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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.

We have received the subjoined communication, which speaks for itself. We commend the matter of it to the candid opinion of the public, and the example of Mr. Eyre we trust will be followed by other Clerks. All who are competent to express an opinion or offer a suggestion on the subject should do so without delay.

It is from the collected opinions and suggestions of practical men that wise, safe, and permanent reforms may be best devised. Mr. Eyre's scheme is well worthy of grave consideration, should it become necessary to tax suitors, but we think it would not be asking too much if we in Upper Canada called for the necessary disbursements in procuring safes to be paid for out of the general revenue of the Province. *We* build our own County Gaols and Court Houses, and that is more than the people of Lower Canada do.

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

Gentlemen,—The necessity of providing fire proof safes for the prevention of Court books and papers in the offices of D. C. Clerks from being destroyed by fire has for some time engaged my attention, in consequence of the numerous fires which have occurred in this and neighbouring towns, especially the fire which occurred at Peterborough some time since, when Mr. Dennistoun's valuable books and papers were burnt, as were also the papers of the County Court Clerk and Custom House.

The following scheme suggested itself to my mind a long time since, and I submitted it to more than one County Judge, who expressed their approbation of it, and I have been about to submit it to your readers several times, but press of business, sickness, and the expectation that some other Clerks would take the matter up, have prevented me. It appears to me that the several plaintiffs are more interested in the safe keeping of the records of the proceedings in a suit than are the defendants. The defendant when sued may not be possessed of any property whereon to levy the amount recovered against him, yet in after years he may become possessed of property out of which the Bailiff may be enabled to make the amount of debt and cost upon an execution, but before issuing which it would be necessary to refer to the proceedings in the cause entered in the Procedure Book. The scheme I propose is as follows:—That a fire proof safe of sufficient capacity should be furnished to every D. C. office in the Province, to be paid for in the first instance by the County Municipality, the cost to be re-paid, with interest, from the following source:—On all suits entered the following fees should be paid to the Clerk by the *Plaintiffs* on entering the same, viz., where the amount sought to be recovered does not exceed £2, three-pence; £5, six-pence; £10, nine-pence; £15, one shilling; and exceeding £15, one shilling and three-pence. The several Clerks to account for these fees received by them, and pay them over to the County Treasurer quarterly, to be by him credited to the Municipality from time to time, until the whole amount so previously advanced shall have been re-paid with interest, when the fees should cease to be collected in, the County having paid for their safes. This would be done in most Counties in from two to four years.

I give the preference to safes over fire proof vaults from the fact that the Divisions are often altered, even in old settled Counties, where the place at which the office is held has to be also changed. Again, the offices are generally kept in the private residences of the Clerks, and upon change of Clerks by death, removal, or resignation, the safe, with the books and papers, could be transferred to the new Clerk, whilst a vault, being built on private property, could not be transferred. Other arguments might be adduced to prove that preference should be given to safes. Safes of sufficient size (regard to be had to the business done or likely to be done for some years to come) can be purchased at from £40 to £50 each, at the Messrs. J. & J. Taylors', Toronto, from whom I bought one for myself last January at £25, capable of holding all the books in my office necessary to be preserved, and the papers of the current Court, with two drawers for cash or papers.

I am, gentlemen, yours,

Thomas Eyre.

ANSWERS TO QUERIES.

[Questions in relation to the law and practice of Division Courts have, for the sake of convenience in reference and otherwise, been assigned a place in this department of the Journal. These questions are usually too long, and in many instances require answers too lengthy for insertion in the place usually assigned to such matters.

Correspondents will always find their communications acknowledged in the next issue after receipt whether *answered* in that number or not. To ensure an answer in the following month such queries should be in the hands of the editors *two* weeks at least before the day of publication.]

"E. T."—A judgment was obtained in the D. C., of which I am now Clerk, in the year 1848. Execution was issued thereon within one month after judgment obtained, and in due course returned endorsed "No Goods." The plaintiff recently learning that the defendant has since acquired means wherewith to pay the debt and costs applied to me as Clerk of the Court in which the judgment was obtained to issue an alias execution. This I have refused to do upon the grounds that the judgment was obtained more than six years since, and D. Courts not being Courts of Record the issuing of the execution is barred by the statute of limitations.

The plaintiff on the other hand contends that an execution having been issued in the suit "within one year from the time of obtaining such judgment," as provided by the 67th Rule, I am bound and ought to issue an alias execution. Who is correct, the plaintiff or myself?

The point is by no means free of doubt, and the safer course would be in all cases like that put to ob-

tain "leave of the Judge" to issue execution. The application is *ex parte*, and would be granted as a matter of course on affidavit showing that the judgment is still unsatisfied, and that the parties to it remain as when judgment was given. Our own opinion (rather opposed to that of E. T.), based on the 10th sec. of the D. C. Ex. Act, and the 67th Rule of Practice, is that leave is not necessary. We believe that there is some conflict of opinion amongst the County Judges on the point, and it is just such an one as requires to be settled by a rule.

Guelph, October 22, 1857.

May I request at your earliest convenience your opinion, through your valuable *Law Journal*, upon sec. 2 of 20th Vic. cap. 63, whether the words "or in any other Court of Law or Equity in Upper Canada" apply to Division Courts?

Alfred A. Baker, *Clerk*.

Our present impression is that they do, and we are informed that they have been understood in that sense by some of the County Judges. Any professional man may raise the question at a sittings of a Division Court.

We should be glad to hear of any decision on the point.

J. J.—Are Bailiffs of Division Courts entitled to poundage when they do not actually sell, but instead thereof give the defendant time to procure the money himself?

According to the strict language of the item in Schedule A to the D. C. Act, the Bailiff does not appear to be entitled to the 2½ per cent. except upon actual sale. We should like to see the opinion to which you refer, for we know that "the Bailiff has frequently far more trouble waiting on the faith of promises than he would have had if a sale were at once made;" and should our views be changed by an examination of the "opinion" we will *gladly* announce it.

A "Division Court Clerk" puts the following case, and asks our opinion on it:—

A. owes B. a debt. A. leaves the country; B. takes out an attachment; the bailiff being from home, the attachment is put into the hands of an ignorant constable, who seizes a trunk belonging to A. (supposed to contain notes), but does not return the attachment for some days after. The constable seals up the trunk without opening it, and as it is some miles from the Clerk's house, puts it in charge of a *safe* person, where it now lies nominally in the Clerk's hands. Query—Should the Clerk open the trunk and find out if there is anything in it liable to be sold?

We see no objection to the Clerk ascertaining the contents of the box if the plaintiff wishes him to do so; but until the articles seized are duly returned to him, he should not concern himself about them.

SUITORS.

Commitment on Judgment Summons.

In accordance with a previous announcement, we continue our selection of English County Court cases in illustration of this subject.

Garrett v. *Anderson*, in the Middlesex County Court, A. Amos, J.

"The original cause of action was to recover the sum of £5. 5s. for a quarter's rent, which amount the defendant (who is a widow) was ordered to pay on the 20th of the same month."

The defendant was brought up on a judgment summons. The solicitor for the plaintiff stated "that he should be able to satisfy the Court that the defendant was not justified in taking the house; and would submit that by refusing to give up possession, the defendant had contracted a debt without reasonable means of payment. The plaintiff had offered to forgive the defendant the rent, but the latter refused to quit the premises on the ground that she had no place to go to. He submitted that this was a case which clearly came within the meaning of the clause of the Statute which enacts that if it shall appear to the Judge that the defendant has incurred a debt under false pretences, or has wilfully contracted such liability without reasonable expectation of being able to pay the same, the Judge may order such defendant to be committed to prison for any period not exceeding forty days. He should be able to satisfy his Honor that the defendant did incur this debt under false pretences, having represented herself to be a person of property when she took the house, and that she would shortly come into possession of £1000 through the death of a brother. At that time she was and has since been in the receipt of parochial relief. In proof of that fact he had obtained the relieving officer's certificate, and confidently submitted that the defendant had, by refusing to give up possession of the house, coupled with the facts he had stated, incurred a debt without reasonable expectation of payment, and had subjected herself to imprisonment."

This statement having been borne our by evidence, the Court held that the defendant remaining in the house was equivalent to a declaration of being able to pay, and ordered her to be committed for seven days."

MANUAL ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—By V——.)

[continued from page 197.]

Claims by Third Parties to Goods seized (continued).

By the 6th section of the D.C. Ex. Act, it is enacted that the landlord of any tenement in which goods are taken in execution may, by any writing under his hand, or under the hand of his agent, to be delivered to the bailiff making the levy, claim any rent in arrear then then due to him, "which writing shall state the terms of the holding and the rent payable for the same."

The rent which the landlord may claim under this section is—

1. Where the letting is by the week, rent for four weeks.

2. Where the letting is for any term less than a year (*e. g.* by the quarter), the rent accruing due in two terms of payment.

3. Where the letting is by the year, one year's rent.

It will be observed that claims by landlord *must be in writing*, and contain certain information as to the nature of the holding.

In reference to this notice of claim, it is necessary to state the meaning attached by a subsequent section (15) to the terms landlord and agent. The term "landlord" means the person entitled to the immediate reversion of the lands; or if the property be held in joint tenancy, coparcenery, or tenancy in common, includes any one of the persons entitled to such reversion. The word "agent" means any person usually employed by the landlord for the letting of lands or the collection of rents thereof, or person authorised to act by writing from the landlord.

A bailiff then making a seizure in case the landlord claims rent for the property on which the goods have been taken, should, on receiving the written claim as before mentioned, of the landlord signed by him or his agent, "distrain as well for the amount of the rent so claimed and the costs of such additional distress as for the amount of money and costs for which the warrant of execution issued, and shall not proceed to sell the same or any part thereof, until after the end of eight days at least next following after such distress taken." (Sec. 6.)

In seizing after notice from the landlord, the bailiff may take any goods that would be liable to distress for rent in ordinary cases, though they may not be liable to be taken in execution, provided he seizes no more of such goods than are sufficient to satisfy the rent due. Thus, although the wearing apparel, bedding, tools, and implements of trade of the defendant, to the value of £5, are protected from seizure *under execution*, yet if the landlord gives the bailiff the proper written notice claiming arrears of rent (under sec. 6), the bailiff may distrain such excepted articles to satisfy the rent: (see *Woodcock* v. *Pritchard*, 1 C. C. C., 428, 17 L. T., Q. B. 16.)

In distraining for the landlord, it must be remembered that the amount is limited for which a distress may be made, and a bailiff should not demand more rent than may be claimed under one of the three holdings above stated.

If the goods taken be replevied by the (tenant) defendant, so much of them "shall be sold as will satisfy the money and costs" for which the warrant "issued, and the costs of the sale, and the surplus of the sale and of the goods distrained shall be returned as in other cases of distress for rent and replevin thereof. But no execution creditor is to be satisfied his debt out of the proceeds of the execution and distress, or distress only where the tenant (defendant) replevies, until the landlord, who shall conform to the provisions of the Act, be paid the rent in arrear for the periods before specified."

It would appear that the intention of the Legislature is, that the landlord should retain his precedence over the execution creditor within the limits prescribed by the 6th section.

If there be sufficient goods to satisfy, both the amount of the rent and of the execution, the execution will, of course, be paid in full; if insufficient for that purpose, the costs of distress, &c., are first deducted; the rent claimed is then paid to the landlord, and the surplus, if any there be, paid over to the execution creditor on account.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

QUEEN'S BENCH

(*Reported by* C. ROBINSON ESQ., *Barrister-at Law.*

RYCKMAN v. RYCKMAN.

Dower—Demand and refusal—Evidence of readiness to assign—13 & 14 Vic, ch. 58, s. 5.

DOWER.—*Plea, tout temps prist Replication*, a demand and refusal. *Rejoinder*, denying the refusal. There was no suggestion that the husband died seised. The evidence showed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land, but she declined saying that she could not work the land and would rather have compensation, and no portion was in fact marked out. *Held*, th[illegible] issue must be found for the tenant.

As the husband did in fact die seised—*Semble*, per *Burns*, J., that that should have been suggested on the record, and the tenant would than have been entitled to damages from the suing out of the writ, and consequently to costs.

DOWER.—The demandant claimed dower in certain lands, as the wife of Tobias Ryckman, deceased, not averring that he died seized, nor claiming damages.

The tenant pleaded that from the death of the husband, he hath been always "ready, and still is ready, to render to the demandant her dower, and rendereth the same here into court."

The demandant replied that more than one month, and less than one year before the commencement of this suit, namely, on the 2nd of August, 1855, she demanded from the tenant her dower, &c., but that he did not render it, and wholly neglected and refused so to do, wherefore she prays judgment to recover her dower aforesaid in the lands, &c., and also damages for the detention thereof.

The tenant rejoined that he did not refuse to render her dower to the demandant, in manner and form as alleged in the replication, concluding to the contrary.

At the trial, at Cobourg, before *Hagarty*, J., it was proved that in July, 1855, the demandant served a written demand of her dower, pursuant to the statute. The action was brought on the 28th of February, 1856.

The tenant had frequently stated to the demandant and her attorney his willingness to give dower, offering her possession of one-third of each field and of the house, and telling her that he would name a person, and she could name another, and she might come any day she wished, and they should stake out the land for her. Her attorney was present when such offer was made to her.

She was told, soon after her husband's death, that she might have her living so long as she would live in the house of Munsen Ryckman, the tenant of one portion of the property, and one of her husband's sons (she had been married to Tobias Ryckman about two years before his death). She was told also by the tenant "here is the land, one-third of it is for you, you can rent it to

any one or live in the house." She said she did not want the land, as she could not work it; that she would rather have something else.

She was requested not to go away till the matter was settled, and on behalf of all the heirs an offer was made to leave it to two persons to stake out the land, but she repeated that she could not work it, and would rather have something else. She was told whatever third the law would give her was ready for her.

Soon after the notice was served of the claim, in July she came again to the land and was again told that the third was ready for her, and she was requested to name a person on her behalf to measure it out. But no portion for her was even in fact marked out.

The learned judge, by consent of parties, directed the jury to find for the demandant, with one shilling damages, on all the issues, subject to the opinion of the court upon the evidence whether, drawing such inferences from the evidence as they might think right, the demandant or the tenant in the action should succeed upon the issues joined, the court to let the verdict stand for demandant, with or without damages, or to order a nonsuit, according to their opinion.

J. D. Armour, for demandant, cited Bishoprick and Wife v. Pearce, 12 U. C. Q. B. 306; Quin v. McKibbin, Ib. 323.

O'Hare showed cause.

ROBINSON, C. J.—I cannot distinguish these cases from that of Bishoprick and Wife v. Pearce, referred to in the argument (12 U. C. Q. B. 306). We are bound, I think, to give effect to our statute 13 & 14 Vic., ch. 58, sec. 5, according to the evident intention of the legislature in making the provision, which was that the tenant should not be subject to costs in cases of dower, unless the demandant were driven to sue for it. If she bring her action when she need not—that is, when her right is not disputed, and when the tenant has been willing to give her all she is entitled to without an action—then the statute protects the tenant against paying costs unnecessarily incurred. Here the tenant has pleaded no false plea, made no unjust defence, and shewn no disposition, before or since the action, to dispute the claim to dower. The only thing to be done therefore was to set out the land for the demandant to occupy.

This the tenant could not do alone, because he was not to be the sole judge in the matter. He offered to join in appointing persons to mete out the dower, but the demandant, according to the evidence, declined to take part in the measurement by appointing some one to act for her; she would take no interest in the matter, not caring about the land, as she said, but wanting money instead.

I do not see how the jury could have found upon their oaths that the tenant in this case had *refused* to render her dower, and that was the only issue raised upon the record.

The verdict, I think, should be in favour of the tenant on the issue, which will not interfere with the demandant taking judgment for her dower.

BURNS, J.—This case differs from the cases of Bishoprick v. Pearce and Quin v. McKibbin in the facts. The record, so far as the tenant pleading the plea of *tout temps prist*, and the demandant replying a demand of dower and refusal by the tenant, presents the case the same, but the evidence shews that in the present case the husband died seized of the premises, and the tenant was in possession by operation of law. The record does not show or suggest that the husband did die seised, and therefore it cannot be ascertained by the record whether it is a case in which the demandant would be entitled to costs as well as damages, irrespective of our statute. The pleadings seem to me sufficient to raise both questons —namely, whether the demandant is entitled to damages and costs, or costs only, if it be a case where she is not entitled to damages. In either case the demandant upon this record was at once entitled to her judgment for sisin of her dower, and there was no occasion to have taken down the case to *nisi prius* in order to have obtained the writ of *habere facias seisinam*. It was only necessary to go downtotrial for the purposeof determining the issues, with a view to see whether the demandant was entitled to recover damages as well as costs. The tenant in this case coming into the possession at the death of the husband, was not a wrong-doer as against the demandant until she demanded her dower and he had refused to give it to her. Therefore the plea of *tout temps prist* in this case was a proper plea on the part of the tenant, but I do not think the effect of the plea is to admit the right to damages. If the demandant's count had stated that the husband had died seised, the effect of the plea then might possibly be to admit the right to damages, but that point is not in question on this record. I think the application of what my brother Draper said in Bishoprick v. Pearce has been misapplied in this case. When he quoted from Bac. Abr. "Dower" D. 2, that notwithstanding the heir had pleaded *tout temps prist* the demandant would be entitled to recover damages from the teste of the original writ to the execution of the writ of inquiry, he must be understood to have meant upon a record properly framed for the purpose. In Hargrave's Notes to Coke on Littleton, 32 *b*, it is said, speaking of how the inquiry shall be of the dying seised and damages, "If judgment be by confession or default, a writ shall issue to deliver seisin and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted it may be supplied by writ of inquiry." The damages are—1. The value *de tempore mortis*; 2. *Damna occasione detentionis dotis*, though if they are mixed up together by the verdict yet it will be good. Now if the tenant's plea of *tout temps prist* be true, one can see no reason, though the demandant may be entitled to recover the value of the third part from the suing out the writ, why he should be subject to the second class of damages. Then with regard to the first, I find, upon looking into the cases in Viner's Abridgment, in all cases where the tenant pleads *tout temps prist*, and the demandant replies to it, there should be a suggestion that the husband died seised, and then the jury would be sworn upon the issue not only to try it, but to inquire of the dying seised and the damages. Upon the record so framed the jury might find the plea for the tenant, and yet asses the value or profits from the suing out of the writ to the time of the inquiry, for it is said that upon the plea of *tout temps prist* being put in, and the demandant taking issue upon it, the damages shall await the event of that issue and the demandant cannot in this case take judgment and pray a writ of inquiry—Roscoe on Real Actions, I. 310. The suing out of the writ is of itself a demand of dower, and if the tenant pleads *tout temps prist*, and the demandant confesses the plea, she is at once entitled to her writ of *habere facias seisinam* without damages; but if she contests the truth of the plea, her right to damages is suspended till the trial of the issue; and as the plea of *tout temps prist* admits the right to dower, she may be entitled to damages from the suing out of the writ, as a demand of her dower, though she fail upon the issue she has tendered upon the tenant's plea. My brother Draper seems to have thought that the heir would be subject to costs where damages were assessed, even though he succeeded on the plea of *tout temps prist*, under the operation of the statute of Gloucester. I am not prepared to assent to that proposition. It was not necessary to determine that point in the case of Bishoprick v. Pearce, nor is it necessary to do so in this case, as the record is not framed suggesting a case that would entitle the demandant to have damages assessed, even from the suing out of the writ. I see in a note to page 321 of the first volume of Roscoe on Real Actions, that it is made a *quære* whether, when the tenant saves himself from damages on a plea of *tout temps prist* he is liable to costs. In this case the demandant has omitted from the record the matter which entitles her to an inquiry respecting damages, and consequently costs, and has gone to trial simply upon the truth of the tenant's plea. If she contends that it is worth her purpose to apply for a writ of inquiry as to the value since the writ was sued out, she can apply for a writ of inquiry, and then the question of costs would properly arise, if any sum were found that she would be entitled to recover.

In Park on Dower, 307, it is said, "The statute of Merton, in giving damages, has left the method of ascertaining them to the court; and the usual practice is, unless the damages are either admitted by the party, or ascertained by the jury who try the action, to grant a writ of inquiry; and if judgment is given for the demandant by default, confession, or any other way than by verdict there must of necessity be a jury impannelled to asses the damages." For the reasons which I shall presently give, I think we can give no judgment in the demandant's favour on the plea, but the contrary, that upon the plea judgment should be given for the tenant; and therefore, if the demand shall contend that she is entitled to the costs of suing out and serving the writ, she must pro-

ceed to have damages assessed in her favour for something. The question will then arise whether the 5th section of the Dower Act of 1850 is to be applied to cases where the action is brought against the heir, and compel the demandant to serve him with a notice a month before the bringing of the action, as in cases where she would (to entitle herself to costs) do against any other person, where her husband did not die seised.

On examining the evidence given in this case, it is quite clear that the tenant, from the time of the death of the demandant's husband down to the bringing of the action, was always ready and willing to have assigned the dower to the demandant, but she always refused to take the land. She avowed that her object was to compel him to make some money compromise respecting it, and that she did not want the land. I met with a case in Viner's Abridgment "Dower" M.a, Vol. IX. p. 282, very applicable to this. The tenant pleaded *tout temps prist*: the demandant replied that she had, at a particular time, demanded the dower, and that the tenant had refused; and in answer to that the tenant rejoined that he had, at the time mentioned, appointed a time, and requested the demandant to come upon the land, and that he would give her the dower, but that she refused. The court adjudged that it was a good answer of the tenant.

It appears to me the tenant is entitled to judgment upon these pleadings and the evidence, and that the verdict should be entered for him, leaving the demandant to have her judgment for seisin, without damages, or take such other course as she may be advised.

McLean, J., concurred.

Judgment for tenant.

Coombs v. the Municipal Council of the County of Middlesex.

Court House—Control and repair of—7 Wm. IV, ch. 18, 11 Vic. ch. 18, secs. 36. 41.

The magistrates in Quarter Sessions have no power to order furniture for the court house, and the County Council are not liable for furniture so supplied.

The fact that the court house was also used as a shire hall for the sittings of the Council, and the furniture made use of by them, could make no difference.

Special Case.

Upon the order of the magistrates of the County of Middlesex in Quarter Sessions, the sheriff of the county ordered of the plaintiff, who is a cabinet-maker and upholsterer, and the plaintiff furnished and put up, the following articles, on the 9th of February, 1857:

	£	s.	d.
the Court Room.			
Five sets damask curtains	£71	0	0
Five sets blinds and rollers	5	0	0
Judge's Room.			
One carpet	5	0	0
Sheriff's Office.			
One carpet, (40s.) chair cushion, (15s.)	2	15	0
Clerk of the Peace Office.			
Three office chairs and cushions	5	5	0
Repairing chairs	*1	0	0
Two carpets	3	0	0
Refixing iron work to office chair, and listing door	*0	6	3
Total	£93	6	3

At the adjourned sessions, on the 18th of April, 1857, this account was duly audited, (first having been sworn to,) and a draft was signed by the chairman in favor of the plaintiff, upon the treasurer of the county for the amount.

The matter being brought to the attention of the defendants, and they considering that the magistrates had exceeded their authority, the treasurer was directed by them not to pay the draft —except as regards two items, amounting to one pound six shillings and three pence, marked thus,* which were for things ordered by the County Council Clerk, which the plaintiff refused to receive, unless the whole bill was paid—which direction he obeyed.

The account was audited and a draft issued under the statute 7 Wm. IV., ch. 18, in accordance with all the provisions of that statute, under the presumption that that statute gave them authority to order these things. The prices are not disputed, but the liability of the defendants or the treasurer to pay the amount, or any part of it, except as above is disputed.

The curtains and blinds in the court room still remain there, and the meetings of the defendants, as also of the different courts of justice, have been held in that room since they were put up by the plaintiff, as usual. The carpet also remains in the judges' room, and the articles furnished for the office of the sheriff and clerk of the peace are still used by those officers.

If the County Council or treasurer are liable to pay the amount, or any part of it, except as to the sum of one pound six shillings and three pence above named, in the opinion of the court, they will do so, with interest from the date of the draft. The payment of costs to be at the discretion of the court.

Becher, Q. C., for the plaintiff.

Connor, Q. C., for defendants.

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

We are of opinion that the plaintiff has no claim upon the municipality to pay him for expenses incurred upon the express order of the justices of the peace.

He has obtained the order of the Court of Quarter Sessions in his favour, signed by the chairman, and professing to be made by virtue of the statute 7 Wm. IV., ch. 18, and 9 Vic., ch. 58.

The latter statute clearly has no reference to charges of this description, but only to fees for services rendered in criminal proceedings. Under the former act the order would be void, unless it quotes the act of parliament under which it was made. The question, therefore, is whether the statute does in itself authorise this order, for it is the only other act named. It is certain that that act makes no provision relating to this kind of expenditure, or to any particular kind, but only to the payment of such as are authorised by other acts.

The statute 4 & 5 Vic. ch. 10, sec. 39, makes it the duty of the municipality to keep the public buildings in repair, and to provide means, and defray such expenses connected with the administration of justice as used to be provided for by the justices of the peace, out of the district funds.

Of course when the justices of the peace lost the power of raising funds to meet these charges, the duty could no longer be incumbent upon them to attend to those objects. And the statute 11 Vic., ch. 18, secs. 36 and 41, gave to the County Council the discretion of doing what was necessary for repairing and keeping in order the court house, shire-hall, and other public buildings.

The justices cannot, since that, bring any charge upon the county by any thing which they may take upon them to do in these matters, which are thus placed especially under the care and control of the Council.

The claim indeed seems rather to be attempted to be supported on the ground, that the curtains and window-blinds, which came to more than three-fourths of the amount of the order, were put up in the court room, which is also used by the Council as the shire hall. But we do not see that that fact at all helps the plaintiff's case. The court house is not exclusively the shire hall, and there is no pretence for saying that these things or any of the other items in question, were furnished with a view to the accommodation of the County Council. If that had been the object, it would surely have been left to the Council themselves to give the order, and to direct and approve of what was done.

They could not be expected to abandon the court house because it was made more comfortable and respectable than it had been before, and therefore their continuing to use it after the change as before, raises no implied assumpsit on their part to pay for what was not ordered by them, nor by their agent, but by the justices with a view to the accommodation of the court and not from an idea on their part that it rested with them to provide furniture for the use of the Council

Besides, we could not rely upon the supposed acceptance and use of the articles by the Council as furnishing proof by implication that the things were provided at their request, for it is expressly admitted that it was the sheriff of the county who gave the order to the plaintiff, and he certainly was not the agent of the Council.

It is a pity that there should be any reluctance on the part of the Council to do anything reasonable and proper for the furnishing of the court room, which is in itself a very satisfactory one, and highly creditable to the county, but we know no ground upon which we could hold the Council to be liable to pay any of the charges referred to us.

Judgment for defendants.

COMMON PLEAS.

(*Reported by E. C. Jones, Esq., Barrister at Law.*)

ALLEN. v. THE CITY OF TORONTO.

Right of municipal corporation to notice of action.

A municipal corporation is held by this court entitled to a calender month's notice of action since 13 & 14 Vic, ch. 54.

Action brought against the mayor, &c., of the city of Toronto for alleged injuries to the plaintiff's property by raising the level of Terauly street.

Plea, that the grievances complained of were committed since 1st July, 1854, and were done by the defendants as the municipality of the city of Toronto, and under the authority of the statutes incorporating and relating to the said city, and that no notice of commencing the action had been given.

Demurrer, that no notice of action required, and that the plea amounted to general issue.

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

This case again brings up the question of the right of municipal corporations to notice of action. It has been held repeatedly in this court that they have such right; and the court of Queen's Bench h ve held the contrary. As is of course well known, I concurred in these decisions when I was a member of that court, and I have only to add, that I have as yet seen no reason whatever to doubt their entire correctness. I cannot bring myself to hold that the legislature contemplated so important a change in the law affecting municipal corporations, by the combined effect of the 14 & 15 Vic., ch. 54, and of the interpretation act, when in our acts relative to municipal corporations nothing appears to indicate such an intention, when it involves a departure from our theretofore prevailing system of law as to municipal corporations both here and in England, upon the law of which country the leading features of our municipal institutions are based; and when the change is rested on a statute the avowed intention of which is to introduce uniformity in existing laws effecting individuals, but which contains not a word in itself (unless by invoking the aid of the interpretation act) indicating an intention to extend the application of the principle beyond the person, or at the utmost the classes who theretofore enjoyed it.

The clear opinion I entertain on this question has placed me in some difficulty as to the disposal of this case. Coming into this court, I find the unanimous opinion of the three learned judges who composed it before my appointment to be contrary to that which I entertain, and I find that the law has been held here accordingly. This would justly shake my confidence in my own conclusions, if it did not convince me, and would at all events induce me to yield to the authority of their decision. But the opinion I have expressed was also the opinion of the Chief Justice of Upper Canada, and my brother Burns, and so the law is held to be in the Queen's Bench. It is greatly to be desired that the question should be settled by appeal, or by a declaration on the part of the legislature. As it is, I conclude it is more consistent with the practice, with the interest of suitors, and with the respect due to the *unanimous* decisions of this court to consider that we are bound by their deliberate judgment, until reversed by a higher authority. Had there been a difference of opinion I should have felt myself more at liberty to re-consider the question.

Acting on this conclusion we give judgment for the defendants on the demurrers to the 2nd plea, which renders it unnecessary to consider any other question raised in the cause.

Judgment for defendants on demurrer.

NOTE.—See Snook et al *v.* The Town Council of Brantford, II. U. C. L. J., 106; Magrath *v.* The Municipality of the Township of Brock, *Ib.* 109; Croft *v.* The Town Council of Peterborough, *Ib.* 125; Reid *v* The Mayor, Aldermen, and Commonality of the City of Hamilton, *Ib.* 186.

CHANCERY.

(*Reported by G. Grant, Esq., Barrister at law.*)

GREIG V. GREEN.

Practice—Demurrer.

A defendant appearing at the hearing, and waiving all objection to an order *pro confesso*, may shew that the bill is open to demurrer for want of equity.

This was a bill filed in November, 1856, by *John Greig* against *Alexander Green*, stating that from the first of April, 1840, to the first of March, 1844, the plaintiff and defendant had carried on business in co-partnership, which had been dissolved on the last mentioned day, and prayed an account of the partnership dealings between the parties; and the affairs and business thereof to be wound up under the directions of the court.

The defendant having failed to answer, an order *pro confesso* had been obtained, and the cause now came on to be heard accordingly

Mr. *Blevins* for the plaintiff, asked for a decree, as prayed.

Mr. *Strong*, for the defendant, appeared and waived all objection to the order *pro confesso*. The court will not on this record make the decree asked, the bill being clearly demurrable for want of equity, the right to relief being barred by the Statute of Limitations. By section 2 of order XIV., a defendant against whom a bill has been taken *pro confesso*, can argue the case upon the merits as stated in the bill, and here the defence appears on the face of the bill.

The court allowed the objection, giving the plaintiff leave to amend his bill en payment of costs if so advised.

TO CORRESPONDENTS.

J. W., Jr.—To your first query, "Yes." To your second query, "Yes."

H. W.—A Magistrate —Where a statute requires "a notice to be given so many days at least," they must be *clear* days.

OTTO KLOTZ.—Your letter answered under "Correspondence."

J. C.—Covenants in restraint of trade in a trading locality are not considered "*usual* covenants."

THOMAS EYRE.—Your letter is given under title "Division Courts."

E. T.,
ALFRED A. BAKER,
J. J.,
A DIVISION COURT CLERK, } Your enquiries are answered under title "Division Courts—Answers to queries."

A CITY SOLICITOR,
A CONSTANT READER. } Under title "Correspondence."

JOHN R. MARTIN.—Thanks for your communication. We intend to accompany it with lengthened remarks in our next: Not space in this Number.

J. E., Southampton.—Too late for attention in this Number.

T. R.—London.—Ditto.

TO READERS AND CORRESPONDENTS.

No notice taken of any communication unless accompanied with the true name and address of the writer—not necessarily for publication, but as a guarantee of good faith.

We do not undertake to return rejected communications.

Matter for publication should be in the hands of the Editors at least *two* weeks prior to the number for which it is intended.

Editorial communications should be addressed to "*The Editors of the Law Journal, Toronto*" or "*Barrie.*"

Advertisements, Business letters, and communications of a Financial nature should be addressed to "*Messrs. Maclear & Co., Publishers of the Law Journal Toronto.*"

Letters enclosing money should be *registered;*—the words "Money Letter" written on an envelope are of no avail.

MR. ALEXANDER MORRISON *is appointed Travelling Agent for this Journal, and as such is authorized to obtain subscribers and advertisements.*

THE LAW JOURNAL.

DECEMBER, 1857.

TO OUR READERS.

This number completes the third volume of the *Law Journal.* We have reason to be pleased with our success, and thankfully acknowledge our indebtedness for the support received.

Judging from a retrospect, we have great cause of satisfaction in contemplating our prospects. Candidly, fearlessly, and honestly, have we striven to serve our

patrons, and are glad to know in return that we possess their confidence and support. We have ever felt and acted on the impression, that the true interests of those who support us are inseparably connected with cautious, safe, and gradual progress, based on experience, and taken for the "love of excellence." Change for change sake, we utterly abhor.

Just as has been, so shall our conduct be in the future management of this Journal.

Our object never has been individual gain, and from the first our resolve was to to increase our expenditure in proportion to our income. Now, with a steadily increasing subscription list, we feel warranted in *enlarging the dimensions* of the *Law Journal.* Hitherto each issue contained 24 pages, four of which were originally assigned to advertisements; latterly six pages at least were required for that purpose. We propose, therefore, to increase the number of pages *from 24 to 32 in each issue, commencing on the 1st* January next, but the size of the page will be the same as heretofore.

By the proposed alteration we shall be enabled to add not only two pages of advertisements but six pages of original and selected matter.

We shall also employ a smaller type than has hitherto been used in the leading articles; and by thus compressing matter, we shall be enabled to give the greatest amount of useful information in the least possible space.

Other improvements which experience has suggested will also be made in form and in disposition of matter; and these without reducing the amount of information in any department of the Journal.

A prominent alteration will be the insertion of the leading articles, after the plan of the English law periodicals, on the first page.

Our Editorial staff is now both strong and complete; and not only in the improved form and enlarged size, but also in the matter and conduct of the Journal we hope to give evidence that as "we grow older we grow better."

One important problem has been solved. Our supporters have enabled us to place a Law Journal amongst the permanent publications of the country. The future must declare whether the Lawyers, Officers of law Courts, and other legal and municipal functionaries will put this on a par with similar publications in Great Britain, by enabling us to enlist the services of the best trained intellects that may be found in the Province, on behalf of our Journal.

LAW AND EQUITY.

We, in this number, make way for a very long, but a very able communication on Chancery procedure. The writer, thoroughly familiar with the subject he treats of, has entered into details that make it necessary for those who would uphold the present system, to deny or explain the facts advanced, if they would not have the profession and the public to take it for granted that the facts advanced are correct—the conclusions just. It is useless to deny that the members of the profession generally, are not technically acquainted with Chancery procedure. They perceive the evil results of the system, without being able to expose the *source* of the evil. To a comparatively few members of the profession is Chancery procedure *known, and they either want the patriotism or the* nerve to speak out, or it may be

> "These lawyers are too wise a nation,
> T' expose their *trade* to disputation."

Our correspondent is bold enough to speak out, and while we would not venture now to expose him to the frowns of the "*Dii Immortales,*" we trust the day is not far distant, when we shall be able to name with safety one who has contributed trained intelligence to the cause of right.

Let the Chancery lawyer, if he can, answer what "a City Solicitor" has said. The public may rest assured that all stated by "a City Solicitor" would, if real, occur as set down; indeed, by making the case extreme it could be put even stronger.

We do not say that the matter as put by our correspondent is one of *every* day occurrence, but we do assert that it not merely might, but sometimes does occur in actual practice. The case which our correspondent suggests, we allow at present to speak for itself. Let those whose duty it is to promote sound reform in our legal system, (and such is the duty of every lawyer) ponder upon the single leaf which "a City Solicitor" has opened in the great book of Chancery abuses. Let them not merely lament and declaim, but let them seek to apply a proper remedy or move others to do so.

For ourselves, we think that jurisdiction in equity ought never to have been committed to a distinct tribunal in this new country, and that equity procedure

as elaborated since the institution of the Court of Chancery has justified the application of nearly all that has been objected against the Court of Chancery at home.

It is the evils *necessarily incidental* to the system we would desire to see abated: and the partial or total abolition of the present exclusive jurisdiction of the Court of Chancery, may now be ·:· nced as a question of policy and legislation, depending upon general reasons of civil jurisprudence and good government.

We candidly confess, we have lost all hope of a full measure of reform from the tribunal itself—if indeed it possesses adequate power to effect it—with our correspondent, we have failed to perceive the mind of the Court acting in unison with the spirit of recent legislation.

Habit and *esprit de corps* have been influential in all ages, and with men in all stations. Lord Eldon invariably discountenanced every legislative enquiry, and proposed reform. It is said of him that the political night-mare of *innovation* haunted his imagination. In his legal vocabulary, reform and revolution were synonymous, and the latter word was another synonym for destruction. He was deeply versed in the fictions, subtleties and procedure of English Equity, and as a pedantic linguist conceived the acquisition of the dead languages to be, not the means of acquiring knowledge, but knowledge itself: so Lord Eldon mistook the means for the end, the *forms* of Justice for the *substance* of Equity.

We fear in the words of "a City Solicitor," that the "constitutional hatred of all innovation" will under the present system, prevent the adoption of appropriate remedies to the festering grievances of the Court of Chancery. The Legislature must apply the remedy, or the virulence of the disease will go on increasing.

It is not our intention at present to enter fully on the great and important question to which we have briefly alluded; indeed the space occupied by the communication elsewhere, would prevent it in this number. We would say only, that master minds even in England, sorely regret the bungling division of legal science into Law and Equity. On the Continent and abroad, it is the just subject of sarcasm and of ridicule. No less an authority than Sir Richard Bethell, himself the most eminent lawyer at the English Chancery bar—the present Attorney General of England, and the probable Lord Chancellor of England—has condemned the absurdity in no measured terms. These are his words:—"For above a century this country has exhibited the anomalous spectacle of *distinct* tribunals, acting upon *antagonistic* principles, and dispensing *different qualities of justice*. Two orders of legal mind have been created by this *unnatural tearing asunder* of an entire and indivisable science, each conversant with a part only, and neither familiar with the entire system of English Law." (Address to the Juridical Society, 12 March, 1855.)

The day is coming, if not now come, for a change in the construction of our Courts. To say that law is *not* equity, is to reproa· ı the administration of justice.

The recent Statute admitting of equitable defences in actions at law, is a step in the right direction. Let the extension still proceed, till step by step the two halves approach and become one perfect consolidated and rational whole. Give to Courts of Law the power and the will to administer "equity," and they become Courts of Equity! Give to Courts of Equity the power and the will to administer "law" expediously and soundly, and they become Courts of Law!! The wall that separates the two sets of tribunals, is more imaginary than real. The "strait jacket" of old customs and old abuses is totally unfitted for us, and must be cast off.

UNSEEMLY FEUDS.

Ever and anon we hear of disputes between County Councils and Courts of Quarter Sessions, Sheriffs and others concerned in the adminisiration of justice. The embroglios usually arise out of the question of the sufficiency or insufficiency of the accomodation of the Court Houses, or public offices contained therein. We pronounce such disputes to be at all times disgraceful, and at no time defensible, either on the ground of public taste, or of public policy. It is not often, indeed, that they assume a tangible form. Faint murmurings, and other evidences of dissatisfaction, are generally the strongest indications of their existence. It is a pity that they exist at all. Our Municipal system is the glory of the land; and even now is being copied to the letter in the Lower Provinces of New Brunswick, Nova

Scotia, and Prince Edward's Island. One thing essential to its successful working is peace and harmony on the part of all, directly or indirectly concerned in its administration. When disagreements do arise, they are, in nine cases out of ten, traceable to very minute and childish causes. Were the principle of "give and take," so useful between individuals in the transactions of every-day life, to enter more into the transactions of public bodies, the evils of which we complain, would not find an abiding place wherever our Municipal institutions flourish.

A Court of Quarter Sessions assembled, begins to survey the room in which it sits, and all at once is struck with the notion that damask curtains or a Brussels carpet, would be a decorative improvement in the appearance of the Court Room. Forthwith Mr. A. B., the well known upholsterer, is ordered to furnish the coveted finery. Nothing doubting the authority of the Magistrates to give the order, the curtains and carpets are duly installed. A "little bill" of course meekly follows. The Magistrates have no public funds out of which to liquidate the same; but an order is directed to the County Treasurer in favor of the importunate tradesman, for the amount of his "small account." The Council get into a pet at the wound inflicted upon their municipal dignity, and by way of displaying their feelings, and of showing their authority, the right of the Magistrates to draw the order is flatly denied. The unsuspecting tradesman stands aghast. The idea of Magistrates doing a thing unlawful, is a shock of considerable power upon the nerves even of a dunning tradesman. He returns to his patrons, who instantly threaten the Municipal Corporation with all that is dreadful for their contumacy. Between the contending bodies the bill remains unpaid, to the disgrace of Municipal and local government, and to the serious loss of an honest tradesman.

We draw not upon our imagination, for one link of this chain of cross purposes, we add not one *line* of *fiction* upon a tale of undoubted fact. The case is one which for years past has, in some shape or other, thrust itself upon our attention. Of late, it has forced itself upon the Judges of the Court of Queen's Bench, and has from them received a judicial lecture.

A tradesman under circumstances, very similar to those we have pictured, in order to recover the amount of his claim, commenced an action against the County Council of Middlesex. He was informed that as against the magistrates in Quarter Sessions, his order was waste paper. He was told that as against the County Council it was no better. In a word, he was told in plain Saxon, that he might "whistle for his money." The case to which we refer, is Coombs *v.* The Municipal Council of the County of Middlesex, reported in other columns. The decision is shortly and well expressed in the head note of the case, which is to this effect: "The Magistrates in Quarter Sessions have no power to order furniture for the Court House, and the County Council are not liable for furniture so supplied. The fact that the Court House was also used as the Shire-hall for the sittings of the Council, and the furniture made use of by them can make no difference."

Were we further to moralize upon this case, we would reduce our observations to two points; first, the Magistrates in Quarter Sessions ought never to have drawn the order: second, having been drawn, the County Council ought to have honored it, the expenditure being one creditable to the County. Here is displayed the want of that principle of "give and take," which we commend as essential to the successful working of Municipal Institutions. Though the Quarter Sessions did wrong in giving the order for the furniture, and afterwards ordering the County Treasurer to pay for it; yet, if the order were a reasonable one, under the circumstances, it ought not to have been disputed. The Court in giving judgment, was compelled to use the following language: "It is a pity there should be any reluctance on the part of the Council, to do anything reasonable and proper for the furnishing of the Court Room, which is in itself a very satisfactory one and highly creditable to the County; but we know no ground upon which we could hold the Council to be liable to pay any of the charges referred to us."

There was a time when Justices in Quarter Sessions were clothed with authority to raise funds for the support, repair, and improvement of Court Houses. That power no longer exists. It was, in 1841, made the duty of the Muncipalities to keep public buildings in repair, and to provide means and defray such expenses connected with the administration of justice, as used to be provided for by the Justices of the Peace out of the District Funds, (4 & 5 Vic., cap. 10,

s. 39.) Hence the Court, in the case to which we have referred, very properly said "of course when the justices of the peace lost the power of raising funds to meet these charges, the duty could no longer be incumbent upon them to attend to those objects." In County Councils is vested the discretion of doing what is necessary for repairing, and keeping in order the Court House, Shire Hall, and other public county buildings, (12 Vic. c. 81, ss. 36 and 41.) With them, and not with the Justices in Quarter Sessions, must now originate orders for repairs and such like. All that the justice can do is to request—not to order—to pray—not to command. Undoubtedly if the building were to become ruinously out of repair, or unfitted for the uses designed, there are ample remedies at law independent of any Statute. But for matters of slight import, though perhaps of positive convenience there is nothing left beyond the discretion of the Councils.

For the success of our Municipal system, we repeat there must be a good understanding between County Councils and public officers, whose duties or whose wants bring them into contact with the Councils. Appeals to Courts of Justice, arising out of a want of courtesy or a want of reason, are not to be encouraged. Reasonable requests ought to be treated in a reasonable manner. Tales of domestic difficulties are not calculated to inspire public respect. Tales of Municipal difficulties are quite as much to be avoided.

In conclusion, we would remark that our observations are to be understood as strictly confined to the subject matter noticed. The authority of the Court of Quarter Sessions to order payments in matters necessary in the administration of criminal law, and requiring prompt discharge, stands on a different footing.

THE COMMON LAW COURTS.

On Saturday, 28th November, Michaelmas Term closed. The Courts of Queen's Bench and Common Pleas were fully occupied; and the business, so far as we could judge, was equally divided.

In the Queen's Bench there were ninety-seven rules nisi granted, sixty of which were argued, the remainder standing over till next term. Three rules nisi for which application was made were refused; others remain for further consideration. The first rule for a new trial applied for in a criminal case was, we are told, issued by this Court. One other, we believe, was also granted by the same Court, but is enlarged till next term. There were not less than thirty-one cases, such as 'demurrers,' 'special cases,' 'special verdicts,' and 'points reserved,' set down on paper days and argued in this Court.

In the Common Pleas there were eighty-six motions for rules nisi, of which sixty-eight were granted and eighteen refused. Of the sixty-eight rules granted, twenty-four were argued and the remainder enlarged. A rule applied for in the London Forgery case was refused; the judgment refusing it was read by the Chief Justice of the Court. There were about the same number of cases set down and argued on paper days as in the Queen's Bench; the precise number was, we believe, twenty-four.

The "humiliation day" (Friday, 27th November,) having fallen on a day in term, slightly interfered with the business of the Courts; but the worst, if not the only effect of it, was to cause a few enlargements which otherwise might not have been made. Our chief curiosity was to observe in what manner the Act allowing applications for new trials in criminal cases would work. We saw enough to convince us that it will become a lasting and a beneficial measure; but we saw also that new trials in this class of cases are not to be had for the asking.

The days appointed for the delivery of judgments are:—

In the Queen's Bench:
Saturday, 12th December, 2 o'clock.
" 19th December, 12 o'clock.

In the Common Pleas:
Tuesday, 15th December, 12 o'clock.
Friday, 18th December, 12 o'clock, (if necessary.)

In the Practice Court:
Tuesday, 15th December, 10 o'clock.
Friday, 18th December, 10 o'clock.

The case of Ryckman v. Ryckman, reported in other columns, bears out the remarks we made in our last issue as to the present unsatisfactory state of the Law of Dower in Upper Canada.

In order to make room for the letter of "a City Solicitor," we have been obliged to omit our Chamber cases and some editorials which will appear in our next.

THE WIG.

We decline publishing the article from a worthy correspondent, who advocates the use of the Barrister's wig in our Courts, on the ground of "British usage," and "protection to the head."

Fully alive to the value of externals, we have yet to learn that a wig adds anything to the wearer: but if our friend J. J. goes on the plea that "there's wisdom in a wig," we aid him with the following authority, without being answerable for its exact whereabouts.

Had Absolom, like other folk, invested in a bob;
He ne'er had cursed the fatal oak, nor felt the dart of Joab:
But when with pangs of death oppressed, he hung upon the twig,
His bleeding breast must have confessed there's wisdom in a wig.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,

Although I am glad to see that the article in your Journal of the month of May last, has been followed on the 10th of June, 1857, by the Statute 20 Vic. cap. 56, in a slight degree improving and simplifying the proceedings of the Court of Chancery, and to some extent giving effect to some of your suggestions, yet you may rely upon it that practically the benefit conferred will be scarcely perceptible, because the change is too slight and superficial, and the Act bears the impress on the face of it of being drawn by persons, who, however good their intentions, had not sufficient knowledge of Chancery practice to be able to find out where the evil was, and in what it consists. To speak figuratively, the Legislature, in passing that Statute, were merely nibbling at the outside edge of three or four of the leaves instead of striking at the root of the evil. The only point of view in which that Act appears anything like a benefit is this—that it is a Legislative acknowledgement of the existence of the evil, shows a Legislative desire to remove it, and promises further Legislative action to accomplish that purpose.

With a view, therefore, to the approaching Session of Parliament, and in the hope of being able to assist in placing the latent evil with greater distinctness before the public—pointing out in what it consists, and how it can be removed and remedied, and, through the public, forcing such information upon the Legislature, and so obtaining from them some future action in the matter which may be sufficiently thorough to produce general practical benefit, I venture to address to you the observations which follow, which I think go far more fully into the matter treated of in your article, or at least show different views of the subject, although I feel that they are written in too great a hurry, and are too little systematized, to do much more than to direct attention to and provoke a discussion of the subject; but if that object be attained and information elicited, they will not have been wholly fruitless.

The first and chief anomaly in the present system of Chancery which presents itself, is the strange and utter repugnance between the theory of the law of equity, or the abstract maxims upon which the Court professes to base its judgments, and the theory of its practice, or the steps and means by which the parties are enabled to introduce their disputes into the Court, and to which they are restricted, for the purpose of obtaining some decision upon them; and also, when that decision is obtained, to get it carried out, and changed from an airy notion merely existing on paper, to an accomplished fact—a tangible reality.

It must be sufficiently plain to any reasonable understanding, to be without argument assumed as an axiom, that in judicial proceedings, provided the parties and their case or dispute are introduced to the Court, it is not of the slightest consequence in the world as respects the decision of the matter by the Court, by what ceremonies or without what ceremonies that introduction is effected. Nor, after the decision is once pronounced, does it matter by what ceremonies or without what ceremonies the parties, with their case or matter so decided, make their exit, and have that decision carried into effect, so that it be carried into effect; while, on the other hand, it is of the utmost importance that the matter itself, to be decided, should be decided justly and according to the rules of right, which it is or at least ought to be the object of all laws to oblige all persons to observe. That the matter cannot be properly decided, unless the Judge correctly and distinctly understands what each party claims, and what each party disputes of the other's claims, and that whatever time or trouble is necessarily occupied in effecting such purposes, is properly and judiciously expended. But the present Chancery system sins against and adopts the exact reverse of all those principles; whilst common law follows those principles as far as its imperfect barbarous origin will permit. And it is to that circumstance alone that we owe the cramped, arbitrary, imperfect theory of the Common Law Courts, which, instead of first devising a comprehensive system to govern all cases, begins at the wrong end, and decides that a confused medley of arbitrary, independent, conflicting decisions are to govern all systems which future Judges may endeavour to extract from such materials; which refuses to extend itself to injuries for which it has not precedents, and will not adapt itself to the changing circumstances of mankind. Yet, aided by its excellent system of pleading and practice, it is a blessing as far as it extends, and deservedly popular; while the comprehensive, noble theory of equity law, which is modeled upon the most perfect systems of the most enlightened nations of antiquity, instead of the most barbarous, and which, in mere theory at least, embraces every subject, adapts itself to all circumstances of life, and, as far as possible, prevents the occurrence of injuries—shackled and paralysed by its absurd, disastrous practice—in its action destroys what by its words it pretends to grant—operates most injuriously, and is deservedly unpopular.

To illustrate the above, and make the difference in the working of these systems more easily discernible by an illustration placing them in juxtaposition, let us suppose the case of a country merchant, doing a thriving business on the credit system—peculiar to this country—who has made large profits, as he has reason to suppose, when all is wound up, but who owes a considerable sum (though much less than he is owed) in notes at three months to those he buys from, according to the usual course of trade of the Province. An unexpected

commercial crisis occurs; he is pressed by his creditors; and to save himself urges his debtors, gets mortgages on realty to secure his debts from £100 to £200 each. The mortgages having become due, and he being informed by his creditors that they cannot renew much longer without half being paid, commences suits in Chancery to sell the mortgaged premises, and his creditors agree to wait nine months to enable him to pay half his liabilities to them, but warn him that in case of default, they will sue him at law on his notes. Upon hearing this *ultimatum* he goes to a Chancery lawyer, because he is in a hurry, and knows the land is all or nearly all he can get, and because he is told that Chancery will decree, in simple matters of that sort, that the mortgage money shall be paid or the mortgaged premises sold within six months, and the purchase money applied to the payment of the mortgage debt, interest, and costs, and the mortgagors decreed to pay the deficiency, and that in Chancery they cannot defend for time, as they must swear to the truth of their answer—which is the theory of that Court on that subject. So he enters all his suits in Chancery, and returns home in fancied security, and on his way reasons thus—

True, my creditors hold my notes, which I cannot defend effectually, because the debt is ascertained and my signature admits all, and judgment must follow; but then my mortgages do the same thing, and I have nine months' start, and besides they must exhaust my personal property on *fi. fa.* goods before *fi. fa.* lands can issue, on which a year must elapse before offering fo sale, and as the full value is never offered, three months more must elapse before they can be sold on a *ven. ex.* Such is the more imperfect theory of the Common Law; so that if the worst comes to the worst, what is owed me will be collected first, and I can pay my liabilities with the proceeds, and leave something handsome besides.

Now mark how in practice and in point of fact the rival theories of these rival Courts are carried out. We will more easily see this by following out one of the suits, which is a prototype of the others. Time wears on. The Chancery suits are pushed to the utmost extremity by the most competent solicitor; but our Chancery pleading, contrary to legal pleading, and contrary even to English Chancery pleading, ordains that what is not denied is still not admitted by defendant, and must be proved by plaintiff, and that if any answer is put in the bill cannot be taken *pro confesso*, the defendant takes advantage of this, and simply says, by way of defence, that he believes plaintiff to be deeply indebted to other persons. This, though obviously no defence as will be fully established at the hearing, serves the purpose of delay. The plaintiff must prove his case; and as he can only examine witnesses in examination time, and must give fourteen days' notice of examination, and is within thirteen days of the next examination term, he is too late, and so is thrown over three months and thirteen days later; and as defendant delayed the full month he was allowed before answering, and as thirteen days more elapsed before the bill could be drawn, filed, office copies of it got and served, four months of the nine are gone. A month more (five of the nine) must then elapse before the case is brought to a hearing; but while plaintiff was taking his evidence, defendant manages to prove by witnesses (what is not at all unusual with people embarrassed with debts) that after giving plaintiff his mortgage, defendant gave three or four other mortgages for small amounts to others, and that twenty other parties in the Division and other Courts, recovered and registered judgments from £10 upwards against defendant, so after waiting two weeks more for the case to be called at the hearing term, it comes on; and the Court holding that though it is perfectly clear that what the defendant urged as a defence amounted to nothing against plaintiff, and although the subsequent incumbrances have no force against plaintiff's mortgage, and though there is no doubt of the rights of the plaintiff and defendant, yet will not decide between them without also deciding between defendant and all claimants against him in the same decree, so they take three months to consider what decree to make, and then decide next term, as in *Moffatt* v. *March*, 3 Grant, 163, by decreeing a reference to discover subsequent incumbrances, to have them added as parties, with power to take accounts and settle priorities between them, reserving further directions and costs. Eight and a half of the nine months are now elapsed; but the merchant goes to his creditors, shows them how matters are, and with difficulty, and on the strength of the decree in his favour, gets three months more—making in all one year. Of these three months, one is spent in frequent applications to the Registrar of the Court, endeavouring to get the decree settled, drawn out, and executed in due form. When obtained, the decree must be brought into the Master's office, and two warrants obtained—one to consider, upon which nothing is done, being mere form—another appointing a future day, generally two weeks off, though often longer, as other cases may be fixed for the prior days. This consumes more time; and then the Master commences business, and it is proved that the incumbrancers are in existence; but the defendant, though subpœnaed, did not attend, and the Master has no evidence to satisfy him whether or not there are more incumbrancers. Therefore he orders them to be advertised for, under rule 42, sec. 14 and sec. 11—that occupies at least another month. At the end of that time, it being proved to the Master that the advertisements were made, and no other incumbrancer coming in, he gives his order under the same rule, s. 15, to make them parties by having each of them served with an office copy of the decree It takes at least two weeks to serve all; and when served with these copies of decree, each party has fourteen days from service on him to deliberate whether he will move to discharge the order, or move to add to the decree, or to vary it, or to submit to be made a party. Most of them submit; but one obstinate fellow disputes on long affidavits every part; then the papers and evidence must be transmitted to the Court at Toronto, and the Court grant a day to argue it. Counter affidavits are put in, and the matter argued at the expiration of another month. Then the Court take time to consider till the next [illegible]n, say three months more, what they will order. In the mean time all proceedings in the Master's office remain at a stand still.

The year given by the creditors to the merchant has elapsed for some time. At the end of that year they sue him at law—(We will suppose all the above to occur after the Stat. 20 Vic. cap. 57, as to bills and notes, comes into force). Sixteen days from the service of the summons commencing the suits at law, the merchant, not being able to dispute the amount of the notes nor to swear to a legal or equitable defence as required by sect. 5 of that Act previous to being allowed to put in any defence, had final judgment entered against him on the seventeenth day after service of the summons, upon which a *fi. fa.* goods issued on *præcipe* merely as of course. It was put in the Sheriff's hands within an hour after the judgment was entered; and thereupon without any further motions whatever, by mere force and virtue of his office, the Sheriff seized, under the creditors' execution at law, all the merchant's goods, chattels, and effects, debts, bills, notes, monies, claims, &c., under the 22d section of the Act, and within a few weeks after made the greater part of the money by Sheriff's sale to the highest bidder at public auction, and returned the writ accordingly, and thereupon the plaintiff's attorneys in these common law actions, on merely filing that writ and return in the office, obtained a *fi. fa.* against the merchant's lands, issued in a similar way as the *fi. fa.* goods had, and the Sheriff under it immediately seized and advertised the lands for sale.

All this time the merchant has not been able to get one farthing out of his Chancery proceedings; but by this time three months more have elapsed, and the Chancery term has come round, and the Court decide that the obstinate fellow who moved the Court was wrong, and must be made a party as well as the rest. After two weeks' delay the order or decree to that effect is obtained and transmitted with the

papers to the Deputy Master in the country. That unties his hands, and the suits in Chancery begin to move again. And the plaintiff in Chancery now takes out two other warrants from the Master to consider and to proceed with the reference on a future day, as before—suppose him in luck, and that it is that day two weeks—then they examine witnesses to ascertain if the incumbrances are still due, or what part of them are, and which of the mortgages and judgments ought to be paid first, and which last.

All this consumes at least one month more; then the Master makes his report in that behalf, ascertains how much is due to each, and directs the mortgagor when and where and to whom he is to pay;—now every one of these numerous defendants may except to the Master's report, and have the matter re-argued and decided by the Court on the evidence taken by the Master, which is very frequently done, and causes great delay; but we will suppose in this instance that none of the defendants do so,—the report must nevertheless be served on the mortgagor, and he must have six months after that service to consider whether he will pay or let the place be sold: (see *White* v. *Beasley*, 2 Grant R. 660.) He does not pay them; all which has to be proved on affidavit to the Deputy Master; yet even now the mortgaged premises cannot be ordered to be sold, for although it might as against the mortgagor, all the subsequent incumbrancers to plaintiff have to be dealt with before any sale can be ordered, consequently the Master must issue another warrant appointing another future day (say two weeks after) to report. That warrant being served on the mortgagor, and he not appearing, or if he appear not showing sufficient cause to the contrary, the Master reports again. And upon this report, the Master's powers being for the present at an end, the whole case and all papers and evidence is again transmitted from the Deputy Master in the country to the Court at Toronto, for further directions (pursuant to *Moffatt* v. *Ward*, 3 Grant, R. 164), which consumes at least another month; and thereupon it is re-heard, argued, and considered, for three months more, when the Court decides (pursuant to *Carroll* v. *Hopkins*, 4 Grant, R. 435), as to the incumbrancers subsequent to plaintiff, who are now in the position of mortgagees as respects the plaintiff, "that they should have successive days of redemption according to their priorities, but of necessity as short a time would be given to each as would be *compatible with the ends of justice.*"

The first part of that judgment, added to the delay already incurred, throws the unfortunate country merchant into dismay; but the last part sounds well, gives hope of increased celerity of movement, and partially revives him. Let us turn to *Rigney* v. *Fuller*, 4 Grant, 198, for its meaning, and we find as far as the unfortunate merchant is concerned, it is *vox et preterea nihil*, for as he can only in that case swear and produce affidavits of others proving that the mortgaged property is not sufficient to pay the principal money, interest and costs, without paying any part of the claims of the other incumbrancers, and could not swear that the mortgaged premises (being land) was likely to be deteriorated in value by waiting the usual time, the Court decided that although they had power to order immediate sale if they pleased, yet "under existing circumstances" it would be "incompatible with the ends of justice" not to allow the usual time to redeem, which *White* v. *Beasley*, above cited, shows, is six months both as to judgments and mortgages, consequently the decree is made out, decreeing the first subsequent incumbrancer to the unfortunate merchant to pay within six months after service on him of that last decree, and in case of his making default in paying (which, of course, "under the circumstances" he will), then the next to pay within six months, and so on through the whole twenty-four subsequent incumbrancers.

It takes some time to get the decree out, to get an office copy of it, and to get it served on the first subsequent incumbrancer, say two weeks, and when that is done, and the six months elapses without payment, the matter being brought before Mr. V.-C. Spragge, as we may suppose to be the case, he decides, as he before decided in one case (not reported, I believe), that upon every successive default of every subsequent incumbrancer, there must be another application to the Court or the Master on affidavits, proving the services and defaults, and ascertaining the additional costs occasioned, and ordering the next incumbrancer to pay the same within six months after service on him of such Master's report, or be barred like the last; so that besides the six months to each, an intermediate period of from one to two months (to be within the mark, suppose one month) between each six months, is also in actual practice and fact lost; yet though every person knows no subsequent incumbrancer will be mad enough to pay more to redeem the place, than, when redeemed, it is worth, no sale can take place till all are barred with the above loss of time.

To avoid the unnecessary tediousness of relating each successive step, we imagine the six months and one month for each of the twenty-four incumbrancers subsequent to the merchant to have elapsed—that all due steps to bar the whole of them have been taken, and thus all are barred,—then of course all but those versed in Chancery would suppose that the sale would take place immediately, by some officer whose duty it was to effect it. Not so; for, first, at more delay and expense, a final order of the Court confirming the foreclosure of the mortgagor and all the subsequent incumbrancers, and allowing a sale to take place, must be obtained, and then in practice the whole matter is transmitted back again from the Court at Toronto to the Deputy Master in the country, where the sale must be conducted according to the tedious, useless, expensive clogs, checks, and ceremonies fully detailed in the Chancery Rule 36 of our Court, and the Schedule O, attached to those rules, prescribing the conditions of such sale—too long to insert, but to which I refer the curious for many delays and details I have not room to insert.

A few of the principles are that the original decrees and final order must be deposited in the Master's office. Two warrants got from the Deputy Master—one called a warrant to consider, which is under written "on leaving papers," and is never intended to be acted on, being merely to create costs and add to the fees by which the Deputy Master is paid; the other a real warrant appointing a future day, under written "to proceed with the reference." This is served on all parties, and at the appointed day they meet, if they see fit. Whether they do or not, the plaintiff, who has been appointed to have the conduct of the sale, is to bring in a draft of an advertisement for the sale—and he is *expressly forbid* to bring in the proposed conditions of sale at that meeting—which draft advertisement that rule prescribes *must contain*, besides what is useful, such as the time and place of sale, and the property to be sold, a vast amount of useless statements, which cost large sums to print, such as giving an exact and minute foreshadowing of the conditions of the sale (which, when advertised, cannot be changed to suit purchasers, and are unnecessary to be known till before the sale at the time and place advertised), and a minute foreshadowing of all the ceremonies which will be observed for offering it for sale by the person who is to act as salesman. The Master must also decide whether he is going himself to act as salesman or hire an auctioneer. If the latter, what auctioneer? whether they are to use the ordinary conditions of sale, or devise others; how many times the sale is to be advertised, and where? After that, the conditions of sale must be devised, and a form of agreement for the contemplated purchaser to sign. All must be printed expressly for the occasion at great and useless expense. In practice the sale does not take place for six months or more after the advertisement. If any one purchases then, instead of at once paying his money and getting his deed from the person who sells (as would be the case at Common Law), and paying his money if the sale was for cash, or if on credit paying down the portion stipulated and giving a mortgage to the officer of the Court for the balance, and get-

ting his deed, as common sense would dictate, the purchaser must pay ten per cent. of the purchase money to the plaintiff or his solicitor, who, however, cannot keep it although it belongs to them, but must forthwith pay it into Court again, which means into some Bank named in the decree, subject to the order of the Registrar. The purchaser must sign the printed agreement for sale. The auctioneer who sold must make an affidavit of the circumstances, which affidavit and the printed conditions of sale are to be annexed to the contract signed by the purchaser, and all transmitted to Toronto and filed with the Registrar there: (see *Patterson* v. *Staunton*, 4 Grant, 10), to be confirmed by the Court, if not objected to within fourteen days after being filed.

And now the merchant imagines his labours and troubles are at length finished; but such is not the case, for the decree being in the ordinary form that the mortgaged premises should be sold and the mortgagor ordered to pay the deficiency, the conditions of sale, though drawn with great care, by some oversight or want of knowledge of the facts, which it is often almost impossible to provide against, happens to mention that the mortgaged premises were to be sold subject to the dower of the mortgagor's wife, when in point of fact the widow, in one of the subsequent mortgages, had joined to bar the dower; therefore, technically speaking, she was only entitled to dower of the equity of redemption of the land, so the mortgagor, having a nominal interest in the matter, on the supposition that some day he might be worth something and be obliged to pay the surplus of the costs, which the purchase money of the land was not sufficient to satisfy, makes an affidavit of those facts, also stating that he believes the purchaser would have bid more if he knew the dower was only on the equity of redemption of the land, and moves the Court within the fourteen days on that ground.

The purchaser is asked by the merchant for an affidavit denying that he would have paid more even if aware that the dower was only in the equity of redemption, which there could not be any difficulty in doing, especially as the merchant was a hale young man, while his wife, by whom he got part of the means which set him up in business, was sickly and old, and the chance of survivorship appeared ridiculous; but the purchaser refuses to make the affidavit, saying he had had trouble enough with the matter already, was sorry he ever got into it, and it might go to Jericho! consequently he is glad to be out of it. It not having been denied by the purchaser, the Court, on the authority of *Jones* v. *Clarke*, 1 Grant, R. 368, seize hold of that circumstance, in order, as usual, to favour the debtor as much as possible; and all that has been done to effect the former sale goes for nothing!

New advertisements correcting the unfortunate omission are made out, and eight months more elapse; then it is offered for sale again to the highest bidder, with a reserved bid to the amount of the first sale; but in the meantime a commercial crisis like the present has arisen, and is continuing; land has fallen so much that no one bids, and it remains unsold until the expiration of another year, when money gets easier and land begins to rise again, and then it is sold for an advance of £5 to another person, the same proceedings are again taken to confirm the sale, and this time there being no opposition, the sale is at length confirmed: and the Court pass the property to the purchaser by a vesting order, under the 7th section of the late Chancery Amendment Act, and after a loss of much more time — at least one month—in making applications to have the costs taxed and the amount of unpaid excess, for which the mortgagor was by the decree made liable, and to get the money out of the Bank again, the matter is closed, and plaintiff at length gets the purchase money, that is, provided he is lucky enough to find the Court in the humor to adopt that option given by the late Statute, which, out of commiseration of his past misfortunes, we will suppose to be the case—though it by no means follows as a necessary consequence that the Court would do so, the Statute giving them the option. They still might take the old way of directing all the parties to join in the conveyance to the purchaser, in which case much more time and money would require to be wasted in getting the conveyance settled before the Master, and forcing the parties to join in it. And if the mortgagor, as is frequently the case, in view of his difficulties and to escape attachment and imprisonment for the costs yet unsatisfied, absconds—searching all over the county to find him out and serve him with the necessary papers to compel him to execute the conveyance—proving all that and the fact of his absence by affidavits to the satisfaction of the Court, and having the Registrar of the Court appointed by the Court to execute it in his name for him as his *quasi* or compulsory attorney.

And when we consider that that same Statute not only enables but impliedly recommends the Chancery Judges to go on circuit, and that they not only have not availed themselves as yet of that option, but have not even shown the slightest intention nor made the most remote preparation for ever doing so, I thing we may fairly conclude that it is not altogether impossible that the Court, although I have given them the credit of embracing the opportunity the Statute affords them of conveying the land to the purchaser by a vesting decree or order, instead of so doing in its constitutional *hatred of all innovations* might prefer the old jog trot way!

And now having concluded the Chancery proceedings by the merchant, let us look back and see how the lawsuits against him had progressed in the meantime, and we shall find, by taking up those legal proceedings where we left off, that the Sheriff, untrammelled by any useless ceremonials, and not obliged to wait at each step or movement before taking another for precise directions peculiarly prepared for each individual case, but acting on the ordinarily known invariable rules of law by virtue of his office, and in the usual routine of it, after having the land advertised for the year required by law, offered it for sale, and no person bidding the value therefor as he considered, he adjourned the sale to a future day, say two months, and returned the writs to the law Courts accordingly, when the creditors' attorney, on the faith of that return, on mere demand from the proper officer of the law Courts issuing such process, obtained a writ of *venditioni exponas*, returnable immediately after the execution thereof (say three months) and delivered it to the Sheriff, who at once proceeded to sell the lands or as much of them as was necessary for the purpose by public auction to the highest bidder for the best price he could get, as by that writ he was compelled to do, received the purchase money, gave a deed of conveyance to the purchaser, and, retaining his own fees, handed the balance to the attorneys of the plaintiffs in the lawsuits, who kept their costs, and handed the amount of their claims to their clients.

All this is done at comparatively trifling expense, because, although the attorney at law is better remunerated for each service performed and step necessarily taken than the solicitor in Chancery, yet those steps are infinitely fewer and more simple at law than in Chancery; and if it should happen, as we will suppose to be the case, that nearly all the land was required to satisfy the executions at law and the Sheriff found that the part not required could not be detached without sacrifice, then he sells the whole, and after satisfying all purposes of the law returns the surplus to the defendant at law. And now, bearing in mind the fact that those claims of the merchant were technically mere equitable claims which he could not enforce except in chancery, which left him no option to sue at law, and that those claims of his creditors were technically legal claims which could not be sued in Chancery, and could only be sued at law, we will have some idea of what serious events, what inevitable fortune or misfortune, affecting every member of the community, turns upon *mere technical distinctions and technical considerations, when there does not exist any real difference in the nature of the subject matters themselves.* The notes the merchant gave and the mortgages he got (when

stripped of the technical considerations of the mortgages being signed and sealed, while the notes were only signed, and the mortgages giving a direct lien to the creditors on the lands of the debtor, while the notes gave no lien at all to the creditor upon any land or property of the debtor) being as regards both notes and mortgages in substance simply written acknowledgments of certain amounts of money due at certain times, and we may more easily see the importance it is to us to avoid the expensive school of actual experience, and guided by the equally instructive though inexpensive lessons of the imaginary past, see that we take those precautions which will prevent the possible future reality of being ourselves, at some future day, by the above or some similar technicalities, placed in the unfavorable position of the unfortunate merchant instead of the favorable position of his creditors!

The difference of their positions, remember, is produced simply by the difference of action of the *rival methods* adopted by the *rival tribunals* for carrying out their judicial projects, and in effect is as follows:—Those who sued at law got judgment in sixeen days, received the greater part of their claims within three months after suing, and recovered the whole within one year and six months without any unforeseen drawbacks or deductions. He who sued in Chancery got nothing for nineteen years, one month, and fourteen days after he sued; lost his business, all his property both real and personal, and his means of living, for want of a portion of the debts for which he was suing in Chancery to apply upon the debts for which he was sued at law, and that, too, although he sued a year before he was sued, and besides that, for want of his means, which was so long locked up in Chancery, he and his family, when all they had was sold at law, and they could get nothing from Chancery, were reduced almost to a state of starvation and obliged to raise money on those very claims in Chancery from Jews and usurers (for all others were afraid to meddle with them) at a most exorbitant rate of interest, by which the m st of what he ultimately recovered was consumed by anticipation! And, more provoking than all, when the purchase money was finally obtained out of Chancery, he discovered that, owing to the numerous advertisements and so much printing specially for each separate suit, and so many applications and motions and paying the deputy-Master $1 per hour for taking so much evidence, and 2s. 6d. for every 100 words of it be wrote, and for all the office copies made, &c., that so much expense had been occasioned, that although none of the mortgaged lands sold for less than £50 above the mortgage money and interest, which would have amply satisfied all his costs if he could have sued at law, yet the amount he ought to have received was fearfully reduced, because in most of his suits he had to pay a large amount of the mortgage money recovered for the costs beyond the amount recovered, which the mortgagor had been decreed to pay, but had absconded without paying; and even in those suits in which fortunately the purchase money obtained was sufficient to pay his claim and all the costs which Chancery would permit to be taxed against the defendant, technically called costs as between party and party. Yet the costs so taxed were in numerous instances so miserably a deficient remuneration to the professional man who had to perform the work ordained by the practice of the Court, however really useless that work might be—such as fees of 1s. 3d. and 2s. 6d. for what hours had to be wasted in performing—being, in fact, less than the legal remuneration of a cabman carter, or errand boy for a similar amount of exertion and loss of time; that the Chancery lawyer, in order to live, was compelled to charge him, and he had to pay an additional amount on each of these transactions technically known as costs between attorney and client, and all these disastrous consequences occasioned without any fault of the Judge, the lawyer, or the plaintiff, simply because the suitor, instead of being permitted as at law to attain the object sought by one direct step, is compelled to take and is restricted to the most indirect circuitous route that can be devised, and in following that route is compelled to take as many and as short steps as he possibly can, without actually going backwards or standing quite still, under the idea, possibly, that the goddess who holds the scales of justice in the Courts of Equity is so much more awful and sublime a divinity than her sister of the Common Law—that the light of her countenance, like Jove's of old, would be too overpowering unless approached with the greatest possible circumspection and with the utmost possible degree of deliberation; and because the Court from time immemorial persisted and still persists in supposing that equity consists, to a great extent at least, in compelling the plaintiff and defendant, who are only interested in the disputes between themselves, at their private expense, to settle the disputes and conflicting interests of all the rest of the world, which, by the most strained construction, can in any way be traced to or connected with—not the disputes between the plaintiff and defendant, but simply to the thing about which they are disputing, although not beneficial to the defendant, and although contrary to the wish and interests of the plaintiff, and also contrary to the wishes and injurious to all the other claimants, who were by sheer compulsion made defendants, and thereby put to costs; and because the Court from time immemorial has persisted and still persists in supposing that equity, to a great extent at least, consists in utterly disregarding the rights and interests of the creditors, for the purpose of promoting the rights and interests of even the most contumacious debtor to the most extreme degree and in the most minute particulars.

And because the Court of Chancery, alarmed at the feeling of discontent which the exorbitant costs, their complicated mode of procedure occasions, and anxious to alleviate that feeling by reducing those costs, seem to imagine they can attain that object, and also retain their present routine practice, by simply reducing the remuneration of the advocates employed to starvation prices, and cannot see, what is apparent to every other rational being, that so long as the uninitiated must employ the initiated, or be utterly unable to proceed; and so long as the initiated will not work for nothing and pay their own board; and so long as the Court cannot compel persons to become lawyers on such terms, nor, if they are lawyers, to practice on them—the proper amount of remuneration must be paid to the practitioner; and that if the party in the wrong is not forced to pay, as in justice he should, the party in the right must pay, as in justice he should not. And that if the Court have in reality any wish to reduce the expenses of these proceedings it can very easily be effected, but only in one way, and that is by simplifying the proceedure and reducing the number of steps necessary to bring a suit to a conclusion. And where an object can be attained by one direct simple step, to use no more; and by allowing as costs between party and party, a proper and reasonable remuneration for what is necessary to be performed.

This letter, I am sorry to see, has attained a length much exceeding what I originally intended, and much exceeding the limits to which, if it were possible consistently with being intelligible, I should have confined it; and still I have not touched upon the anomaly peculiar to our jurisprudence, of compelling the same plaintiff and defendant, if they happen to have pending between them at the same time disputes, which are technically legal causes of action, and disputes which are technically equitable causes of action—instead of having all settled and determined in one action, to resort to a lawsuit to determine the one set and a Chancery suit to determine the other; and thereby causing the plaintiff and defendant the cost and trouble of two suits instead of one, and also obliging the country *to employ and pay two Courts and two sets of Judges to do the work of one.* Nor the even worse anomaly of having in the same country at the same time, and professedly with the same object of doing justice between the parties litigant one set of Courts of superior jurisdiction laboriously, deliberately, and expensively delivering decisions in one party's favour according to

aw, which as soon as adjudged the other set of Courts are employed, at the instigation of the losing party at law, with equal labour, and deliberation, and more expense to the parties, in reversing—with costs against the party who was successful at common law, because contrary to the principles of equity law.

Now, if all these evils were the inevitable, irremediable conditions of human litigation in the same manner as "death is the hard condition of our birth," we would be doomed to bear them, and it would be part of the duty of our lives to endeavor to do so with Christian resignation; but as they are obviously capable of cure or at least of alleviation, I think the attempt should be made as soon as possible, and would propose the following methods:—First, as the most direct, obvious, simple, and complete method, I would give the Common Law Courts what they want—the comprehensive, flexible, expansive, and summary jurisdiction which equity possesses in theory but cannot put in practice. I would give the Court of Chancery the practical mode of practice of the common law, which would enable Chancery to do in reality what they profess in theory, together with jurisdiction over all common law matters. I would make each of these Courts of co-extensive and universal law and equity jurisdiction, proceeding by the same rule; and I would give to each of them a more perfect system of judicature than together they now have, simply by abolishing the Court of Chancery by Statute, changing it into a common law Court of superior jurisdiction, of which the Chancellor should be Chief Baron or Chief Judge, calling it the Court of Exchequer or any other name; transferring to each of these common law Courts, in addition to its common law jurisdiction, all the jurisdiction appertaining to the Court of Chancery while in existence; and also, in addition, I would expressly give them jurisdiction to be exercised and enforced in such manner as to those Courts should seem meet, over every other description of dispute, misunderstanding, and matter in any wise affecting any of her Majesty's subjects, their property, rights, or privileges, but to be administered according to the principles of the pleadings and practice of the common law where applicable; and where not applicable then as much in accordance with such principles of pleading and practice of the common law as the nature of the case will admit; and in all other instances at the absolute discretion of the Courts as to the mode of practice.

And I would enact that in all cases the rights of the parties litigant should be determined upon the evidence, or implied or express admissions of the parties by the Court or the presiding Judge at the trial; and when by the presiding Judge, subject to be affirmed, varied, or reversed by the Court in term, without the intervention of a jury, except in such cases where nothing should be in dispute between the parties litigant beyond some isolated question of fact, such as the execution or non-execution of some instrument, or the commission or non-commission of some trespass or common law tort, and the amount of damages consequent thereupon; and except such cases as sound entirely in damages, such as defamation, seduction, assault and battery, malicious prosecution, actions in the nature of deceit, or for malicious or negligent collisions or other injuries to person or property, and cases of a similar nature.

And to obviate the only plausible reason I ever heard given for the continuance of the present division into Courts of Common Law and Courts of Chancery, viz., that most of the Chancery Judges are not thoroughly versed in common law, and most of the Common Law Judges not thoroughly versed in equity law, I would transfer one of the Vice Chancellors to the Common Pleas and another to the Queen's Bench, and supply their places with one of the Puisne Judges of the Common Pleas and another of the Queen's Bench, by which means no possible question could arise in any Court with which at least one of its Judges would not be thoroughly conversant, and with which the other Judges would not have as much general knowledge as at present fits them for deciding indiscriminately Chancery as well as Common Law questions in the Court of Equity and Appeal, which they are continually doing upon appeals from the decisions both of the Superior Courts of Common Law and Chancery.

The Law and Equity Judges of the several now existing Courts would then bear the same relative proportion numerically to each other in the Courts below as they have always done, and still would do collectively while forming the Court of Error and Appeal.

That measure would be a measure of cure. The other method would be a half measure of mere alleviation, viz., to let the Courts remain with divided jurisdiction—Common Law and Chancery as they are—merely changing, simplifying, and assimilating the practice of the Court of Chancery as far as possible to that of Common law, making another Chancery Court—say the Rolls Court—exactly the same as Chancery, with three new Judges, so as to have enough to get through the business in a reasonable time and go circuit, as contemplated by the late Statute. All which, with the present limited number of Judges, and the immense and constantly accumulating amount of labour they have to perform, is impossible.

And now having tired myself and possibly the reader, in the perhaps not very sensible endeavour to make the country at large see what is their interest, though it cannot affect mine one way or other; and having in the effort expended some considerable time and labour, for which I shall certainly receive no pecuniary recompense, and in all human probability, unless from you, no thanks and more or less abuse.

I remain, yours very truly,

A CITY SOLICITOR.

To the Editors of the Law Journal.

Gentlemen:—Permit me to request your answer to a certain question on which there are different opinions between some Magistrates.

The question is,—Has a Magistrate the power to award damages to a complainant against a defendant who was convicted for furious driving on the highway, whereby complainant sustained damages?

The latter part of the 8th section of the Act 18 Vic. Cap. 138, says: "Provided always, that the said fine and imprisonment shall be no bar to the recovery of damages by the injured party before any Court of competent jurisdiction."

Some persons maintain that a Magistrate has the power to award damages under the Act 4 & 5 Vic. Cap. 26; others again doubt this since that Act is only relative to "malicious injuries to property," and since in the most instances where one party drives against another party's conveyance and breaks it, their is no malicious intent, but either drunkeness or carelessness is the cause of the accident. If thelatter view (*i. e.*, that a Magistrate has not the power) is correct, the injured party has in general but a poor chance for redress. It frequently happens that parties of unstated residence and not possessed of any property, hire a conveyance, drive about, get intoxicated, run races, and break another person's conveyance, if the injured party lodges an information before a Magistrate and the Constable is successful, the perpetrator is brought up and fined, the fine goes into the treasury of the Municipality where the act was committed, the injured party has lost his time and is thus left to look for redress before a Court of competent jurisdiction. Before he can do so he must ascertain the party's name and residence, and ascertain whether he has any property or not, otherwise he might lose more money and time without getting satisfaction. Upon inquiry, however, he finds that the perpetrator is not possessed of any property, and that it will be useless to sue him; in consequence of which, the injured party finds no redress for his loss. If, however, the Magistrate would have had power to award the damages at the time the defendant was before him, there would have

been a chance for redress, or otherwise punishment by imprisonment for non-payment of the damages awarded.

Another question I beg leave to ask:—Has a Magistrate authority to issue a Warrant for the apprehension of a criminal, before an information is laid?

Should your answer be in the affirmative, you will please to point out the course to be pursued by the Magistrate, after the criminal is brought before him, and under what form the conviction is made. Should your answer be in the negative, I likewise wish to know what steps a Magistrate can take for the apprehension of a criminal, in case he, the Magistrate himself, sees the crime committed, but either from fear or other motives, finds no person who has the courage of lodging an information, and is living too far from another Magistrate to lodge the information himself in order to secure the apprehension of the criminal.

A third question to which I desire an answer is:—Is it imperative that a written information be first made where a party is brought before a Magistrate under the 28th sec. of the Act 4 & 5 Vic. cap. 26? Trusting that your answers will be very valuable information for me, I remain

Respectfully yours,
OTTO KLOTZ.

[Mr. Klotz's letter includes several points involving questions of general law, which we do not undertake to answer, but so far as possible we desire to meet the wishes of our old correspondent.

In a prosecution under the Statute 18 Vic. ch. 158, Magistrates are not authorized to award damages in the nature of compensation for the civil injury. They are only authorized to *punish* for the public *offence*. Parties seeking compensation for the civil injury should proceed in a Division Court or a Superior Court, accordinng to the amount claimed.

Upon the other questions put we must refer our correspondent to the serial publication in Vols. 1 & 2 of this Journal "On the duties of Magistrates," which gives very full information on the subject of informations, warrants, and the arrest of offenders. We may add that there is a clause in the County Crown Attorneys Act, which enables that officer in certain cases to institute proceedings *ex officio*]—*Eds. L. J.*

To the Editors of the Law Journal.

GENTLEMEN,—I am rejoiced to see that in the last number of your able periodical you make allusion to the Reporters of our Courts. For some time there has been much dissatisfaction felt by the profession with more than one of the three Reporters. The Reports of the Common Pleas are a full year in arrear and issued at very irregular intervals; month after month is allowed to pass without what ought to be a monthly number. Then perchance, out comes a double number characterised for want of attention—nay, even ordinary care. The arguments of counsel are seldom given, and when given, really travestied. In many cases the names of counsel are wholly omitted. (Refer to *Buckner* v. *Buckner*, 6 C.P., p. 314; *Smith* v. *Wallbridge*, *Ib.*, p. 324; *Allen* v. *The City of Toronto*, *Ib.*, p. 334; *Topping et al* v. *Yardington*, *Ib.* p. 347; *The Queen* v. *Kelly*, *et al Ib.*, p. 372; *Copp* v. *Holmes*, *Ib.*, p. 373; *Robinson* v. *Cripps*, *Ib.*, p. 381; *Ryckman* v. *Van. Valkenburg*, *Ib.*, p. 385). In one case the name of the Judge who read the judgment of the Court is omitted: (Refer to *Griffiths* v. *Municipality of Grantham*, *Ib.*, p. 274, noticed in your November issue). The fact is that the Judges are the Reporters, and the paid Reporters (nominally so called) are too careless to correct the proofs. Mr. Christopher Robinson is, I agree with you, a praiseworthy exception; and since he became Reporter of the Queen's Bench, has done much to *redeem* the Reports of his Court from the charge of carelessness and slovenliness. It would be well for Mr. Grant, the Chancery Reporter, to take a lesson from Mr. Robinson; and as for Mr. Jones, if his case is not hopeless he might do so likewise. Besides the profits on publication, these gentlemen enjoy, I believe, the salary of £150 each, and if unable to do the work, should resign—if unfit, should be cashiered. Why do not the Law Society make the Reporters "jointly or either of such Reporters separately" report cases in Chambers under S. 4 of 18 Vic., cap. 128? You deserve well of the profession for supplying at your own expense this vacuum which ought not to exist.

Yours, &c.,
A CONSTANT READER.

[We are happy to inform our correspondent that we have, since the receipt of his letter, examined Nos. 9 and 10 of the C. P. Reports recently issued, and notice in them "signs of improvement." Our correspondent is not singular in his remarks. If others were to speak out as he does, there would be in the premises much less cause of complaint.]—EDS. L. J.

MONTHLY REPERTORY.

COMMON LAW.

C.B. LODER v. KEKULE. *Feb. 9, July 4.*

Measure of damages in case of delivery of an inferior article to that contracted for.

Where an article of inferior quality to that contracted for is delivered, and is an article that can be immediately re-sold in the market, the measure of damages in an action for the delivery of an inferior article is the difference between the value of the article contracted for at the time of the delivery, and the value of the article delivered. But where the article cannot be immediately re-sold, as where the re-sale is delayed by the conduct of the defendant, the measure of damages is the difference between the value of the article contracted for at the time of the delivery, and the amount made by the re-sale within a resonable time of the article delivered.

Q.B. GOMM v. PARROT. *June 12, July 4.*

C.L.P.A.—Inspection of documents—Dower.

The demandant in an action of dower against a *bona fide* purchaser from the husband for value is not entitled to inspect the deed of conveyance to her husband, then being in the hands of the purchaser.

Q.B. SUTTON v. SADLER ET AL. *June 26, July 4.*

Competency of testator—Presumption of sanity—Onus probandi.

Where the competency of the testator is disputed, and evidence is given on both sides, there is no presumption in favour of competency, and the jury ought not to pronounce the will to be valid unless they are affirmatively convinced that it really is so. In an ejectment, the defendant admitted that the plaintiff was heir-at-law of the person last seized, and claimed as devisee and insisted on the right to begin. He then produced a will, and after proof of its execution called witnesses to prove the testator's competency The plaintiff then gave evidence to impeach the competency. The Judge at the trial told the jury that when a will is produced and the execution of it proved, the law presumes sanity, and that the burden of proof was then upon the heir-at-law, and that the devisee must prevail unless the heir-at-law established the incompetency of the testator and that if the evidence was such as to make it a measuring cast and leave them in doubt they ought to find for the defendant.

Held, that this was a misdirection and that there is no such presumption where evidence is given by the heir-at-law which disturbs the belief of the Jury on the competency of the testator.

C.B. FLORENCE v. JENNINGS. *April 20.*

Action for interest agreed to be paid upon a bill if such bill were not paid at maturity after judgment recovered in an action upon the bill itself for the amount of the bill and costs.

The defendant jointly with another person undertook if a bill of exchange drawn by the defendant in favor of the plaintiff were not wholly paid at maturity, to pay as interest thereon £20 for each month during which the bill should remain unpaid after maturity. The bill was not paid at maturity and the plaintiff paid the defendant for the amount of the bill and the interest £20 per month as appeared by his particulars of demand specially endorsed. He declared upon the bill only and recovered judgment by default for the amount of the bill. He afterwards brought an action for the interest as per agreement.

Held that he could not recover for interest subsequent to the judgment, the claim being res judicata, but that he was entitled to interest prior to the judgment, as he could not have recovered it in the first action there being no count upon the agreement or for interest.

C.B. JENNINGS *v.* FLORENCE.

In an action for malicious arrest and arrest being for a larger amount than was due upon a judgment, the plaintiff must show special damage.

Declaration, that the defendant recovered judgment against the now plaintiff for £265 9s. 6d., and afterwards obtained from certain debtors of the plaintiff as garnishees of a certain debt then owing to the plaintiff the sum of £20 13s. 11d. in payment and satisfaction of so much of the said £265 9s. 6d., and that the defendant afterwards maliciously sued out a *ca sa* for the whole amount, and endorsed the writ with directions to the sheriff to levy the whole amount, and delivered the said writ to the sheriff who afterwards arrested and imprisoned the plaintiff under the said writ to satisfy the defendant the whole of the said sum of £265 9s. 6d., and that the plaintiff by reason of the premises was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge.

Demurrer.

Held, in accordance with Churchill v. Siggers 3 Ell. & B. 929 that such action is maintainable if special damage be shown, and that special damage was sufficiently alleged in the declaration.

IR. REP. FARRELL *v.* HICKIE. May 1.

Guarantee.—Signature by attorney.—Personal liability.—Demurrer to defence.—Consideration.

The attorney for an execution creditor having given an indemnity to the sheriff's officer, signed by himself as attorney, is personally liable. Such a guarantee is legal, and supported by sufficient consideration.

REG. at the prosecution of the Rev. James Gollock, the Rev. W. Newman, and the Vicars Choral of Cork *v.* THE JUSTICES OF THE PEACE OF THE COUNTY OF CORK. April 16.

Quarter Sessions.—Tithe rent charge.—Presence of an interested Magistrate.—Invalidity of proceedings.

A magistrate was present on the bench at the hearing of an application for the reduction of tithe rent charge, he himself being one of the tithe payers interested in the case.

Held, that the Court was improperly constituted, and a *certiorari* might issue to bring up the proceedings.

C.B. MIDLAND GREAT WESTERN R. CO. *v.* BENSON. [June 3.

Consignment of goods to carrier.—Advance by consignee.—Subsequent receipt of goods by consignor.—Repayment by carrier to consignee.—Right of action by carrier.

B. delivered to the plaintiffs certain goods to be forwarded by them to K. B. then wrote to K. inclosing him the plaintiffs' receipt for the goods, and requesting him to make an advance on them. K. advanced £40 to B. on the goods. B. subsequently got back the goods from the plaintiffs, whereupon K. required the plaintiffs to pay him the £40—plaintiffs having paid the same under threat of legal proceedings.

Held, that they might recover such sum from B. in an action for money paid for his use.

CHANCERY.

L.C.C. FINDON *v.* FINDON.

Will.—Construction.—Gift over.

A testator bequeathed an annuity of £100 to his daughter while she was single, but on her marriage and on a settlement being made for her for life, and to the use of her issue, he bequeathed for her use £2500, and in default of such issue, over. The daughter married, and had one child, who died an infant, no settlement having been made on the marriage.

Held (affirming the decision of the M. R.) that the gift over did not take effect.

R.C. ELLIS *v.* EDEN. [March 27, April 16.

Will—Construction of.—What securities are within the meaning of "stocks in the foreign funds."

Certificates for Boston Water scrips and bonds of the Pennsylvania Railroad Company held not to be included.

R.C. DAWSON v. PRINCE. July 17-18.

Married woman—Bill of exchange drawn in favour of.—Separate estate.—Notice.

Where a bill of exchange was drawn in favour of a married woman, and her husband, by forging her indorsement got it discounted, it was held that no interest in the bill passed to the holder.

The fact of a bill of exchange being drawn in favor of a married woman is notice that it is in respect of her separate estate.

REVIEW.

CANADA INSURANCE GAZETTE.—It is not customary for us to notice other than legal publications, but we do not hesitate to infringe upon the rule in respect to this periodical, of which the third number is before us, as it happens to present to our readers—belonging as they do to the more intelligent classes of the community—three strong points of recommendation, viz.: 1st. It gives a large amount of information on subjects of great and general importance, the principles of which are very little known to the masses, although involving the ruin or prosperity of a very large proportion of the population of every civilized country. 2ndly. The articles are well written. And lastly, although perhaps not its least recommendation to us, it is a home production.

It is printed in Montreal by Mr. John Lovell, and declares itself to be "A SCIENTIFIC, INDEPENDENT, *and* GENERAL RECORD *of Finance, Investment, Speculation, Joint Stock Bodies, Assurance Companies, Provident Institutions, Savings' Banks, and Friendly Loan, Benefit, Building, and Freehold Land Societies.*

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CORONERS.

STEPHEN CRAWFORD, M.D., and WALTER THORPE, M.D., Esquires, to be Associate Coroners for the United Counties of Huron and Bruce.—(Gazetted Nov. 21, 1857.)

GEORGE PATON, Esquire, M.D., to be an Associate Coroner for the County of Waterloo.—(Gazetted Nov. 21, 1857.)

JOSEPH CRAWFORD, Esquire, M.D., to be an Associate Coroner for the County of Grey.—(Gazetted Nov. 21, 1857.)

JOHN NATION, M.D., and JOHN GARDINER BOLSTER, Esquires, to be Associate Coroners for the County of Ontario.—(Gazetted Nov. 28, 1857.)

NOTARIES PUBLIC.

HENRY C. R. BECHER, of London, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Nov. 14, 1857.)

JOHN S. POWELL, of Port Robinson, County of Welland, Gentleman, to be a Notary Public for Upper Canada.—(Gazetted Nov. 21, 1857.)

ALEXANDER S. KIRKPATRICK, of Kingston, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted Nov. 28, 1857.)

D. O. No. 13. (13 *and* 14 *Vic., Cap.* 5.)

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT.

Toronto, 18th October, 1857.

NOTICE is hereby given, that HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL, has been pleased, under the authority vested in him, to order that Unwrought Stone, now charged with a duty of fifteen *per centum, ad valorem*, as a non-enumerated article, be placed in the list of Goods paying a duty of two and a half *per centum, ad valorem*, from and after this date, and shall be rated accordingly. By Command,

R. S. M. BOUCHETTE,

11—3 in. *Commissioner of Customs.*

D. O. No. 14, (16 *Viot. Cap.* 85.)

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT.

Toronto, 13th October, 1857.

NOTICE is hereby given, that HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL, has been pleased, by an Interpretative Order, bearing date the 10th of October, instant, to direct that Lithographic Printing Presses, Printing Ink, and Implements of all kinds, be admitted to entry free of duty, in accordance with the terms of the Act 18 Vic. Cap. 5, exempting Printing Presses, Materials, and Implements of all kinds from duty.

By Command,

October 20th, 1857. R. S. M. BOUCHETTE,

11—3 in. *Commissioner of Customs.*

CROWN LAND DEPARTMENT.

TORONTO, Oct. 13th, 1857.

NOTICE is hereby given that the Lands in the Township of Rolph in the County of Renfrew, U. C., will be open for sale on and after the 11th next month, on application to the Resident Agent, William Harris, Esq., at Admaston near Renfrew.

For list of Lots, and the conditions of Sale, see the Canada Gazette, or apply to Mr. Harris.

ANDREW RUSSELL,

11—6 in. Asst. Commissioner.

CROWN LAND DEPARTMENT.

TORONTO, 21st Oct. 1857.

NOTICE is hereby given that the Lands in the Township of Barrie in the County of Frontenac, U.C., will be open for Sale on and after the 17th of next month, on application to the Resident Agent, Allan McPherson, Esq., at Kingston.

For list of Lots, and the conditions of Sale, see the Canada Gazette, or apply to Mr. McPherson.

ANDREW RUSSELL,

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  [k] Under common law procedure act.
  [l] Evidence under non assumpsit.
  [m] Evidence under non assumpsit, since rules of H. T. 4 W. 4.
  [n] Plea of payment.
  [o] Plea of non est factum.
  [p] Plea of performance.
  [q] Plea of "nil debit" and "never intended."
  [r] Of certain special pleas.
  [s] Of certain miscellaneous rules relating to pleas.
  [t] Of null and sham pleas.
  [u] Of issuable pleas.
XVI. The replication.
  [a] Replication de injuria.
XVII. Demurrer.
XVIII. Repleader.
XIX. Issue.
XX. Defects cured by pleading over, or by verdict.
XXI. Amendment.
  [a] Amendment of form of action.
  [b] Amendment of mesne process.
  [c] Amendment of declaration and other Pleadings.
  [d] Amendment of verdict.
  [e] Amendment of judgment.
  [f] Amendment after nonsuit or verdict.
  [g] Amendment after error.
  [h] Amendment of final process.
  [i] Amendments in certain other cases.

I. GENERAL RULES.

II. PARTIES TO THE ACTION.

It is sufficient on all occasions after parties have been first named, to describe them by the terms "said plaintiff" and "said defendant." Davison v. Savage, i. 537; 6 Taunt, 675. Stevenson v. Hunter, i. 675; 6 Taun, 406.

And see under this head, Titles, Action; Assumpsit; Bankruptcy; Bills of Exchange; Case; Chose in Action; Covenant; Executors; Husband and Wife; Landlord and Tenant; Partnership; Replevin; Trespass; Trover.

III. MATERIAL ALLEGATIONS.

Whole of material allegations must be proved. Reece v. Taylor, xxx, 590; 4 N & M, 469.

Where more is stated as a cause of action than is necessary for the gist of the action, plaintiff is not bound to prove the immaterial part. Bromfield v. Jones, x, 621; 4 B & C, 380. Eresham v. Posten. xii. 721; 2 C & P, 540. Dukes v. Gostling, xxvii, 786; 1 B N C, 588. Pitt v. Williams, xxix, 203; 2 A & P, 841.

And it is improper to take issue on such immaterial allegation. Arundel v. Bowman, iv, 103; 8 Taun. 109.

Matter alleged by way of inducement to the substance of the matter, need not be alleged with such certainty as that which is substance. Stoddart v. Palmer, xvi, 212; 4 D & R, 624. Churchill v. Hunt, xviii, 253; 1 Chit. 480. Williams v. Wilcox, xxxv, 609; 8 A & E 314. Brunskill v. Robertson, xxxvi, 9 A & E, 840.

And such matter of inducement need not be proved. Crosskeys Bridge v. Rawlings, xxxii, 41; 3 B N C, 71.

Matter of description must be proved as alleged. Wells v. Girling, v, 853; Gow 21. Stoddart v. Palmer, xvi, 212; 4 D & R, 624. Ricketts v. Salwey, xviii, 68; 1 Chit. 104. Treesdale v. Clement, xvii, 320; 1 Chit. 603.

An action for tort is maintainable, though only part of the allegation is proved. Ricketts v. Salwey, xviii, 69; 1 Chit, 104. Williamson v. Allnley, xix, 140; 6 Bing, 266. Clarkson v. Lawson, xix, 299; 6 Bing. 587.

Plaintiff is not bound to allege a request, except where the object of the request is to oblige another to do something. Amory v. Broderick, xviii, 600; 2 Chit, 320.

In trespass for driving against plaintiff's cart, it is an immaterial allegation who was riding in it. Howard v. Peete. xviii, 653; 2 Chit. 315.

In assumpsit, the day alleged for an oral promise is immaterial, even since the new rules. Arnold v. Arnold, xxvii 47; 3 B N C, 81.

Where the *terms* of a contract pleaded by way of defence are not material to the purpose for which contract is given in evidence, they need not be proved. Robson v. Fallows, xxxii, 186; 3 B N C, 392.

Distinction between unnecessary and immaterial allegation. Draper v. Garratt, ix, 11; 2 B & C, 2.

Preliminary matters need not be averred. Sharpe v. Abbey, xv, 537; 5 Bing, 193.

When allegations in pleadings are divisible. Tapley v. Wainwright, xxvii. 710; 5 B & Ad. 395. Hare v. Horton, xxvii, 302; 5 B & Ad. 715. Hartley v. Burkitt, xxxiii, 925; 5 B N C, 687. Cole v. Creswell, xxxix, 355; 11 A & E, 661. Green v. Steer, xli, 740; 1 Q B, 707.

If one plea be compounded of several distinct allegations, one of which is not byself a defence to the action, the establishing that one in proof will not support the plea. Baillie v. Kell, xxxiii, 900; 4 B N C, 638.

But when it is composed of several distinct allegations, either of which amounts to a justification, the proof of one is sufficient. Ibid.

When is tender a material allegation. Marks v. Labee, xxxii, 193; 3 B N C, 408. Jackson v. Allaway, xlvi, 842; 5 M & G, 942.

Matter which appears in the pleadings by necessary implication, need not be expressly averred. Galloway v. Jackson, xliii. 498; 3 M & G, 960. Jones v. Clarke, xliii, 694; 3 & B, 194.

But such implication must be a necessary one. Galloway v. Jackson, xliii, 498; 3 M & G, 960. Prentice v. Harrison, xlv, 852; 4 Q B. 852.

The declaration against the drawer of a bill must allege a promise to pay. Henry v. Burbidge, xxxii, 234; 3 B N C, 501.

In an action by landlord against sheriff, under 8 Anne, cap. 14, for removing goods taken in execution without paying the rent, the allegation of removal is material. Smallman v. Pollard, xlvi, 1001.

In covenant by assignee of lesser for rent arrear, allegation that lesser was possessed for remainder of a term of 22 years, commencing, &c., is material and traversable Carvick v. Balgrave, v, 783; 1 B & B, 531.

Minimum of allegation is the maximum of proof required. Francis v. Steward, xlvii, 984; 5 Q B, 984, 986.

In error to reverse an outlawry, the material allegation is that defendant was abroad at the issuing of the exigent, and the averment that he so continued until outlawry pronounced, need not be proved. Robertson v. Robertson, i, 165; 5 Taun, 309.

Tender not essential in action for not accepting goods. Boyd v. Lett, l, 221; 1 C B. 222.

Averment of trespasses in other parts of the same close is immaterial. Wood v. Wedgwood, l, 271; 1 C B, 273.

Request is a condition precedent in bond to account on request. Davis v. Cary, lxix, 416; 15 Q B, 418.

Corruptly not essential in plea of simoniacal contract, if circumstances alleged show it. Goldham v. Edwards, lxxxi. 435; 16 C B, 437.

Mode by which nuisance causes injury is surplusage. Fay v. Prentice, l, 827; 1 C B, 828.

Allegation under per quod of mode of injury are material averments of fact, and not inference of law in case for illegally granting a scrutiny, and thus depriving plaintiff of his vote Price v. Belcher, liv, 58. 3 C B, 58.

Where notice is material, averment of facts "which defendant well knew," is not equivalent to averment of notice. Colchester v. Brooke, liii, 339; 7 Q B, 338

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