. But the order may be made without any summons issuing at all—under this last clause—when made, the order stands good, and can be served as an order upon any garnishee, (and in fact, binds all the debts due the debtor in the Province, so

far as he is concerned, upon notice of the order.)

Then the summons issued under sec. 5 and sub-sec. 4, when served on the garnishee, has the effect of binding the debt due from him to the debtor, until the judge decides the suit. The summons is in itself an *attaching order* when served. I had at first thought it was only so when a fiat of a judge had been obtained.

Of course this construction saves the necessity of an affidavit, and does away with the judge's fiat, expediting the operation of the Act wonderfully. All the suitor has to do is to make out his particulars of claim against his debtor, and leave them with the clerk, giving the name of the garnishee also, and then the clerk summonses both the debtor and the garnishee in one summons.

This summons may have a special return before the judge in Chambers, in less than 10 days. Upon hearing the summons the judge gives judgment for or against the plaintiff, or for or against the debtor. If the last, he may then ask the garnishee if he owes the debtor, and if he owes the debtor, a judgment also follows against the garnishee, which judgment discharges (if sufficient) the creditor's claim against his debtor.

It seems to me, that the Act should allow the garnishee when he does not dispute his claim, and was always willing to pay it, a fee for his attendance. I hope the new rules have something to this effect. Then an affidavit is only necessary to get an order under sec. 6. Upon reflection, it seems doubtful when one examines the sec. 6, warranting the order to attach, and the form of the order given, whether it was not really the *intention of the Legislature even to give a creditor* power to attach accruing rent or wages. I alluded to this in my last. Some County Court judges have decided in the negative, but this point will be further discussed. Section 18, it will be seen, is a strange one, and empowers the clerk or judge to authorize any one not a bailiff to enforce process. Quære, in such a case, is the person (not a bailiff) entitled (say on executions) to court costs?

It is to be hoped the new (and I believe) voluminous rules will soon be out.

LEX.

Toronto, July 15, 1869.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE

GENTLEMEN,—A Division Court Summons is issued in the County of L. (where cause of action arose) against D. residing in Toronto, dated 6th August, 1868, for sittings of court to be held on the 21st of same month, and was served on day of issue on D. in Co. L. where D. resided about a year previous, and happened to be that day. Lake Ontario lies between Co. L. and Toronto, washing the limits of both and covering a distance of about 35 miles. Was D. served in time? Can Co. L. be said to adjoin County in which D. resides, D. living in Toronto?

In Special Summons under the New Rules (Division Court), served on K. 1st. June, 1869, the clerk makes use of form, reading "In case you give such Notice disputing the claim, the cause will be tried at the sittings of this Court to be held in the Court Room in the town of G., on the 14th day of June, 1869, after the return day first above named &c.;" and at the end of the summons gives notice. "The two next ensuing sittings of the said court will be held, as follows: on the 15th day of July, 1869; on the 18th day of August, 1869."

Is not this a deviation from what the judges who framed the rules meant to do. This summons gives the defendant notice of three sittings of the said court, whereas, it seems to me the judges intended summons to give notice of only two sittings. The form of summons given by judges is " * * * * * the cause will be tried at the sittings of this Court to be held at ——, next after the return day &c., * * * * the two next ensuing sittings &c.," in blank dates in form as above.

Do not you think the judges meant the summons to give notice to defendant of the sittings of the court next after the return day; and if the summons were not served in time for such sittings, that then the trial of the cause would take place at the other sittings named. Could not such a summons be set aside?

Your early answer will confer a favour.

Yours truly,

AN INQUIRER.

We do not think the County of L. and the County of York are adjoining counties within the meaning of the Division Courts Act. Even if Lake Ontario was entirely within Canadian

territory the counties referred to could not be said to *adjoin*.

As to the second question. The officer issuing the summons seems to have quite misunderstood the use and object of the form. The blank in the form of Special Summons after the words "held at" was intended for the *place* of holding the Court, not the day on which the case was to be tried, that is shown at the foot of the Summons where the days of holding the ensuing sittings are set down, the Court coming next after the full period for service has elapsed, that is, after ten, fifteen or twenty clear days from the day of service. Our correspondent is right, we think, in all particulars, and if the defect has not been waived the proceedings would probably be set aside.

Referring to this point, a clerical omission was made in the form of Special Summons as printed, which will doubtless be corrected by the Board of County Judges. The words "on or" were omitted before the words "next after the return day first above named."—[Eds. L. C. G.]

REVIEWS.

THE CANADIAN PARLIAMENTARY COMPANION. Edited by Henry J. Morgan, author of the Bibliotheca Canadensis, &c. Fifth Edition. Montreal: Printed by the Montreal Printing and Publishing Company. 1869.

We have to thank the editor for a copy of the new edition of this well-known and now well-established publication. The fifth edition is an enlarged and improved one. It contains in five parts all such information as one would expect to find in a work of the kind, either in reference to the Parliament of the Dominion or to the Local Governments or Legislatures. The work opens with a list of the Queen's Privy Council of Canada. Then we have a short biography of Sir John Young, the Governor of the Dominion, and of each of his staff. Next we have each of the Deputy Heads and chief officers of the Departments laid before us in a panoramic form, showing all that each has done and suffered for the good of his country. This is followed by a short sketch, giving the legal qualifications of senators and members of the House of Commons. All this is introductory matter. Part I. of the work then opens with a biographical sketch of each member of the Senate, prefaced by a short account of the venerable Clerk, and concludes with a note of the changes in the Senate since the last edition of the work. This part of the work, though embracing biographies of seventy-two senators, is condensed within thirty-six pages. Part II. gives an explanation of certain Parliamentary terms and proceedings, and embraces twenty-four pages. Part III., which is devoted to the House of Commons, opens with a short sketch of the well-known and popular Clerk, expands in a series of biographies of the 181 members of the collected wisdom, and, having exhausted 75 pages of the work, concludes with a note of the changes in the membership of the House since the last edition. Part IV. is devoted to the Local Governments and Legislatures of Ontario, Quebec, Nova Scotia, and New Brunswick, and hands down to posterity all connected with the Local Governments and Legislatures in appropriate language. This part of the work occupies eighty pages. Mr. Morgan, the editor, by the publication of this and similar works, is doing good service to his fellow-men, and is doing much to mark his day and generation in the great stream of time. It is to be hoped that he reaps some rewards of a substantial kind as fruits of his industry. It is well that his name should live after him, but it is very desirable that his body should not be in the meantime neglected. Man cannot live by fame alone. That kind of fame which gives to the famous a little of this world's dross "on account," though earthy, is often convenient, and sometimes necessary.

PARLIAMENTARY GOVERNMENT IN ENGLAND, ITS ORIGIN, DEVELOPMENT, AND PRACTICAL OPERATION. Edited by Alpheus Todd, Esq., Librarian of the House of Commons of Canada. London: Longman, Green & Co. 1869.

We have received the second volume of this valuable work, and had intended to have reviewed it in this number; but, considering the importance of the work, and the pressure of other calls on our time, we did not like to give it a "slip-shod notice," and so have deferred our review of it till our next issue.
