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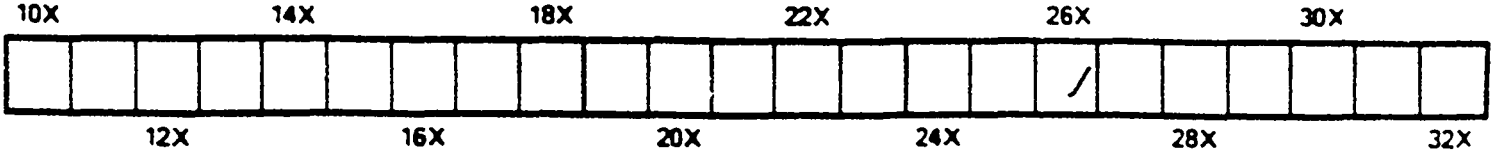

DIARY FOR AUGUST.

6. Saturday. .. Articles, &c, to be left with Secretary, Law Society.
7. SUNDAY... *10th Sunday af. Trinity.*
14. SUNDAY... *8th Sunday after Trinity.*
20. Saturday ... Long Vacation ends. Last day for service of Writ for Co. Court.
21. SUNDAY... *9th Sunday after Trinity,*
22. Monday..... Trinity Term begins.
23. Tuesday..... Last day for notice of Examination Chancery, Toronto & Cobourg.
24. Wednesday Last day for notice of Examination Chancery, Goderich.
26. Friday..... Paper Day, Q. B.
27. Saturday ... Paper Day, C. P.
28. SUNDAY... *10th Sunday after Trinity.*
29. Monday..... Paper Day, Q. B.
30. Tuesday..... Paper Day, C. P. Last day for declaring for County Court.
31. Wednesday. { Paper Day, Q. B. Last day for return of non-resident defaulters to County Treasurer.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

AUGUST, 1859.

GARDINER v. GARDINER.

To the Editors of the Law Journal:

GENTLEMEN,—The success which has attended our joint efforts to ameliorate Chancery practice, by directing public attention to the imperfect state of the law regulating its proceedings, encourages me to attempt by similar means the remedy or settlement of the existing laws which govern, or are supposed to govern, the rights of creditors, and the real and personal representatives of every owner of lands in Upper Canada who happens to die more or less in debt.

The point is this: can each or any of those creditors—although the real estate passed at the instant of death either to the devisees by the will, or to the heirs-at-law by descent, without any judgment or lien upon it as against deceased, through whom alone the real representatives claim, without claiming through the executors or administrators, to whom the real estate now passed—can creditors, I say, sue the executors or administrators alone, issue a *fi. fa.* lands against them alone, and cause the sheriff to sell those lands on that *fi. fa.*, as if those lands on the death of the owner had passed by the will or the letters of administration to the executors or administrators, instead of to the heirs or devisees; and will a *bona fide* purchaser at such sheriff's sale for value, get as good a title to the lands as if they had passed by the will or the letters of administration to the executor or administrator instead of the heir? For if not, then the innocent *bona fide* purchaser for value is defrauded by the prevailing practice; and if he does, then he gets a good title to A's land, because it was sold as B's land, on a *fi. fa.* against B. alone, in a suit against B. alone,—the whole proceedings, as regards the owners, the real representatives, being "*res inter alios acta,*" of which they had neither notice or knowledge, and, unless authorized by some express exceptional legislative enactment, directly contrary to every principle of British law, and even of natural justice, which would not deprive the owner of his property unheard and without the opportunity of defence or redemption, and would not entrust his defence against his will to his rival, whose interest it is to favor the personalty at the expense of the real estate; thereby affording that rival the opportunity (not always neglected) of in effect confessing judgment against his adversary, under cover of defending him. Yet, according to the case of *Gardiner v. Gardiner*, all that may be very easily and with perfect certainty accomplished, by means of a legal contrivance in the form of a suit at law, by which the creditor is plaintiff and the executor or administrator defendant, and which is so far of the nature of the old action of ejectment on a vacant possession, that the executor or administrator acts the part of casual ejector, instead of the now exploded Richard Roe, but is unlike the action of ejectment to this extent, that there the true owner was not finally concluded by what was done; and besides, by means of notice to the true owner, and the consent rule and confession of lease, entry and ouster, the fictitious suit between fictitious parties was before judgment changed into a real suit between the real parties, and full opportunity of defence afforded before the rights of those really interested could be affected; while by the legal contrivance which *Gardiner v. Gardiner* declares to be authorized by the law of Upper Canada, everything is concocted, transacted and finished, so far as the party really interested is concerned, *in nubibus*, and remains as it commenced, a fiction, until it resolves itself into the tangible fact of the duly registered sheriff's deed of the land of the real representatives to the *bona fide* purchaser thereof for value, without notice, at sheriff's sale; when it immediately, by force of the registry acts, which affect all the world with notice of registered deeds, descends like the bolt of Jove upon the devoted heads of the real representatives, and for the first time gives them legal notice and warning of their danger, by showing them that all is over, that their rights are irretrievably destroyed, and that it is then too late for defence or redemption.

This case of *Gardiner v. Gardiner* was decided against the opinion of Chief Justice Macaulay, and has since been acted upon in practice, although believed to be contrary to the opinions of many of the judges. It enunciates the doctrine that such sheriff's sales and deeds are good, under and by virtue of the English statute 5 Geo. II. cap. 7, sec. 4, and, if law, establishes that titles depending on such sheriff's deeds are good; but if not law—and it has never been held to be so, either by the Court of Appeal here or by the Privy Council in England—then all titles depending on such sheriff's deeds are worthless. Therefore, as the doctrine it enunciates may any day be exploded on appeal, it is well worth while considering whether it be or be not correctly decided; and the subject well deserves the attention of the *Law Journal*, for it is certainly yet open for consideration whether the point has been well decided. I would ask you therefore to discuss the subject in your pages.

Yours, &c.,

A CITY SOLICITOR.

The foregoing letter, from a personage to whom the public are already indebted for the discussion of important questions of law reform, serves as a fitting introduction to a brief notice of the case to which it refers.

In every view such a notice is important, and we shall proceed to the discussion of the topic with all the freedom which the honest investigation of a scientific subject is entitled to claim.

Making all proper allowance for the necessities of a new country, and admitting the propriety of facilitating the transfer of real estate by all the methods known to the law, we yet think that real and personal property should not be placed exactly on the same footing, and, looking to the future of Canada, confess to a feeling—perhaps our readers

may call it a prejudice—against the complete abandonment of *all* the protections which surround land at home; and we are of opinion that "this Canada of ours" would not add to her material interests by an authoritative recognition of any principle that would allow a homestead and a hoggerel to be dealt with in the same way, or by any extension of the doctrine in *Gardiner v. Gardiner*.

The case of *Gardiner v. Gardiner* was decided in 1832, and is reported in 2 K. B., O. S., 520. It excited much discussion amongst the profession at the time, and many were found who agreed with the minority rather than with the decision arrived at by the majority of the court. The decision, however, was not formally questioned on appeal, and the doctrine it enunciates has been acted on ever since. Thousands, nay, millions of acres have changed hands under its authority; and we believe few practitioners at the present day actually decline to pass a title on a sheriff's deed, whatever latent doubts may trouble them.

There are grave surroundings, therefore, to the subject; and yet, as our correspondent remarks, the doctrine enunciated by *Gardiner v. Gardiner* might at any moment be exploded by an adverse decision; and if it was, what would become of titles depending on sheriff's deeds?

Doubtless the courts would struggle, and perhaps rightly so, against disturbing the law as laid down, after being acted upon for so many years, and might approach it with "fear and trembling," as they contemplated results. Yet the judges may be placed at any moment in a position wherein they might be "plainly obliged" to resolve the question on its abstract merits, notwithstanding that the most calamitous results would follow.

No one can read the cases in our courts without entertaining some doubts as to *Gardiner v. Gardiner*, and there is nothing to be gained by shutting our eyes to latent danger (even where danger is imaginary, there is much satisfaction in ascertaining our position). Its nature and extent should be determined, that proper steps may be taken to avert it. In this spirit it is that we approach *Gardiner v. Gardiner*.

In considering this case, it is necessary to keep in mind what the common law was, and how far it has been varied. It is clear that by common law the lands of the ancestor could only be affected in the hands of his heir by a judgment against the ancestor in his lifetime, or the ancestor's obligation under seal binding his heir, each of which would operate as an estoppel on the heir claiming through the ancestor; and such judgment would have to be revived against the heir by *sci. fa.*, which was a double proceeding, being both an action and an execution combined, to which the heir could plead; and the obligation should be enforced by action of debt against the heir, in which action the specialty creditor could recover to the extent of the lands descended. The statutes, 29 Car. 2, cap. 3, secs. 10 & 11, 1 Ev. Stat. 218, and 3 W. & M. cap. 14, 1 Ev. Stat. 462, do no more than prevent the then practise of evading those common law liabilities by means of conveyances by the ancestor to others in trust for himself, which in effect left the land always his, and to descend to his heir, or by willing it, instead of leaving it to descend to the heir; but no man's land could, while he lived, either before or after these statutes, be seized or taken in execution, until or except by 13 Ed. I. stat. 1 (2nd West.), cap. 18, 3 Ev. Stat. 307, which first gave *fi. fa.* to levy the judgment debt off the goods and lands—that is, the profits of the lands accruing to the owner—or *elegit* of one half of the judgment debtor's lands itself; which half of the land the judgment creditor did not become the purchaser of, but was to take at an estimated valuation or rent, and hold until the estimated yearly profits or rent paid the debt, being in effect a sort of Welsh mortgage, and was merely a chattel interest or mortgage, which went to the executors, and not to the heirs of the judgment creditor.—(*See* 2 W. Saund. 68, foot note.)

Matters remained in this state until the passing of the English statute 5 Geo. II. cap. 7, sec. 4, upon the interpretation of which *Gardiner v. Gardiner* depends. The section is divisible into a number of sub-sections or branches, which subdivision, as it will make the section more easily comprehended, without altering the sense, we shall take the liberty of making by splitting it into three branches, as follows:

The *first branch* enacts that lands, &c., in the "plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his Majesty or any of his subjects."

Second branch.—"And shall and may be ASSETS for the satisfaction thereof, *in like manner* as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty."

Third branch.—And such lands, &c., "shall be subject to the like remedies, proceedings and processes in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing thereof," "towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts."

It appears to us that in the first place, as respects aliens, no change is effected, but the lands remain as if the act

never passed; therefore the heirs and devisees are entitled to plead alienage as a defence. But the defence, according to *Wood et al. v. Campbell*, 3 Q. B. U. C. 269, and *Doe Richardson v. Dickson*, 2 O. S. K. B. Rep. U. C. 293, can only be raised before and not after the *fi. fa.* lands issues against the executor or administrator; and *Gardiner v. Gardiner*, it appears to us, prevents the heir or devisee from urging the defence at the only time he could urge it, by deciding in effect that the heir and devisee need not be parties or have any knowledge or notice of the proceedings, and therefore are not afforded any opportunity of urging any defence until after the *fi. fa.* issues against the executor or administrator, and the land is thereupon sold at sheriff's sale, and the purchaser on the sheriff's deed proceeds to eject the heirs and devisees; when, it being too late to urge the defence, the heirs and devisees are permitted to make an ineffectual attempt to urge it, and between the two sets of cases lose their lands against law because the courts will not permit them to defend themselves. It seems equally clear that in the second place, as regards creditors who are subjects, the following changes are effected:

The first branch in the 4th section makes a great change in the previous law, but it makes no greater change than this, viz.: it subjects all lands and real estate in Canada to be applied to the payment and satisfaction not only of the specialty debts of the ancestor binding his heirs, but also of *all the just debts, duties and demands* which the owner owed to the crown or any of its subjects, and that as well whether such creditor proceed to enforce his claim during the lifetime or after the death of his debtor the owner. But that branch applies itself solely to the rights of the parties, leaving untouched the means by which such rights are to be enforced; while the second and third branches apply solely to the means by which such rights are to be enforced, leaving untouched the rights of the parties. Thus the second branch applies itself solely to where the debtor has died without the creditor having enforced his claim, and where the creditor is seeking to enforce his claim against the land after it has descended or passed by will to the heirs or devisees; and then makes such lands, as to such claims, although they be of no higher degree than simple contract debts, from the time of the passing of the statute, what, if they had been claims upon the ancestor's obligations binding his heirs, they would have been without that act, viz., assets real per descent or *inter manus*, in the hands or possession of the heirs or devisees. (*See* Tomlin's Law Dict., "Assets.") And so the heir or devisee, who had been previously liable to be sued in debt on his ancestor's specialty at common law, or on the stat. 3 W. & M. c. 14, as above stated, also thenceforth became liable to be sued as well in any form of action for any just debt, duty or demand his ancestor owed, subject to nearly the same liability as an executor or administrator would have been if, instead of real property descending to the heir or devisee, such lands had been personally passing by will or letters of administration to the personal representatives—that is, to the extent of the real property descended or willed; but such second branch leaves untouched any remedy against the owner of lands while he lives. The third branch applies itself solely to cases where some or any judgment creditor is seeking to enforce some or any judgment at common law, or decree in Chancery against his judgment debtor, such debtor being then alive, in which instances it enacts in effect that the lands of such judgment debtor may be seized and sold along with his goods on the same *fi. fa.* or other execution by describing all his property in the *fi. fa.*, &c., as "goods, chattels, lands, real estate and effects." All which clearly appears from the Canadian statute 43 Geo. III. cap 1, which varies the law as established by the preceding statute by enacting that from and after the end of the then session of Parliament, "goods and chattels, lands and tenements shall not be included in the same writ of execution, nor shall any such process issue against the lands and tenements until the return of the process against the goods and chattels." But that third branch of the 4th section of 5 Geo. II. cap. 7, does not change or profess to change the nature of the realty, or to make realty personalty, or to make its nature in any degree more nearly approximate to personalty; and it leaves wholly untouched all cases where the owner dies and his lands descend or pass by will, which cases had been sufficiently provided for by the second branch of the section 4, in the manner aforesaid.

Lastly, it is worthy of notice that the statute does not, either before, or at, or after, the death of the owner, charge the debts absolutely on the lands, so as to affect the lands before placing in the sheriff's hands the attachment or *fi. fa.* lands for execution. If it had, every debt would be a mortgage or lien by virtue of the statute, and the first contracted would be the first incumbrance. It merely gives the creditor a right to issue an attachment in some cases; in all other cases to sue the owner while alive, and his heir or devisee after he dies, in any form of action applicable to the creditor's claim, and so obtain a *fi. fa.* lands, and put it in the sheriff's hands, and thereby for the first time acquire a claim or lien upon whatever land itself should happen to be and remain at the time of the issuing of the attachment or *fi. fa.* the lands of the owner or his heirs or devisees. But both the owner and his heirs and devisees are, by the express words of the second branch of the 4th section of 5 Geo. II. cap. 7, left at liberty in the meantime to sell, convey, and pass indefeasible titles to purchasers,

in like manner "as at the time of passing of the act they could as to real estate in England by common law as well as by the statute." (3 W. & M. cap. 14, secs. 5, 6 & 7; see also opinion of Ashurst, J., in *Shetelworth v. Neville*, 1 Term Rep. 457.) Besides, *Topping v. Yardington*, 6 C. P. U. C. 348 & 349, and other cases, show that the lands are not, even in the eye of the law, in the hands of executors or administrators to be administered, and cannot be administered by them; while *Vankoughnet v. Ross*, 7 Q. B. Rep. U. C. 248, shows that an action of debt against the heir at common law or the devisees, on the statute 3 W. & M. c. 14, on the ancestor's obligation, was and is maintainable as in England, though the Court of Queen's Bench in that case in accordance with *Gardiner v. Gardiner*, decide that covenant against the heir, for a cause of action against his ancestor, and, in *Forsyth v. Hall*, 3 Dra. Rep. 304, decide that debt on simple contract to recover the ancestor's debt would not lie against the heir. So that the Court of Queen's Bench, by the above cases, have, we contend, in effect totally repealed the whole of the second branch of the 4th section of 5 Geo. II. cap. 7; because, if it be permittted to have any meaning, it, together with the first branch of the same section 4, must necessarily make all claims, simple contract or otherwise, equivalent to specialty debts of the ancestor, and recoverable, by the statute 5 Geo. II. cap. 7, in any suitable form of action against the heir or devisee, in the same manner as specialty debts of the ancestor could previously have been recovered in an action of debt against his heirs or devisees under the common law and the statute 3 W. & M. c. 14. The last mentioned cases have complicated the difficulty which *Gardiner v. Gardiner* created; for, to make the decisions consistent, it will now be necessary to decide that in all cases where the deceased bound his heirs by specialty, the creditor should pursue the old course, and sue the heir or devisees in an action of debt at common law, or on the statute 3 W. & M. c. 14, but that the executor or administrator should be sued in all other cases.

If the above observations be correct, it follows as a natural consequence that *Gardiner v. Gardiner* would have been an equally binding authority, if the intestate there had owed the plaintiff a specialty debt, and the plaintiff had sued the heir instead of the administrator for its recovery, and had replied to the heir's plea of payment of the ancestor's debts to the value of the lands descended (which would be a good plea,—3 W. & M. cap. 14, secs. 6 & 7, and *Butcher v Nightingale*, 1 Stra. 665), by admitting the plea to be true, but alleging that by the statute 13 Ed. I. stat. 1 (2 West.) cap. 18, it was enacted that "when debt was recovered in the King's Court, it should thenceforth be in the election of him that sued therefor to have a writ of *fi. fa.* unto the sheriff for to levy the debt off the lands and goods," &c.; that the intestate died possessed of goods, which were in the hands of the heir to be administered; and that the plaintiff elected to hand a *fi. fa.* to the sheriff to levy his debt thereof. And if the court had, on demurrer to such replication, held that although in point of law the goods could not be considered in the hands of the heir to be administered, nor to be his property for any purpose whatever, but on the contrary must be considered to have been and to be in the eye of the law the property of the administrator, yet, as the statute evidently intended to give the plaintiff the benefit of levying his debt not only out of the lands of the intestate, but also out of his goods, and that too by a writ of *fi. fa.* against goods, and as certainly the plaintiff had a right to maintain his action against the heir on the specialty debt of his ancestor, and, if he had not paid debts of the intestate to the value of the lands descended, would have had as certainly a right to have execution of those lands or be paid the value thereof (3 W. & M. cap 14, sec. 5; 1 Ev. stat. 464, note; *Ex parte Merton*, 5 Ves. 449), he could not be said to be wrong in prosecuting his action to the extent he had against the heir;—and then if he were turned round now by that plea, he would lose the whole benefit of the suit, and also be compelled to pay the heir his costs of suit for having sued him in the wrong; and besides would be put to considerable trouble and delay in suing the administrator to judgment and execution, when perhaps after all, owing to the delay occasioned by bringing a useless suit against the heir, he might now find himself too late, and that other creditors had been beforehand with him, and swept away on their execution against the executor all the personal assets; though to be sure in that case it might be contended that any injury of that sort he might suffer was occasioned by his own mistake of the law. Nevertheless, on the whole the replication was good in law, and the *fi. fa.* might issue against the goods of the intestate, as if they were in the hands of the heir to be administered. The purchaser at sheriff's sale at least would obtain a good title, as nothing could be urged against him which could have been pleaded in the action against the heir by the administrator, provided he had been a defendant therein instead of the heir. Yet, bad as is the above confusion of legal principles introduced by *Gardiner v. Gardiner*, such confusion is even still worse confounded by the not unnatural efforts of later judges to confine to as narrow a compass as possible such doctrine. Among other instances may be mentioned that of *Graham v. Nelson*, 6 C. P. U. C. 281, which, on authority of *McDade v. Dafoe*, 15 Q. B. U. C. Rep. 386, establishes the further anomaly that although goods could, yet lands cannot be sold on a *fi. fa.* against an executor *de son tort*.

From what above appears, these results follow, viz.: first, no one can, as the law now stands, tell what course is safe to pursue, and therefore runs a risk, whatever way he moves, of going wrong; secondly, all titles depending on such sheriff's deeds are dangerous, and cannot be sold by those who have purchased them for the full value of the land to any person conversant with the difficulty; thirdly, it injures both debtors and creditors by deterring intending purchasers at sheriff's sales, few of whom would like to purchase a doubtful law suit; fourthly, it materially diminishes the fund for creditors, as well as hinders and delays them by obliging every creditor to proceed to *fi. fa.* lands and sheriff's sale, thereby adding costs to each debt, which often doubles it; fifthly, when the heirs are abroad, or infants, as is often the case—nearly always since the Primogeniture acts—it practically prevents the possibility of administering the lands so as to save that course, and consequently disinherits the heirs; sixthly, it operates equally hard on executors or administrators of testators or intestates owning perhaps a village lot, worth say five to ten pounds, and having many creditors, by rendering those executors and administrators liable, after they have duly administered all they could administer, to be sued in twenty or more actions by all those creditors, to see which of them will get that lot,—all of which actions must go to *fi. fa.* lands and sale by sheriff, because none can be preferred by the executor or administrator to end the dispute, while which of them is to get the lot depends on the chance of which gets his *fi. fa.* lands first into the sheriff's hands; and by the process of testing the experiment the executors and administrators are ruined, having to pay *their own* costs of suit, at least in each case, as all the cases may be tried at the same assizes, and each plaintiff has a right to recover verdict and execution, so as to have a chance to get his execution in first, and so grab the coveted village lot.

We feel that every reasonable man, whether in his own mind he believes *Gardiner v. Gardiner* is rightly or wrongly decided, will unite with us in saying that the Legislature ought to adopt the suggestion thrown out by Chief Justice Draper on the point, in *Graham v. Nelson*, 6 C. P. U. C. 281, that it would be prudent to pass an act to legalize titles already acquired—and, we would add, to settle the matter for the future by either making the heirs and devisees be sued along with the executors or administrators, as can be done with heirs and devisees by 3 W. & M. cap. 14, in the same action, or obliging them, whenever the plaintiff replies or suggests lands, to be substituted as defendants in the place and stead of the personal representative.

This would remove all difficulties, and no great obstacle can lie in the way of its accomplishment.

2

LOCAL COURTS COMMITMENT.—THE 91st CLAUSE.

The subject of imprisonment by the English County Court Judges has attracted considerable attention at home. It has been brought before the public by the general press, the Law Amendment Society has reported upon it, and learned judges have written and spoken upon it.

In a late number of the *Law Times*, our able contemporary has noticed the subject with his usual ability and discretion. Mr. Collier it would appear has given notice of a bill to amend the law of imprisonment by the County Courts *his* purpose being to restrict the power at present vested in them.

The learned Editor of the *Law Times* in referring to this makes some sound and well considered observations which we have much pleasure in laying before our readers.

"The details of his (Mr. Collier's) measure will be looked to with much curiosity by all who have given any consideration to a question really far more difficult than those who blunder about it are willing to believe. The problem to be solved is this, to preserve the use while removing the abuse. Hasty reformers would abolish uses and abuses together; for the power of imprisonment has its uses, indeed, without it the County Courts would be almost worthless. The measure of that use is not to be found alone in the number of imprisonments or the number of cases in which the punishment succeeds in enforcing obedience to the order of the Court, but in that unknown quantity of cases where the knowledge of the existence of such a power induces to obedience. Nor do its uses end here. Add to these the multitude of cases, greater probably than all the rest, in which, if no such power existed, the suitor would set at defiance orders which he would soon come to learn were impossible of enforcement. Then, again, what should be done with torts? We can well understand, and would not hastily reject as untenable, the argument that, inasmuch as it is undesirable to encourage small credits, it would be desirable to take from the creditor the power of enforcing them; but would that content the public when wrongs are done? Is a man to subject me to false imprisonment, to slander, to an assault, to a trespass, with absolute impunity to himself, because he has no goods and chattels? Is poverty to be permitted unrestricted license to do injury, because a judgment of the County Court is not to be enforced otherwise than by an order which the defendant will throw into the fire when he is aware that nothing can come of it? These are practical difficulties for which we have neither heard, nor been able to devise, a practical solution. We shall therefore look with great curiosity at the promised bill of Mr. Collier, hoping to find a definite plan which shall prevent the abuse of imprisonment where there is hope-

less poverty, without abolishing it for cases in which there is wanting only the will to pay; and still more where punishment ought to follow the wrong committed by the defendant. Nor can we altogether abandon, even in the case of small debts, the principle so often affirmed here, that debt is wrong; that to take from one man his goods or money on promise of payment,, and after having used them, not to pay, is only one degree short of the moral wrong of the boy who tells a lie to the same tradesman in order to obtain by that lie a penny loaf. Casuistry alone can find a substantial distinction between the guilt of him who falsely says, 'Mrs. Smith sent me for a pound of sugar,' and so obtaining the sugar devours it, and the well-dressed rogue who says to the tradesman, 'Let me have a coat, and I will pay for it,' when he has not the means of paying, and does not expect to have them; and we cannot discover so much greater an objection to the sending of the latter offender to prison than to the sending thither of the former."

The 91st, 92nd, 93rd & 94th sections of the Division Courts Act are copied from the 98th, 99th, 100th, 101st & 102nd sections of the English Act 9 & 10 Vic., c. 85, so that the law here and in England was exactly on the same footing until altered by the statute of last session. Our *Division Courts* answer to the *English* County Courts, the powers and procedure in both sets of Tribunals being very nearly alike. (The Upper Canada *County* Courts are Superior Courts.)

As in England, public attention was also here directed to the subject of commitments by the Division Courts by writers in the public press, on very slender ground certainly, as we explained in a former article. However that may be, a "cry" was got up loud enough to reach the ears of the Attorney General of Upper Canada, and that gentleman with his usual promptitude in such matters framed a measure to meet the evil complained of, or rather to make timely provision to guard against the evils complained of in England. It has met with general approval in this country, and as an amendment upon secs. 91 & 92, (copied from the English Act 9 & 10 Vic., ch. 95, as before mentioned,) it exhibits the Canadian method of solving some of the difficulties to which our respected contemporary refers.

Mr. Attorney General McDonald's plan for remedying the evil as contained in chapter 33 of last session, secs. 21, 22 & 23 of that act, embrace all that is material to give, and is as follows:—

Sec. 21.—A party failing to attend to the requirements of any such summons, shall not be liable to be committed to gaol for the default, unless the judge is satisfied that such non-attendance is wilful, or that the party has failed to attend after being twice so summoned, and if at the hearing it appears to the judge upon the examination of the party or otherwise, that he ought not to have been so summoned, or if at such hearing the judgment creditor does not appear, the judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as any other judgment of the Court.

Sec. 22.—The examination shall be held in the judge's chambers, unless the Judge shall otherwise direct.

Sec. 23.—In case a party has after his examination been discharged by the Judge, no further summons shall issue out of the same Division Court at the suit of the same or any other creditor without an affidavit, satisfying the Judge upon facts not before the Court upon such examination, that the party has not then made a full disclosure of his estate, effects, and debts, or an affidavit satisfying the judge that since such examination the party has acquired the means of paying.

It is believed by those conversant with the working of our Division Courts that the foregoing enactments will guard against indiscriminate commitments for non-appearance, will form a safe barrier against the abuse of the process of the Court by preventing the judgment summons being used for malicious purposes or needlessly resorted to by creditors, while they still leave the Courts with undiminished powers for enforcement of such satisfaction as the debtor may be able to give and for the punishment of fraud.

Perhaps our learned brother of the *Law Times* may see in the alteration made by our Legislature, a good hint for legislation in England.

Our own opinion was and is that the law as it stood, if *carefully, discreetly and wisely administered*, well served the purposes for which it was designed; and with the Editor of the *Law Times* we have our fears that Law Reformers too often try to combine ingredients which cannot co-exist, namely speed, cheapness and efficiency for creditors, and tender-heartedness towards debtors. We must beware lest in our efforts to reconcile these opposite conditions, we destroy the efficiency of both.

"SWINFEN v. LORD CHELMSFORD."

The great case of *Swinfen* v. *Lord Chelmsford*, has been tried and decided, so far as the jury are concerned, and a verdict has been entered for the noble defendant. The facts of the case are shortly these: Lord Chelmsford (while Sir Frederick Thesiger) was counsel for the plaintiff in *Swinfen* v. *Swinfen*, at the trial in Stafford, before Sir Cresswell Cresswell, in March 1856. Sir A. J. E. Cockburn, (then Attorney General, and now Lord Chief Justice of England) was counsel for the defendant. After the first day's proceedings were over, Sir Frederick Thesiger, becoming alarmed at the course of the examination, and a remark privately made to him in a short conversation by the presiding judge, "I think Cockburn has damaged your female witnesses," offered a compromise, which, after some negotiation, and after the refusal of

Mrs. Swinfen, Sir F. Thesiger's client, to accept, was agreed to,—Sir F. Thesiger taking the responsibility on himself, and signing the papers in the usual manner. Mrs. Swinfen continuing her objections, a new trial was moved for, on the ground that the arrangement was made by counsel and attorney without her consent; and a new trial was granted, at which Mrs. Swinfen obtained a verdict. She then brought this action against Lord Chelmsford, and the trial took place about three weeks after his Lordship resigned his high office of Lord Chancellor of England.

The *Law Times* in commenting on the case says: "The jury found rightly for the defendant, who had committed no other fault than that which every leader at the bar—time out of mind, has often committed—that of compromising a case on his own authority. Until the question came in this formal shape before the Court, it was always supposed that the authority of counsel over a cause was almost absolute; the law was thought to be that the client placed his cause in the hands of counsel to be dealt with according to his discretion, and that there was thus an implied authority to act in any way that he might deem most advantageous to his client. The question has not yet received the formal decision which its importance deserves; but it is sufficiently doubtful to make counsel or attorney extremely cautious not to depart from the regular course of an action without previous authority expressly given. Sir F. Thesiger in this cause did only that which most other leaders have done unquestioned, and which all probably believed they had a right to do—so that no blame whatever rests upon him. He has completely cleared himself from the imputation of corrupt motive, as charged in the declaration."

The case is perhaps one of the most important ever tried in a British Court of Assize. Such parties as defendant and witnesses have never before we believe, been brought before a jury. Three distinguished judges were put into the witness box, the ex-Lord Chancellor, just retired from the woolsack, the Lord Chief Justice of England, and Sir C. Cresswell, the judge of the Divorce Court,—all to prove the part they had taken in this important case, and to establish the charges made by Mrs. Swinfen and her counsel of "fraud against a great advocate, and of corruption against a great judge." The result however is such as cannot fail to be pleasing to the public, as we are sure it is to the profession.

COURT OF EXCHEQUER.

(Sittings at *Nisi Prius* at Guildhall, before the LORD CHIEF BARON, and a special Jury.)

Monday and Tuesday, July 4th, and 5th.

SWINFEN v. LORD CHELMSFORD.

Long before the appointed hour for the commencement of this most important case, the approaches to the Court were occupied, and the greatest anxiety to obtain admission was manifested. On the doors being opened every available seat was occupied chiefly by members of the bar, who mustered in great force.

At a quarter to eleven, Mrs. Swinfen, accompanied by her solicitor, Mr. Emmett, came into Court, and was shortly afterwards followed by the noble defendant, who took his seat next his counsel. The Earl of Shrewsbury and Mr. Justice Haliburton, the celebrated author of "Sam Slick," occupied seats on the bench.

Messrs. Kennedy, G. Denman and McMahon, were counsel for *Mrs. Swinfen.*

Sir Fitzroy Kelly, and Messrs. Bovill, Montague Smith, and Ellis, represented Lord Chelmsford.

Mr. Kennedy put in an affidavit from the defendant's attorney, to the effect that Mr. Justice Cresswell and Sir Alexander Cockburn were necessary witnesses.

The attorney for the plaintiff in the action *Swinfen* v. *Swinfen*, was examined, also his London agent, which closed the plaintiff's case.

The Lord Chief Baron asked Mr. Kennedy if he wished to offer any evidence on the second count, which was to the effect that the judge illegally expressed himself to the defendant, Sir F. Thesiger, the counsel for Mrs. Swinfen, that the case was going against him, and that upon such communication he, Sir Frederick, compromised the matter.

Mr. Kennedy said that he had proved every word of the count.

Sir F. Kelly, in a court literally crammed to suffocation by members of the bar, rose to reply, and asked if there was any evidence whatever to go to the jury.

The Lord Chief Baron said that he had not the slightest doubt that there was not a particle of evidence upon the second count.

Sir F. Kelly proceeded with his address, and said he hardly knew what course to take. For the first time in his experience, extending over half the period allotted to man, he had heard a gentleman denounced by a member of the bar in language ill-befitting the atmosphere of the Old Bailey. A nobleman and a gentleman himself, one of the brightest ornaments in his profession, had been stigmatised in a manner that was shocking to hear; even the Lord Chief Justice, a man whom they all respected, had not escaped, whilst the very judge who tried the case had been held up as a brute for his conduct by the learned counsel on the other side.

Mr. Kennedy denied that he had ever made use of such language, but it was said in court.

Sir F. Kelly proceeded to say that in such a way had the whole case been conducted. He would tell the jury that this case was one of the greatest importance, involving as it did the liberty and independence of the law. Whenever that liberty and independence disappeared; whenever juries could be intimidated and controled, they might rely upon it that a blow would be struck at the liberty and independence of the subject which would not be easily recovered. The noble lord who was the defendant in this action, was charged, at the time he he was counsel for the plaintiff, with having betrayed the interest of his client for base purposes, and had degraded his profession—a really criminal charge. And it was brought against a man who, while he was a member of the bar, had never done one act to sully his own honor or to cast a blot on his fair fame. The jury were aware that the whole question of the trial in which the noble lord was counsel arose on the construction of a will which was made by Mr. Swinfen on the 7th of July, 1854. The heir-at-law filed a bill in equity to set aside the will, and was supported by other members of the family. The learned counsel then entered into a *resume* of the Swinfen case, which has been so many times before the public. If there is any fraud in the conduct of Sir Frederick Thesiger, then the other counsel, judge and jury were both equally guilty. Mr Kennedy

had charged Sir Frederick Thesiger, that for the sake of attending to a case at Swansea, he had "robbed" his client of her estate. During the five-and-thirty years he (Sir F. Kelly) had been a member of the bar of England he had never heard such an imputation thrown upon any one connected with the law, to say nothing of a man who had run through, such a brilliant career at the bar as Sir Frederick Thesiger (Lord Chelmsford) had done. He regretted to say that such a degrading charge too had been made by a member of the bar of England.

Examination of Lord Chelmsford—I was engaged as leading counsel for the plaintiff in the case of Swinfen v. Swinfen. Two ladies, Mrs. Rowley and Mrs. Leichman, were examined the first day. I did not feel quite satisfied with the course things were taking as to the result. In their cross-examination a letter was read which did not please me. I watched the jury, and I thought the impression made upon them was rather prejudical. At the close of the day I went up to shake hands with the judge. He was a very old friend of mine. Some remarks were made by him, but what they were I don't recollect. Sir Cresswell Cresswell met me the other day, and, I think it but fair to state it, he told me what I said, but I don't recollect it. The communication with the judge was more that of a private friend, but I believed him to have an unfavourable impression of the case. I saw Sir A. Cockburn in court, and told him that it was a great pity that these people should litigate in this way, as they were relatives. He said they were not unfriendly disposed. I then communicated with counsel and attorneys, and told them this matter should be arranged if it could. I ordered Mrs. Swinfen to be sent for and she came. Mr. Cole was present. I most certainly deny stating that any offer had been made by the other side. I never said I had received a communication from high quarters or anything to lead them to believe that I had had any conversation with the judge. I did tell them, and pressed very strongly upon Mrs. Swinfen the importance of a compromise. I am sorry to hear that I did not treat Mrs. Swinfen with courtesy. I was very desirous that she should compromise, as the case stood. I think she said, "What do you propose?" and Mr. Alexander said something about "a thousand a year for your life." She said she could do nothing without consulting a friend, Sir Henry Durrant. He came, and the result was that she would return to town, and let me know the result by telegraph. I felt the jury was against us; and I felt the pulse of the other side as well as I could, to see what could be done. This was on the Saturday, and the message came at two o'clock on the Sunday from Mrs. Swinfen, saying "The offer is refused." We did not consider that satisfactory, as no offer had been made, but at the same time I said to Mr. Alexander, "Then we must fight it out." On the Monday Mr. Simpson came and told me that it was very necessary that the case should be arranged, for he had heard that Mrs. Swinfen gave orders that Mrs. C. Swinfen should be refused admission to the testator. I said, "Very well; I will go to the Attorney-General and offer to take £1,000 a-year, which I had every reason to believe he would give. I spoke to him going into court, and he agreed to give us £1000 a-year. That was to be the basis of an arrangement. We had a long discussion with the Attorney-General about the costs, and they agreed to pay us £1,250. I tried hard to get £1,500. After that Colonel Dyott, the High Sheriff, interfered, and the Attorney-General told me his client had broken off the negociations. I spoke to him, and said it was very unhandsome. I then requested Colonel Dyott to retire from interfering with the case, as he was not interested, and he did so. I felt satisfied that if the case came into court again all hope of compromising it was at an end. I was very anxious to have it settled if I possibly could. I offered to take the responsibility, as Mr. Simpson would not agree to it. He asked me to defend him against his client. I thought, under the circumstances, it was a most beneficial arrangement. The engagements I held at Swansea did not enter for one moment into my mind. Ultimately the basis of a compromise was concluded, and I put my initials to it.

Cross-examined by Mr. Kennedy—The arrangements about the Stafford case being tried on Saturday was made between my clerk and that of the Attorney-General, with, I presume, the consent of the judge. I had not the slightest communication, before I left the town, with the judge about the Swansea case. I am happy to say the judges are friends of mine, and I might have written to have had a case fixed for my convenience. I have read everything in the way of instructions that was handed to me. Here are my notes I made on the brief (pulling a large packet of papers from his pocket). I have not the least recollection of what the judge said to me at the time. I met him in the park a short time ago, and he told me what he said was "I think Cockburn has damaged your female witnesses" (roars of laughter, which continued for some minutes, and in which his lordship and the court joined). I don't recollect that he said "The verdict's gone," or "saving something from the wreck." I had such a number of cases that one very soon chased another out of my head. I saw the Attorney-General on the Sunday at Stafford. I dined at Lord Hatherton's, but I don't know where I dined on the Saturday; certainly not at Miss Sparrow's, for I havn't the honor of the lady's acquaintance (laughter). Nor with Lady Wilton, I don't know Lady Wilton (a laugh). Nor with Lady Chetwynd. These are all new acquaintances you are introducing to me (a laugh). I proposed £1,000 a year as a most advantageous arrangement. I cautiously abstained from mentioning to my client what the judge said to me.

Do you think it was a right thing for the judge to speak to you in that way?

I don't think I should be called upon to offer an opinion on that question.

This answer was followed by loud demonstrations of applause in court.

Cross-examination continued—I did not feel bound to tell my client upon what grounds I based my judgment, but as the result of that judgment I strongly recommended Mrs. Swinfen to accept £1,000 a year. She came about ten minutes after I accepted the compromise for her. Mr. Simpson did ask me to wait till she came, but he did not tell me that any compromise must be subject to her approval. I never said that Mrs. Swinfen hadn't a leg to stand upon. I wanted to do the best for her I could.

Examination of Mr. Justice Cresswell—I presided at the trial of Swinfen against Swinfen, at Stafford, in March, 1856. I recollect seeing Sir F. Thesiger. He was sitting on the opposite side of the counsels' table, and when the court adjourned I beckoned him over and shook hands with him. I asked him if he was going to Lord Hatherton's, as Mr. Baron Bramwell and myself had an invitation. He said he had a consultation in the cause and declined. I spoke to him about it, and told him that the Attorney-General had damaged two of his most important witnesses. That was all that passed to my recollection.

Cross-examined by Mr. Kennedy—I dined with several persons while at Stafford, but I can't recollect whether I mentioned the case or not. If any gentleman had asked me it is probable I would have answered him. I thought the case was seriously damaged by the examination of the female witnesses.

Examination of Lord Chief Justice Cockburn, by Mr. Montagu Smith—I was leading counsel in the case of *Swinfen* v. *Swinfen*. I recollect two letters that were read, and cross-examined the ladies. At the close of the day I had some conversation with Sir Frederick Thesiger. He asked me if it could not be settled. I said that after reading my instructions, of all the cases I ever had, this was one that ought to be settled. I made no offer, but on the Monday morning Sir Frederick Thesiger came to me, and we discussed the matter, making £1,000 the basis. The same offer that Sir Frederick made

was present in my own mind. I was certainly not prepared to go further, nor would I have gone so far but on account of the relationship between the parties, and the peculiar way in which Mrs Swinfen was placed by the death of her husband, old Mr. Swinfen's son. It came out that about the time of the making of the will Mr. Swinfen was so far gone as not to know that it was his son that was dead and not his daughter. That came out on cross-examination. I then felt that our case was safe, for we had very strange evidence behind. I did not read the bill in Chancery.

The Lord Chief Baron—Very few people volunteer to read a bill in Chancery (roars of laughter).

Mr. Alexander, one of the counsel engaged with Sir Frederick Thesiger in the case at the trial in Stafford, was examined; after which

The Lord Chief Baron summed up. He said that as to the second count, which charged collusion between the defendant and Sir C. Cresswell, he would direct them that there was no evidence to go to a jury. He would further say that he did not think it was decent to put the second count on record; public decorum had, in his opinion, been outraged by putting on the records of the courts such a charge as this. He would lay it down as a principle of law, that all the law required a barrister to do was the discharge of his duty towards his clients as best he could. He might be utterly wrong or mistaken, but if he intended to act honestly by his client he was not responsible. The learned judge said the simple question the jury had to decide was, whether the defendant had acted prudently or properly, or in the best interests of his client.

Mr. Denman tendered a bill of exceptions to the ruling of the learned judge, before the verdict was given.

The Jury, without a moment's hesitation, returned a verdict for the defendant on both counts.

APPEAL REPORTS.

We referred some time ago to the inconvenience the profession were subjected to, by there being no regular Reports of cases in Appeal. We are happy to state that with the assistance of Mr. Thomas Hodgins, who has hitherto furnished us with Chancery Reports, we hope to remedy the inconvenience; and in this number we commence a series which will contain a summary of the decisions since the establishment of the Court.

THE CRIMINAL LAW AMENDMENT ACT.

It is a question whether the law regulating criminal prosecutions is yet sufficiently simplified. It states distinctly enough that indictments may be in short forms, and specimens of which are given in the statute; and it also lays down that objections to indictments for matters of form must be taken by demurrer before the case is proceeded with. But some of the old legal questions still arise, and if they can be called up, counsel for a prisoner finds it his clear duty to make the most of them, for he must see that, if possible, his client is not convicted contrary to law. It is still nearly as difficult as ever to draw the distinction between what is "matter of form" and what is matter of substance, what can prejudice the trial on its merits and what is so merely formal that the prisoner cannot be prejudiced by an amendment.

The subject is one of no small importance, especially in view of the jurisdiction and powers of the Courts of Quarter Sessions. Where the office of County Attorney and Clerk of the Peace are not united, the Clerk of the Peace, who is in most cases not a lawyer, draws the indictment and has fees allowed to him The County Attorney has very little time to revise and amend it. Some County Attorneys decline to do so, leaving the responsibility on the shoulders of the party who is paid for the duty. This inconvenience will of course wear out as the offices become united. But there is a more serious difficulty which will not wear out without a change of the law. It is this. The Court of Quarter Sessions is as far as possible from being a Court composed of lawyers. It consists of Magistrates, numbering in some Counties eighty or ninety, all of whom are entitled to sit on the Bench, and vote upon such questions as are involved in the subjoined judgment pronounced by the Court of Quarter Sessions at Goderich. We do not criticise the decision for more than one reason. It is appealed against, and we say nothing of its merits until we see the view taken by the Superior Court. But it does seem very plain, that it is very inconvenient if the law allows such questions to arise at all, and yet leaves them to be decided by laymen. The power and duty of the Court of Quarter Sessions to try cases involving most serious punishments is undoubted. If this power is to continue, and the Bench is to continue constituted as at present, it is very desirable that the law should be in such shape that the fewest possible legal questions shall arise, and that the verdicts of juries on the merits should be arrived at by means of proceedings, involving the fewest possible technicalities, and, that these verdicts when arrived at, should remain intact unless clearly contrary to evidence. It is true that the County Judge is Chairman of Quarter Sessions. But in his absence another may be chosen, and with the increased duty of County judges they are very likely to take care to be absent. In that case, some of the nicest legal questions that can arise in the difficult science of the law may have to be decided without legal advice or assistance. At least such may be the result if such questions as those opened in the subjoined case are really properly open to argument at all; and that point we leave untouched at present. Certain it is, however, that lawyers evidently think the forms of indictment, however plainly and intelligibly drawn, though put in the most simple and easily understood language, still open to the old fashioned questions on points of law. But for this fact such a case as this could not have arisen. It is equally certain that the ends of justice do not require that such questions should be mooted; and it is equally

certain that the law should, if possible, be made so simple that every court that administers it should with reasonable care be able to understand it. That this is not the case at present is evident from more facts than those relating to the matter in hand. Magistrates sitting singly and in Petit Sessions have, it is known, large powers in a large class of cases. But they must proceed regularly and make up formal convictions. It is supposed that these may be very simple, for a set of forms are given. But with all this apparent simplification, and all this apparently easy magisterial grammar of the law, it is a significant fact, that nearly all the appeals against convictions, in one county at least, for the past two years, have succeeded, the convictions being held bad in form, or the Magistrates being held to have exceeded their jurisdiction. It is not an easy thing to frame laws, to be thoroughly understood and well administered in a new and mixed community by the yeomen themselves. Yet it must be done, if possible, and we think that now the statutes are consolidated, it will not be very difficult to condense and amend the criminal law by an act of next session, in such a manner as to obviate the anomalies now apparent. And with this view we intend to revert to the subject. It is worthy of attention, if it were only for this single fact, that in the present case it was necessary for the counsel for the prisoner to move under three different statutes, and only under one of them does he seem to have any right of appeal.

The case furnished us is as follows :—

"QUARTER SESSIONS OF HURON AND BRUCE."

The Queen v. Henry Campbell. } Judgment delivered by R. Cooper Esq., Chairman.

False pretences.

The indictment is in the following form:

United Counties of Huron and Bruce, to wit: } "The jurors for our Lady the Queen, upon their oath present, that Henry Campbell, on the 8th day of May, A.D. 1859, at the Township of Culross, in the County of Bruce, one of the united counties aforesaid, unlawfully, fraudulently, and knowingly by false pretences, did obtain an order from one Thomas Maloney, one of the Municipality of the Township of Culross, requiring the delivery of certain wheat by and from one George Smith, and by presenting the said order to the said George Smith, the aforesaid Henry Campbell fraudulently, knowingly, and by false pretences procured a certain quantity, to wit, nine bushels of wheat from the said George Smith, of the goods and chattels of the said Municipality of the Township Culross, with intent to defraud."

The following was the evidence:

Thomas Maloney, sworn on the part of the crown. I am a Councillor of the Township of Culross. I look at the order produced, it is in my hand writing.

(Copy.)

Culross, April 28th, 1859.

"George Smith, Penetangore. Please give the bearer *three of golden drop, three of fife,* 9 of milling wheat, 2 of corn, and oblige yours truly,

THOMAS MALONEY.
ROBERT PINKERTON.

I was authorised to sign both names. The words (three of golden drop, three of fife) now appearing erased were not erased when I gave the order to prisoner. Mr. Pinkerton is a Councillor. I gave the order to prisoner. He came back to me seven or eight days afterwards, and said he had been somewhere and had some papers in his pocket, and his little girl had got them and burnt the order; and he seemed in great distress, and wanted another in place of it, as he could not get the wheat, and so I gave him the second order in these words.

Culross, May 6th, 1859.

"George Smith, Esq., Penetangore. Sir, please give the bearer three golden drops wheat, three of fife, nine bushels of milling, two of corn, oblige yours,

THOMAS MALONEY.
ROBERT PINKERTON.

It was wheat provided for the poor. An allotment was made to various parties by the Township Council, and prisoner's allotment was 15 bushels of wheat and two of corn, (the amount of each order) and I intended one only in place of the other.

Cross examined.—Individuals give notes for the wheat. Prisoner gave a note for the first order, not the second. The words were not erased when I gave it to him. The note he gave was in favor of the Corporation.

George Smith, sworn.—The wheat was in my possession. The first order was erased when presented. I gave nine bushels on it. I also honored the second order, I can't say who got that. I always honored the orders whoever brought them. My list shews "Campbell, 15 bushels," "Peter McDonald, 9 bushels." I wrote Peter McDonald on the back of it because some one (I cant say who) gave in the name. Some parties took several lots for themselves and others.

William English, sworn —I saw prisoner present the erased order and get the wheat on it. He said in answer to Smith, that Maloney had erased it himself.

William McIntyre, sworn. I drew the wheat for prisoner It was *twenty-four* bushels (15 & 9) being the amount he requested me to get. He did not get it all home, but all except one bag which was lost or stolen while I was driving it, and prisoner was with me. The whole was loaded up for him.

The Chairman charged, that the 15 bushels, were evidently obtained, as proved by smith, and that there is evidence that the 9 were also obtained as stated by English, with whose evidence that of McIntyre agrees ; and if both were obtained, the nine were obtained by false pretences.

The jury returned a verdict of guilty.

A motion has been made by *Mr. McDermitt* for the prisoner to arrest judgment. There was no demurrer to the form of the indictment before the jury were sworn, as required by the statute in cases of formal objects apparent on the face of the indictment.

The grounds of the present motion are,

1st.—That the indictment is uncertain in the manner of stating the offence, and, that if acquitted, the prisoner could be again indicted, that an acquital under this indictment would not be conclusive, because the offence is so badly and indefinitely set forth. In short, that the prisoner has no reasonable means of seeing what he was indicted for.

2nd.—That the order for the wheat is not sufficiently described or set forth, it is not said who it is payable to, nor is the quantity of wheat named.

3rd.—That the mere statement that the prisoner presented the said order is not an allegation of a false pretence; and the words at the end of the indictment, ("with intent to defraud,") could not, as the indictment is framed, be held to relate to any single part of it. They might relate to the obtaining the order, for obtaining the wheat.

4th.—That the indictment is double, charging two separate offences.

Mr. Lewis, on the part of the crown contended, That the indictment would have been bad had it not narrated the whole

circumstances, and that the facts alleged only showed one offence, and, that though it was necessary to state these facts, the Act of 18 Vic., warranted the stating them in the concise form here used, and he insisted also, that under the statute these objections should have been taken before the jury was sworn, the objections being to matter of form, apparent in the face of the record; and, that the indictment must be held good after verdict at all events.

We think the best way to test the validity of the indictment, is to look at it as if all unnecessary words were struck out of the first part of it. It would then simply state, that the prisoner got the order, and with fraudulent intent obtained the wheat. The Act 18 Vic., allows of a most concise form of indictment for this offence. That form only requires the allegation of the quantity and name of the property, and that it was obtained by false pretences with intent to defraud. Yet the form is not compulsory. It would be absurd to make it so. Indictments *may be* in this form, the act says; but they may be varied to suit the facts, keeping in view the concise manner of framing them shown in the statute. Then the cases given in Archbold, (and no others were cited on either side,) show, that if a false pretence consists of a series of acts, each should be named; and in one case an indictment is held bad for not naming one piece of the prisoner's conduct sufficiently. Here there were two acts making one pretence. Both are named as sufficiently as the statute requires, though the fraudulent intent need not have been alleged except as to the second of the two acts. But the two allegations of fraud, could not mislead the prisoner, or deprive him of any opportunity or means of defence which the omission of either would have left him. And this fact, if there were no other reason, shows that the defect, if any, is cured by going to trial, and certainly cured by verdict. But we think that there is no "formal defect." If there be any, it is only in the insertion of surplusage—the two allegations of fraud. Certainly this defect, if it be one, was apparent enough on the face of the record to require a demurrer before going to trial. But, had the allegation of fraud been inserted six times, although the indictment would have been inartificial, it might not have been bad. But, does it charge two offences? We think not. The narrative is not separated in any of its parts. It is a simple statement of one fraudulent transaction, but a transaction only consummated by two acts, the obtaining the order, and then the wheat.

As to setting out the order, the ninth section of the statute disposes of the objection.

It was ingeniously argued that the indictment was so double that one could not tell to what part of it the closing words, charging fraud could apply. They obviously relate to the transaction, which is a single fraud, consummated by *two* acts, each done with "intent" to do *one* fraud. This is the plain meaning of the indictment, and the finding of the jury, and we think it must stand.

The motion is refused.

There was another motion, to reserve points of law under chap. 109, revised statutes, upon similar grounds.

We think the case clearly made out by the evidence, and find no question of law to reserve.

Another motion was made for a new trial under chapter 110. We see no reason for granting it, and the conviction stands affirmed.

From this last decision it is open to the prisoner to appeal, and by so doing he may perhaps be able to raise all the questions here decided, and have them all disposed of by the Court in Toronto. The sentence will be postponed until the first day of next Quarter Sessions, in order to give the prisoner an opportunity of testing the accuracy of the present decision, as his counsel has stated his intention of doing, by appeal.

Such was the judgment, and we shall await with some interest the final decision. It is very questionable, it seems to us whether the court had power to remand the prisoner to the next session, however much they might desire to give him the benefit of an argument before one of the Superior Courts. But as the offence calls for a most serious punishment, it seems that the Bench preferred to run the risk of the delay, rather than pass a sentence after a verdict and judgment which might be wrong. Whatever the issue, we feel confident that the law simplified as it is supposed to be, may be usefully still further simplified and condensed. (*Communicated.*)

CHANCERY AGENCY TARIFF.

We publish below a series of resolutions, lately adopted by the Chancery practitioners in this city, relative to Agency fees. Some years ago, when the Common Law Tariff was on much the same scale as the present Chancery Tariff, the Toronto practitioners declined to act for their principals at less than full fees; but, under existing circumstances, we think the Chancery practitioners here have acted wisely in adopting the rate fixed by the resolutions; and since the present tariff of their Court is lower in many cases than that of the Common Law Courts, it may not perhaps be inappropriate to advise liberality to their country principals, as, doubtless, few but difficult cases will, owing to the appointment of Deputy Masters and Registers in the various counties, be carried through in Toronto. We understand that during last winter the difference between the tariffs at Common Law and Chancery, was brought under the notice of the Chancery Judges, and some amendment promised. The court, we learn, expressed surprise at the difference, and requested suggestions, which were shortly afterwards submitted; but as yet nothing has been done, although a tariff of Sheriff's fees has been issued, allowing those officers Common Law fees in all Chancery proceedings. Whatever may be the result, the present disbursements are too heavy in proportion to the fees; and it may be well for all interested to consider how far the rule which was adopted in framing the Common Law tariff, may be beneficially applied in Chancery—"to pay fairly for what is done, but *to shorten the work.*"

TORONTO, 21st July, 1859.

At a special meeting of the practitioners in the Court of Chancery, residing in Toronto, held this day, pursuant to notice, for the purpose of taking into consideration a Tariff of Agency Fees, to be charged for business performed in Toronto, by agents for their principals, Mr. Davis having been appointed Chairman, and Mr. Fitzgerald, Secretary; it was

1. Moved by Mr. Roaf, seconded by Mr. Blake, and

Resolved unanimously, That the members of the profession present at this meeting, and the other practitioners signing these resolutions, pledge themselves not to practise as Agents in Chancery at lower rates or terms than those resolved upon at this meeting; and those present hereby agree respectively to sign the resolutions which may be now adopted.

2. Moved by Mr. Hector, seconded by Mr. Bacon, and

Resolved, That the fees for business performed in the Court of Chancery by agents in Toronto for their principals, be charged at *not less* than the following rates, *i. e.*, one-half the full solicitor and client fees allowed by the practice of the Court; counsel fees and disbursements to be paid in full.

3. Moved by Mr. Blake, seconded by Mr. Taylor, and

Resolved, That in special cases, the fees for business in Chambers, and in the Master's Office, may be the subject of arrangement between principal and agent,—half fees being the *minimum*.

4. Moved by Mr. Hector, seconded by Mr. Bacon, and

Resolved, That in any case, the minimum Counsel fee at the hearing shall be £2 10s.; that being the lowest fee taxed by the Master of the Court at Toronto, on the hearing.

5. Moved by Mr. Blake, seconded by Mr. Hodgins, and

Resolved, That the Chairman and Secretary do procure the signatures hereto of those present at this meeting, and of other Chancery practitioners in Toronto, and do cause copies of the proceedings of this meeting to be printed, and forwarded to the legal practitioners throughout Upper Canada.

THE CONSOLIDATED STATUTES.

The work of incorporating the acts of last session with the consolidated statutes is progressing rapidly, and will probably be completed next month.

As might be expected, the duty of doing this was entrusted to those eminent jurists, Sir James Macaulay, and G. W. Wickstead, Esq., Q. C. Judge Gowan, we understand was, as before, requested by His Excellency to assist in the important labour entrusted to these gentlemen.

DIVISION COURTS.

OFFICERS AND SUITORS.

To the Editors of the Law Journal.

Fort Erie, 28th July, 1859.

GENTLEMEN,—In Division Court No. 3, County of Welland, of which I am Clerk, within the last 18 months, the aggregate amount upon which judgment summonses issued was $1,014, amount paid thereon $295; the number of orders for commitments was seven, the number of actual commitments none. Two orders for commitment were issued by me during the above period; in one case, the whole amount of debt and costs was paid, in the other the defendant left the province to avoid paying a debt for which he was security only.

From my experience as Clerk of this Division Court for the last 10 years, I am decidedly of opinion that the "91st clause" is a most useful one, and without it many an honest creditor would lose his just debt. Should the Legislature repeal this clause, under any circumstances such repeal should only affect suits for debt contracted after the passing of the act, otherwise injustice would be done to those who have given credit, with the view of enforcing payment under that clause of the act, when all other means failed.

Your obedient servant,

JAMES STANTON.

To the Editors of the Law Journal.

NORWOOD, Co. OF PETERBORO', July 29, 1858.

GENTLEMEN,—In compliance with the invitation contained in your June number, requesting information on the working of the 91st clause of the Division Courts Act, I beg to enclose the following; shewing its working in this Division for 18 months, ending 30th June last:

The number of judgment summonses for the above period was seven; the total number of cases for the same period, 916. Aggregate amount at issue in judgment summonses cases £72 14s. 0d. In one case no order was made. In four cases, settled between the parties previous to or on the Court days. One case, returned "not served," subsequently settled between the parties. And one case, order not obeyed; no further action.

I consider the existence of the clause in question essentially necessary for the interests of the creditor, as from my own knowledge the fact of its being available has induced many to pay, who would otherwise not do so. Hoping ere long to see the power to garnishee given to Division Courts,

I remain Gentlemen, yours &c.,

JAMES FOLEY,

Clerk 2nd D. C., U. C. Peterboro and Victoria.

ANSWERS TO CORRESPONDENTS.

DIVISION COURT PRACTICE.

To the Editors of the Law Journal.

June, 1859.

GENTLEMEN.—The Act of 13 and 14 Vic., ch. 53, sec. 14, among other things, says, "The Bailiff's fees upon executions, shall be paid to the Clerk of the Court, at the time of the issue of the warrant of execution, and shall be paid over to the Bailiff upon the return of the warrant, and not before."

The fees referred to are those mentioned in Schedule A, of the act cited. This question, however, arises, Do they include *all* the Bailiff's fees mentioned in the schedule, and, if not, what particular items are meant? I shall be obliged by your views on this question.

From the reading of the statute, I infer that the Bailiff is entitled to his fees, provided he returns his warrant of execution *within the proper time*, whether the returns be *nulla bona* or otherwise. I am aware that the reading of the schedule would not entitle him to mileage, in cases where he did not make anything. Whether he would be entitled to the fee for "enforcing," &c., is a question I would like to have your decision upon. If the Bailiff is not entitled to any fees, when his return is *nulla bona*, what is to be done with the fees paid to the Clerk, supposing that the return was made in proper time? The Commissioners appointed to consolidate the Statutes of Upper Canada, have (page 152, sec. 52) made an addition to the section which I have already cited, stating, that any fees to which the Bailiff is not entitled, shall be repaid to the party from whom they were received. This section seems to me so obscure, that one cannot form a satisfactory conclusion as to its meaning.

By the way, are the Consolidated Statutes now law? Let me ask some more questions.

Section 3, 18th Vic., ch. 125, is silent as to what is to be done with money recovered on execution issued under a transcript of judgment, from one division to another. The practice generally adopted is, to send a return to the clerk of the division from which the transcript was issued, and remit the money with such return. Am I obliged to do so? If not, what is my proper course? If I am obliged to forward the money, at whose risk is it while passing through the post office?

Yours truly,

I. A.

[Our correspondent is an "official," and an industrious, pains-taking man, anxious to carry out the law to the best of his ability. He is a Division Court Clerk, and, we are told,

a very efficient one. We do not like to refuse to consider his queries put in the above letter, or some others which he has sent, and to which we will attend bye and bye. But we cannot, as a general rule, be expected to answer all moot or mooted questions on *Division Court law*, or any other subject. In cases between private parties, we have no disposition to save the parties the proper fees that should be paid to a professional adviser; and, moreover, we can hardly be expected to give, every month, for nothing, a number of opinions which, if obtained in the usual way, would cost many hundred dollars. So much for "defining our position." We will now give some few short answers to our friend's queries, presuming further, that we only give opinions, and if, after all, the Judges "decision" should be contrary to our "opinions," *I. A.* must not be annoyed, or too much surprised.

First. The reading of Schedule A. is not difficult. It gives mileage "where" certain things are done. The expression of one thing, excludes any other which is not expressed. So there can be no mileage where money is *not* "made;" nor can there be mileage where neither is money made, nor the case "settled *after the levy.*" But in either of these events, there will be mileage.

Second. There can be no fee for "enforcing," unless the writ has been enforced by sale, or by *collection* of the money by some means by the Bailiff, during the currency of the writ.

Third. Section 52 may be literally followed. In the event of the Bailiff not becoming, for any such reasons as above suggested, entitled to mileage, &c., the Clerk has only to refund the money to the litigant who has deposited it.

Fourth. The Consolidated Statutes are not yet proclaimed as law.

Fifth. As to transcripts, and remitting money. The Clerk need not, we think, remit any money by post, without written instructions to do so. These instructions would cast the risk on the party who gives them. But if he remits without instructions as to the mode, and there is a loss *in transitu*, the loss is the Clerk's. A suitor cannot complain, for all the Clerk need do, is to have the money subject to the suitor's order. The money obtained under a transcript is the suitor's money. If the Clerk who sent the transcript, gets the money sent back *to him*, he gets it as *agent* for the suitor, we should say, rather than as Clerk; and of course, any instruction from him as to the mode of remitting, would be a reasonable protection to the other Clerk. The fact is, the transcript is under the suitor's control, the moment the one Clerk has sent it to the other, as desired by the suitor.—EDS. L. J.]

To the Editors of the Law Journal.

DERRY WEST, 30th June, 1859.

Gentlemen,—An action was brought against the sureties of a deceased Clerk of a Division Court, for money alleged to have been paid him in his lifetime. The case is as follows: A. brought an action against B. to recover about £4 12s. 6d. and got judgment for the amount; execution was issued against B. and returned "no goods was on;" B. was brought up on a judgment summons and an order made to pay 10s. per month; the first month was paid and the 10s. duly entered on the clerk's books; before another instalment was paid the clerk died. Sometime after, A. asked B. why he was not paying the money? B., in answer, said, I have paid the whole of your claim to the clerk in his lifetime, which my wife can prove. A. brings the action against the above sureties and calls on B.'s wife as evidence; the agents for the defendants objected to her being sworn, on the grounds that she was not a competent witness, but urged that the clerk's books should be produced, and the entries in said books to be the legal evidence between the parties, agreeable with the statute in such case made and provided. The 49th section of the Division Court Act for 1850 was referred to, and read by the Judge and by the defendants' agent. The Judge paid no attention to the section alluded to, although he read it, but gave judgment for plaintiff upon the evidence of B.'s wife. *Query*—whether is B.'s wife or the clerk's books to be relied on as evidence in a court of justice? Your opinion on the *law of evidence referred to will* confer a favor upon the defendants, and also upon your servant and subscriber.

J.-T.

[The wife was a competent witness. The weight to be given to her testimony was for the acting Judge to determine. The entries in the clerk's books are made evidence in certain cases certainly, but here there was an allegation of fact, *no* entry in respect to which appeared in the clerk's books. Such evidence as that in this case one would think needed corroboration of some kind.—EDS. L. J.]

To the Editors of the Law Journal.

Galt, July 25th, 1859.

GENTLEMEN,—Upon the strength of your known willingness to give information upon questions of general importance, I beg to submit the following case:—

A sues B in a Division Court for a certain sum, say $50. B, under the 27 sec. of 16 Vic., cap. 177, files a plea of *tender before action* of $30, and pays the same into court, in full satisfaction of A's claim. The clerk immediately communicates notice of such plea and payment to A, *who does not* within *three days* after notice of such payment, *signify to the* clerk his intention to proceed for the balance of his demand, notwithstanding such plea. Do the words "*all proceedings shall be stayed*" operate as a final bar to the action, and preclude A from prosecuting his claim for the balance of his demands? In the event of want of notice being agreed at the trial, can the Judge overrule the objection and order the case to proceed, or can the Judge adjourn the case under the 26th section of the same act and allow A some further time within which to give notice of his intention to proceed?

An answer in your next issue is most respectfully requested.

I am your obedient servant,

A. M.

[The words "all proceedings shall be stayed," ought we think be regarded as directory, and not operating as a final bar to the action. The judge might therefore, the circumstances warranting it, adjourn the case at the expense of A.—EDS. L. J.]

CORRECTION.

In letter of John Holgate, page 154—July number—second last line of the communication, for "*be satisfied that its intention absolutely necessary,*" read "be satisfied that its *retention* is absolutely necessary."

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(Reported by THOMAS HODGINS, Esq., LL. B., Barrister at law.)

(Before ROBINSON, C. J., DRAPER, C. J. C. P., MACAULAY, ex. C. J. C. P., MCLEAN and BURNS, J. J., SPRAGGE, V. C., and RICHARDS, J.)

BECKIT v. WRAGG.

Dormant equities—Trustees—Fraud—Laches—Principal and Agent.

A party who held a bond for a deed of a lot of land, on which he had erected a saw mill, became involved in 1834, and assigned his interest thereunder, and all his other real and personal estate, to certain of his creditors, as trustees on the express trust that said trustees should sell such and so much of the same as was necessary (except said lot and saw mill); should work the saw mill and sell the lumber made thereat, and collect outstanding debts, and apply all moneys so realized—1st. To pay the interest due on the bond; 2nd. To pay the expenses of the trust; 3rd. To pay the debts due to the creditors; and 4th. To pay the assignor any surplus, and to re-convey the premises, and thereupon the said creditors released the debts due to them. The trustees appointed one of their number (G. B. W.), to act, who was not a creditor, but agent of one (W. & Co.), and as such agent he signed the deed and also the release. He shortly

afterwards went into possession, and obtained a conveyance of the lot in question from the owner, in fee, and then conveyed to his principal. On a bill filed in 1855 against the principal (G. B. W. being dead), it was

Held, (reversing the decree of the Court below), 1st That G. B. W. had not obtained such conveyance as trustee for the original assignor, but as agent of the defendant (the creditor, W. & Co.) 2nd. That express trusts are within the *Dormant Equities Act 18 Vic. c. 124* (SPRAGGE, V. C., *dissentiente.*) *3rd. That* the facts of the case did not establish any actual or positive fraud on the part of the defendant to bring the case within the exception in that Act. 4th. That at all events, the laches of the plaintiff had disentitled him to relief.

(19th July, 1859.)

This was an appeal from the Court of Chancery. This case is reported in 6 Grant, 454. The facts are as follows:

In 1832, the plaintiff contracted with one Christopher Elliott, for the purchase of a certain lot of land, in the township of York, and Elliott thereupon executed a bond for a deed, and delivered possession of the premises to plaintiff. Plaintiff continued in possession about two years, and during that time, he expended upwards of £800, in the erection of a tavern and outhouses, and a steam saw mill, the engine of which was affixed to the freehold. In Nov. 1834, the plaintiff becoming involved, assigned the said property, and all his real and personal estate to certain trustees, on the express trust, that the Trustees should sell such and so much of the said property, except the land and premises above described, as were in their nature saleable; and should work the mill, and sell and dispose of the lumber sawn there, and apply the proceeds: first, to pay the debt and interest due on the premises, as set out in the bond; second, to pay the expenses of the trust, and the debts due by the plaintiff, as specified in the trust deed, and lastly, to pay the surplus, if any, to the plaintiff; and to reconvey the premises. One of the trustees, George B. Willard, was described in the deed, as a creditor, but in reality he was agent for the defendant Wragg (a creditor,) and as such, signed the deed and release for him. The trustees shortly afterwards met, and agreed that Willard should manage the affairs of the trust, and he was accordingly put in possession, and the other trustees never acted further.

After the execution of the deed, the plaintiff went to the United States, and during his absence, a *fi. fa.* for £40, against his goods and chattels, was placed in the Sheriff's hands. Two of the trustees offered to guarantee the debt, to prevent a sacrifice of the property, but the Sheriff refused to accede to their request, unless Willard consented. He refused, and in Dec., 1834, the property on which £800 had, a short time before, been expended, was sold for £45 9s. 5d. to Willard, who immediately removed the engine from the premises. It was sworn that before the sale, the saw mill had been dismantled by Willard—the boiler and many of the heavy castings having been removed, without the trustees having been consulted.

Two days after the sale, Willard obtained an agreement from Elliott, for the conveyance of the land and premises in question, and they were accordingly conveyed to him, on the 19th December, 1834. Willard then, as agent of the defendant Wragg, conveyed the said land and premises to Wragg, without consideration, on the 7th February, 1835.

For the defence, it was urged that the laches of the plaintiff had disentitled him to relief; that he had filed a bill in 1839, and answers were put in, but that it was dismissed for want of prosecution; that if there was fraud, it was barred by the Statute of Limitations (4 Wm. IV., ch. 1), twenty years having elapsed since the cause of suit arose; and that, at all events, the plaintiff was bound by the Dormant Equities Act (18 Vic., ch. 124), that act having been passed on the 30th May, 1855, while the plaintiff's bill was not filed until the 14th June, 1855. Upon these points, the Court of Chancery

Held, that this was a case of express trust, within the meaning of the 33rd section of the Act 4 Wm. IV., ch. 1, and, being so, the court would not be justified in refusing relief on the ground of laches. *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41; *Chalmers* v. *Bradley*, 1 J. & W. 51; and *Beaumont* v. *Boultbee*, 5 Ves. 485.

Held, also, that the plaintiff was not barred by the Dormant Equities Act,—1st, because express trusts are not within that statute, and 2nd, because cases of positive fraud, are entirely excepted out of it.

From this judgment, the defendant appealed to the Court above.

Eccles, Q. C., for the appellant.

Mowat, Q. C., and *Roaf* for the respondent.

ROBINSON, C. J.—The land in question in this suit is the west half of lot No. 5 in the first concession of the township of York, and its broken front.

The object of this suit was to procure a decree declaring the defendant to be a trustee of the premises, and compelling him to carry out the purposes of the trust.

It stands admitted on the case that on the 19th December, 1834, one Christopher Elliott, now deceased, was the owner in fee of the premises; that on that day he made a conveyance of the premises to George Busby Willard, who is also now deceased, for a consideration of £377 and upwards, and that Willard took this conveyance as agent of the defendant, Wragg, and in February, 1835, made a deed of the land to the defendant.

Willard had gone into possession of the land about the middle of November, 1834, and for many years after the land was thus conveyed by him to Wragg he was in possession of it as Wragg's agent; and since he left it, Wragg's possession by himself, his tenants or agents, has continued to the present time, except that a portion of the land having been laid out in village lots, some parts of it have been sold by Wragg, through his agents, to other persons, who have occupied and built upon them.

The bill in this case was filed on the 14th June, 1855; Willard having died about three years before.

It is complained on the part of the plaintiff, that the taking of the conveyance by Willard from Elliott, and his conveying the property afterwards to the defendant, was a flagrant breach of a trust accepted by Willard and others for the benefit of the plaintiff and his creditors, under a deed executed by the plaintiff on the 13th November, 1834; and it is alleged that Willard, throughout the transaction, acted for and represented the defendant Wragg. It is insisted that there is sufficient in the evidence to connect the defendant with the trust, and to entitle the plaintiff to the aid of the Court of Chancery in compelling him to carry it out. The defendant maintains that whatever may be the facts of the case upon the merits, the plaintiff cannot support the suit, for 1st. He is barred by the Statute of Limitations, 4 Wm. IV. c. 1, secs. 28, 32, 33, 34; and 2nd, That our statute relating to Dormant Equities, 18 Vic. c. 124, prevents the defendant's legal title from being disturbed under pretence of the equities set forth in the bill; and 3rd, That if the plaintiff be not positively and absolutely barred by either of these statutes, he is precluded from successfully prosecuting his suit, by his laches—his long acquiescence in the transactions he now complains of, and by the fact that he himself having instituted a suit in equity, in 1839, against this defendant and Willard, who was then living, upon the same alleged grounds of complaint—such suit was with the plaintiff's assent, and at his own instance, after it had been fully answered by Willard, *dismissed with costs.*

Now in the first place, as to this action being barred by the 4 Wm. IV. c. 1, the 32nd section of that act gives in effect the same time for bringing a suit in equity for any land or rent as is given by the same statute for bringing an action at law for the recovery of land or rent, and with the same exceptions on account of disabilities, I assume, as are made in favor of persons having claims at law.

One of these disabilities is absence from the province.

The plaintiff, it is proved, left the province in October or November, 1834, and never returned to it for any period, however short, until some time in 1844, in which year he returned to Upper Canada.

The original bill in this cause was filed the 14th June, 1855, which was more than the ten years after the removal of the disability on account of the plaintiff's absence from the province, and more than twenty years after the plaintiff's alleged equitable right accrued—which I take to be in December, 1834—when the conveyance from Elliott was taken, which the plaintiff complains of as being in violation of the trust.

Primâ facie, therefore, this suit is barred by lapse of time, under the 28th clause of the statute.

But it is contended for the plaintiff that the Statute of Limitations throws no such difficulty in the way, for that he is entitled to the benefit of the 33rd clause of that statute, which enacts "That when any land or rent *shall be vested in a trustee upon any express trust*, the right of the *cestui que trust* to bring a *suit against*

the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed only to have accrued against such purchaser and any person claiming through him."

Here Beckit, *cestui que trust* of Willard, is suing Wragg, not Willard; and the question is, whether this should be regarded as a suit brought *against the trustee, or any person claiming through him*, within the meaning of that clause.

If it should not be so regarded, then the plaintiff can have no advantage under that clause.

It certainly is not a suit against a trustee in whom the land is vested upon any express trust, for Wragg is not made a trustee by the deed from the plaintiff to Willard and others, of the 13th November, 1834, neither was the land vested in him by that deed, or by any other upon any trust. He is not named in the deed as one of the parties of the second part, who are to take in trust the estate or interest which the plaintiff held under his bond from Elliott; and though the name "Wragg & Co." was subscribed by Willard as their attorney, that can make no difference, and it would have made none if the signature had been written by Wragg himself, or by one of his partners, or by any other person by his authority, since Wragg & Co. were not among the parties named in the deed. It was not in fact signed by himself, and it is not proved that Willard had any legal authority from Wragg, or from Wragg & Co., to sign such a deed for them.

The estate, or rather Beckit's interest in it, is granted upon certain trusts to the parties of the second part, of whom Wragg is not one.

But Willard was clearly made a trustee by the deed of 13th November, 1834, because, though he did not execute the deed in his own name, but in the name of Wragg & Co., yet by the deed the interest of Beckit under that deed was conveyed to Willard and the others in trust, and he accepted and acted under the trust for some short period, and the interest vested in him and the others of the second part, although he did not in his own name sign and seal the deed.

Then Willard, being a trustee, and the defendant Wragg having taken a conveyance of the estate from him in February, 1835, should Wragg be regarded as a person claiming through Willard, *the trustee*, under the 33rd clause, so that this suit against him can be held to be unlimited as to time? I am not clear that he can, for upon the evidence it is plain that Wragg took the estate in effect from Elliott upon a contract for purchase made with him through Willard, as Wragg's agent, and not by any means under a chain of title of which the trust deed forms any part.

The meaning of the 33rd clause is, that in the case of an express trust, there shall be no limitation of time, as against the *cestui que trust* when he is seeking a remedy against his trustee, and that the heir, devisee, or assignee of the trustee, shall be no more protected by the Statute of Limitations than the trustee himself, until some one has purchased for a valuable consideration, *under* that chain of title.

Here it is true that Wragg does literally claim *through* Willard, who was one of the trustees, but he did not take from him, and does not claim through him any interest that had passed under the trust deed. On the contrary, he claims through Willard a legal title to the estate, which Willard took not from Beckit, but directly from Elliott, and which was not accompanied with any express trust, or a trust of any kind, from Elliott. Wragg took indeed, by his deed, a title paramount to that of the trustees, and of the plaintiff, who had conveyed to them, and who did not affect to convey to his trustees the legal estate, for he had it not.

If under these circumstances Wragg can be held (which I doubt) to be claiming through Willard as trustee, within the meaning of the 33rd clause, merely because he took the estate from Elliott, through him or his agent, and, for all that appears, without any knowledge of the previous contract between Elliott and the plaintiff, or of the deed that had been executed between the plaintiff and the trustees in November, 1834; the effect of that would be that the Statute of Limitations would not run against the plaintiff, Beckit, as *cestui que trust*, until the time at which the interest, whatever it was, which the trustees took had been conveyed to a purchaser for a valuable consideration. Now Wragg, on the 7th February, 1835, for a valuable consideration, took, not indeed such land, which means any interest in land capable of being inherited, as had been conveyed by Beckit's deed, under an express trust, but the whole and absolute legal estate in the land which Beckit had contracted to buy—and this was more than twenty years before the filing of this bill—ten years also having elapsed since the ceasing of any disability on account of Beckit's absence.

The 33rd clause does not in express terms deprive the party who purchases for a valuable consideration of the protection of the statute, when he purchases with knowledge of the trust; and if we could add that qualification to the statute, as flowing from the principles of equity, and if Wragg's be a title which comes within the meaning of that clause at all, we should then have to consider whether the evidence warrants us in holding that Wragg had in fact purchased from Elliott with notice. He does not admit knowledge of the trust when he took his title, nor do I see it proved. But Willard, his agent, knew all about it—that is very clear; and I assume that if notice would be material, the defendant should be held bound by the knowledge of the facts which Willard possessed—since he accepted the title procured by Willard's agency, and transmitted through him.

But on the whole, for the reasons I have stated, I have not come to the conclusion that the defendant is not protected by the Statute of Limitations, 4 Wm. IV. c. 1, s. 32, notwithstanding the enactment contained in the 33rd section, the time having run out which is sufficient to bar the remedy, notwithstanding the temporary disability from absence, and the 33rd clause, not seeming to me to apply under the circumstances of this case, where the defendant is not claiming under or through the deed which created the trust, but through a title paramount.

But, secondly, if my brothers should come to a different conclusion on this point, as the Court below has done, then we have to consider whether the defendant, Wragg, is entitled to avail himself of the protection of our "Dormant Equities Act," 18 Vic. c. 124. That statute makes a peculiar provision, suggested by peculiar circumstances. It enacts, section 1, that "no title to or interest in real estate, which is valid at law, shall henceforth be disturbed or otherwise affected in equity, by reason of any matter or upon any ground which arose before the passing of the said act [7 Wm. IV. c. 2], or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the passing of the said act, unless there has been actual and positive fraud in the party whose title is sought to be disturbed or affected."

Both parties in this case, as I have already mentioned, claim under Elliott, and his seizin therefore stands admitted. He conveyed to Willard, who conveyed to Wragg; and as Elliott had made no title to any other person before he had conveyed to Willard, and has, so far as appears, conveyed to no one since, and there is no surmise of Willard having practised any fraud upon Elliott, I assume that Wragg's title derived through Willard is *valid at law*, and so far comes within the statute relating to Dormant Equities. Then this being so, can this suit be maintained in the face of that statute? I think it cannot. The statute is very peremptory in the part of it which I have cited, and which forbids the disturbing or seeking to affect, upon equitable grounds, a title to real estate which is valid at law, by reason of any matter or upon any ground *which arose* before the passing of the Chancery Act, and which act was passed on the 4th March, 1837. The provision is absolute that it shall not be done, and one only exception is made—"unless there has been actual or positive fraud in the party whose title is sought to be disturbed or affected."

It has been argued that in addition to the only exception made in the statute, of cases of *actual and positive fraud in the party whose title is sought to be disturbed*, we should engraft upon the statute another exception—of cases of express trust, for that otherwise cases of such plain and palpable injustice might occur, as it is certain the Legislature could never have intended should go without a remedy; as for instance, if this plaintiff, Beckit, had been legal owner of the whole, and had, before the passing of the Chancery Act of 1837, conveyed it to the defendant, Wragg, upon trust to sell, or to hold it for his use, and if the defendant in disregard of this trust had either before the passing of the Chancery Act, or since, insisted upon retaining the estate and applying the

profits to his own use, it has been said it would be monstrous, and so it would, if the Dormant Equities Act should have the effect of leaving the *cestui que trust* without remedy.

Whenever a case of that kind shall arise, it will be time to determine whether the Legislature has made a provision which will admit of such positive injustice, and which would seem, as has been remarked, so inconsistent with the caution that has been observed in framing the Statute of Limitations, 4 Wm IV. ch. 1, s. 33.

It will probably then be urged that the 18 Vic ch. 124, cannot be made to shelter such gross injustice, for that the case of a trustee using and enjoying as his own, or alienating for his own purposes an estate which he held upon an express trust for the use and benefit of another, would be a case of *actual and positive fraud*, such as would come within the exception which the act does in terms contain, or that the case itself, without regard to the exception, should be held to be one which would not in fact come within the statute at all, which seems rather to point to equities growing and *arising out of* transactions and conduct of parties in acquiring or dealing with estates before the passing of the Chancery Act, than to the simple case of a direct and express trust accompanying the transmission of the legal estate. The language of the clause is "by reason of *any matter or upon any ground which arose* before the passing of the said act." The mere trust itself, as it stood expressed in the deed, would not in such a case furnish the ground or occasion of resorting to a Court of Equity, but the ground of relief would be the breach of that trust, by doing or attempting something inconsistent with it, or by refusing or neglecting to carry out the trust. Unless such cause of complaint arose before the passing of the Chancery Act, the mere fact that the trust had been expressly created before the act would probably not be considered as bringing the case under the statute respecting Dormant Equities; and if the fact of the breach of trust in any such case having occurred before the Chancery Act should be determined to bring a case even of express trust within the act, so as to preclude relief (which I do not now hazard an opinion on), it might at least be observed as bearing upon the allegation of hardship, that the act or conduct complained of must in any such case have been submitted to for the long interval of 18 years, between the passing of the Chancery Act in 1837, and of the Dormant Equities Act in 1835.

But it was not material that I should have said so much upon this point, for the case before us is very far from being a case of *express* trust between these parties.

Whether upon the facts proved the defendant should, upon the principles which govern courts of equity, be decreed to be a trustee for the complainant and the creditors, although he was not constituted a trustee by any deed or instrument, is a different question, and where the facts from which a trust would be *implied* took place before the passing of the Chancery Act, 1837, I think it is clear that the Dormant Equities Act will not permit the holder of a valid legal title to be disturbed in his estate, on the ground of such implied or constructive trust, unless where we should be warranted by the evidence in holding that there had been actual and positive fraud in the party whose title is sought to be disturbed.

Then is there proof of such fraud, that is of actual and positive fraud, in the defendant Wragg; for it is his title, not Willard's, that is sought to be affected by this suit? The words are very express and emphatic. We must have proof of actual and positive fraud, as something distinct from implied and constructive fraud. We are to ask ourselves whether we see proof of any thing done by Wragg with a fraudulent design, or any thing done by his agent with his permission or knowledge, that was actually and positively fraudulent. If Wragg were bringing an action upon his title derived from Elliott, and were resisted upon the ground that a fraud had been practised upon Elliott by his agent Willard in obtaining a conveyance from him, then no doubt he could no more resist the consequences of proof of any such fraud practised by Willard in obtaining the title for him, than if the same fraudulent means had been used by himself, for the effect upon the interests of the person defrauded would be the same. But this is no case of that kind. The defendant has been left for very many years in possession of the estate. It is not Elliott, or his heirs, or any person claiming by subsequent assignment from him, that is objecting to the defendant's title, nor indeed is any one excepting to his legal title, but he is attacked on the ground of an equity, stated to have arisen from a trust by which the estate in his hands can be affected.

Now, as I have already stated, the defendant, Wragg, was not made a trustee by the deed of the 13th November, 1834, either expressly or by any implication or construction. The confidence placed in a trustee is personal. It depends upon the opinion which those for whom he is to act have of his integrity, his diligence, and his fitness in other respects to execute the trust. No one would be appointed a trustee in such a deed as that made by the plaintiff on the 13th November, 1834, merely because he was a creditor. Persons may be and often are selected for such trusts, who are not creditors; and even where creditors only are appointed, such alone are usually selected as are willing to undertake the trust and are able to attend to it, and of whom it is thought that they will act uprightly, and are capable of acting efficiently. The evidence shows that Willard was especially selected, and was relied upon from his personal knowledge of the lumber business. Notwithstanding Willard signed the name of "Wragg & Comp'y" to the deed, as if they were parties of the second part, to take under the deed, which they were not, yet neither Beckit nor his creditors had on that account any pretence for regarding Wragg as a trustee; nor is it reasonable to suppose that they imagined they had, for he was no dealer in lumber, but was a hardware merchant residing in Montreal, more than three hundred miles from the property in question. It was not likely that he could or would have accepted such a trust, if he had been asked to do so.

All that we hear of the relation between Willard and the defendant is that Willard was employed by him in keeping a shop in Toronto, for disposing of the defendant's goods. That would not upon the general principles of agency give any right to Willard to place Wragg in the situation of trustee, by making him a party to a deed of this description, without special authority from Wragg to do so.

If therefore it be essential to proof of actual and positive fraud in Wragg, to shew that there was a fiduciary relation between Wragg and Beckit, or between Wragg and Beckit's creditors, and that fraud existed in the breach of the obligation which such a trust imposed, the plaintiff's case fails, for there was no such fiduciary relation.

That Willard was a trustee is clear, and what is complained of as being done by him has the appearance of being altogether inconsistent with his duty as a trustee, and so a violation of the trust; but we must consider that the account we have of these transactions is given more than twenty years after they took place, and not till some years after Willard's death, who could best have told us what he did, and upon what grounds he acted

It seems that there was a bill filed against Willard, as trustee, and the defendant, Wragg, by Beckit and some of his creditors as plaintiffs, so long ago as 1839, which was answered by Willard upon oath, and was afterwards dismissed with costs at the instance of the plaintiffs. It is stated that the suit was abandoned for the want of funds to carry it on, but this does not seem a satisfactory account of the matter, if the answer of Willard, whose conduct was impeached, was such as to show that the charge of breach of trust was one that he had it not in his power to repel.

What answer was given to the suit by Willard, I confess I should like to have seen, if it could have been properly before us; for the case is certainly a very strange one, as it stands upon the evidence, and in the absence of explanations which I should have thought might have been elicited from some of the witnesses that were examined, but which are totally wanting in this case.

For all that appears, the amount Beckit owed when he made the deed may have equalled or exceeded the whole value of the interest and property he was assigning; for though he had made large improvements, he may not have paid for them, and it is probable that his debts were in a great measure incurred in making these improvements. He was apparently insolvent, for he left the province immediately after and remained away for years, during which time we have no evidence that he made any inquiry, or exhibited any anxiety about the use made of the property that he had assigned. His creditors gave him a release when he executed

the assignment, and in fact they seem to have given him a release in contemplation of the assignment, for the release is executed in July and the assignment in November following.

The creditors therefore, having given up all claim upon Beckit in consideration of the assignment, were the persons who we should have supposed would be most injured by any misconduct of Willard in the trust, if indeed they were not the only persons who would be substantially injured. Though many of them lived just at hand, and were men in business, and Willard also was living here, and a Court of Chancery being open to them from 1837, we hear of no attempt by the creditors to call the trustees to account, except that the names of three of them were joined with that of Beckit as plaintiffs in an abortive suit brought in 1839, and not proceeded in, but allowed to be dismissed with costs ten or eleven years afterwards.

Ten or twelve years then elapsed without any further attempt to call either Willard or the defendant to account; and at last this suit, like the former, is instituted, as I infer from the evidence, at the instance of the plaintiff. It is not easy to understand this apparent indifference on the part of the creditors, if they were satisfied that there had been grossly fraudulent conduct on the part of Willard, and for which a Court of Equity could justly hold Wragg liable. That Beckit, returning to this country after ten years absence, should have let ten years more elapse before he brought the present action, and should have then proceeded in this suit after Willard's death, cannot surprise us; for about the time of the filing this bill there had taken place that extraordinary increase in the value of real property in and near Toronto which has, as we have seen, tempted many to advance what the Legislature has called "dormant equities," upon very much lighter grounds than seem to have existed in this case.

What is insisted upon is, that Wragg should be made to give up the estate, because his agent, in obtaining it, committed what the law deems a fraud, not upon Elliott, from whom he obtained the title, but upon other parties, in regard to whom *he* stood in the relation of trustee.

Now, as to the transactions that took place in 1834, and the conduct of Willard and of the creditors, his co-trustees, it is altogether of so singular a character, and the evidence is so loose and obscure — especially upon points which one might suppose could have been made much more clear by the witnesses that were examined—that I am really far from satisfied that we should be safe, at this distance of time, in imputing either fraudulent conduct or fraudulent motives to Willard, with so little hesitation as the plaintiff desires we should.

And as to the defendant Wragg, I think it far from improbable that he may have been entirely innocent of anything wrong, either in intention or conduct; consider what the circumstances were. Beckit had no interest whatever in the property, further than that he held Elliott's bond to make him a deed, provided he should pay him £200 on the 14th November 1834, and £157 more in two years from that date, with interest.

He had bargained for the property in 1832, and seems to have begun immediately to erect a steam saw mill upon it. As the iron work and machinery required for the purpose were in Wragg's line of business, it is probable that the debt to him was among the most considerable that he owed, though what the amount of that debt was, or of any or all of the debts against Beckit, or what judgments were against him in 1834 or afterwards, is nowhere stated. But he seems to have been so much involved before the two years came round when he was to make his first payment to Elliott of £200, that he gave up in despair the hope of being able by any exertions of his own to pay for the property and keep it. His debts were pressing, and how did he propose to satisfy his creditors, or at least to quiet them so far as to be content to let him depart from the province without paying them? Why, by making over to his creditors all his interest in Elliott's property, for which he had paid nothing; nor, as it seems, was he able to pay anything, although more than one half of the price which he had agreed to pay was upon the point of falling due. And it is to be observed that the deed of the 13th November 1834, does not give power to Beckit's trustees to sell his interest, such as it was, in the lands and premises. On the contrary, it restrained them from doing so, and provides that they shall set the steam saw mill in operation as soon as they can, and shall, out of the proceeds of the lumber to be sawed, pay off Elliott his £357 as soon as they can; and after that shall pay all expenses attending the trust; and next, pay off all the creditors; and then pay the surplus, if any, to Beckit himself.

There was no proof whatever that Elliott was concurring in, or had any knowledge of this arrangement of the 13th November, by which the £200 which he was to receive from Beckit on the 14th November (his first payment) was to be left to be paid out of the profits of a saw mill to be put in operation and kept at work by Beckit's creditors out of their own funds. It is perfectly well known, I believe, that the period when an estate can be paid for out of the profits of a steam saw mill that has been built upon it, must be exceedingly uncertain, and may in fact never arrive, especially where no provision has been made, apparently, for the supply of capital out of which the labour and stock are to be provided by which the saw mill is to be put in operation and kept going. There was at that time no equitable jurisdiction existing in Upper Canada, which could relieve Beckit from the legal consequences of failing in his contract of purchase, by giving him any further day, and he was liable to be dispossessed by Elliott at any moment after the 14th November had passed without his paying the £200 due on that day. Under such circumstances it was absurd in Beckit to pretend to make such an arrangement as he did, for it could have no effect whatever unless Elliott was concurring in it—of which there is no evidence, nor any evidence indeed that he was at all privy to the arrangement.

What his conduct was when he became aware of it, does not seem to have been inquired into in this suit, though witnesses were examined who, I should suppose, must have been able to tell us.

It is remarkable how obscure the account is of what led to the abandonment of the trust deed. If Elliott altogether refused to pay attention to it, and gave proof that he intended to resume possession of his land, or to sell it to any other person who would buy,—since Beckit had absconded, leaving him wholly unpaid,—that must have shown at once that the trust could not be carried out. The whole account of the *fi. fa.* said to have issued in Lowe's case, and what was done, or professed to be done under it, is singularly imperfect, and it seems surprising that more light could not be thrown upon that part of the case by the examination of the gentleman who was sheriff at the time by the transaction, or of some of his officers, or by documents that could be produced from his office.

If any object could have been answered by relieving Beckit's property from the pressure of Lowe's execution for £40, it seems incredible that the other trustees and the creditors would have allowed the proposed arrangement to be broken up, rather than remove that difficulty by advancing so trifling a sum. It may, and I should think must have been obvious to all, that without satisfying Elliott, the deed of the 13th November 1834 must fall to the ground: and it may have been evident to Willard that the only chance any creditor had of securing his debt, was to place himself in Beckit's position as regarded Elliott, and fulfil what Beckit had failed in. Whether it was supposed that under Lowe's execution, or any other that might be expected, all the interest of Beckit in the land was liable to be seized and sold, and that the person purchasing at such sale would have an advantage in dealing with Elliott, can only be conjectured; or whether Elliott himself may not have supposed that he could only through a sale of that kind be protected against any claim that Beckit might endeavour to make against himself. This action not being brought until after the death of Elliott and of Willard, we do not see what explanation it might have been in their power to offer of the motives with which they respectively acted. As regards Willard, the case as it stands affords much ground for unfavorable impressions; but I do not feel at liberty to conclude that he necessarily acted with a fraudulent design, or that we should come to that conclusion if all the facts were known to us. Whatever may have been the real state of facts as regards Willard, I do not see any such proof of actual and positive fraud on the part of the defendant Wragg, as disentitles him to the effect in his favor of the statute 18 Vic. cap. 124, as regards the protection of his legal title to the property in question. As to the granting any other relief to Beckit, which could be granted without disturbing the defendant's title to the land, I

think the second clause of the statute 18 Vic. cap. 124 (if the Statute of Limitations does not bar the suit, as at present I think it does), gave to the Court of Chancery a discretion to interfere, or not, as they might think right under the circumstances; and considering the lapse of time, and the plaintiff's laches in this case, in which it cannot be said there was an express trust on the part of the defendant, I think that discretion would have been best exercised by dismissing the bill.

Some difficulty has been found in assigning a precise meaning to the words in the second clause of the Dormant Equities Act, "In regard to any other equitable right or claim," &c. I take them to mean, in regard to any equitable claim or right arising before the passing of the Chancery Act, to which effect can be given by the court *without disturbing or otherwise affecting a title valid in law.* In regard to such claims or rights, I think the court is empowered to act as they may find to be just and reasonable, under all the circumstances of the particular case; and they are not prohibited from acting upon and enforcing such equitable claims, even in cases in which there has been no actual or positive fraud in the defendant. On the whole, my opinion is, that the judgment given should be reversed, and the bill dismissed with costs.

It has been made a question by the reasons of appeal, whether the court below were right in refusing to allow the answer given by Willard to the bill filed against him in 1839, at the suit of this plaintiff, to be read in evidence. I dare say it was rightly rejected as a medium of proof in favor of the defendant Wragg, of any facts stated in it; but I am disposed to think it might have been properly received, for the purpose of informing the court what answer Willard had given to the alleged breach of trust charged against him, before the plaintiff Beckit moved to have his own bill against him and Wragg dismissed with costs.

That, I confess, I should like to have seen. Where a plaintiff's action at law is met by a substantial defence on the merits, pleaded in bar, and he then enters a *nolle prosequi* either as to the whole declaration or to that part to which the defence is pleaded, he takes a step which, according to circumstances, may or may not conclude him. The plaintiff applying to dismiss his own bill, is more in the nature of a retraxit, which precludes all further proceedings on the same cause of action. As the practice in equity now is, both here and in England, the plaintiff could not afterwards have attacked Wragg upon the same matter. It was not so, *however, at the time of Becket's bill in the first suit being dismissed;* but I think it was material, and ought to have been allowed, that the court should know as a fact what statement had been advanced on the other side before Becket gave up his suit, and whether he gave it up before or after any evidence had been taken. The facts were then all recent, and the parties were living who could have given a clear account of transactions which are now so long gone by.

Our opinion is, that the judgment appealed from should be reversed, and the bill dismissed with costs.

(To be continued.)

COMMON LAW CHAMBERS.

(Reported by C. E. ENGLISH, Esq., M.A., Barrister-at-Law.)

McDONELL v. PROVINCIAL INSURANCE COMPANY.

Practice—Change of Venue—Accident.

The occurrence of an accident preventing the trial of a cause at an Assizes in the county where the venue is laid (e. g. personal inability of judge) is a ground for changing the venue, in order to save delay, especially when prospective difficulty of obtaining witnesses and the peculiar position of some of the parties to the suit renders the obtaining of justice much more expensive and troublesome, if not even doubtful, if trial deferred. [24th March, 1859.

ROBINSON, C. J.—The plaintiff moves to change the venue from the county of Ontario to the county of York, on the ground of his witnesses being likely to be out of the way, at another Assizes, on account of the dangerous illness of the plaintiff, and on the ground that the judge who presides at the Assizes for the county of Ontario declines to try the same (for personal reasons).

The action is on a policy of insurance on goods against fire. The policy sued on was granted in Toronto. The building in which the goods insured were burnt was at Colborne, in the county of Northumberland. The venue was laid in the county of Ontario.

The fire occurred early in 1857. The action was brought 6th March, 1858. The plaintiff declared on the 9th April laying the venue in the county of Ontario.

The defendants pleaded denying the loss of the goods, as alleged, affirming that the plaintiff was insured in another office, and gave no notice of it; that he assigned the policy without the consent of the defendants, to one Gillespie.

That the plaintiff was guilty of fraud and false swearing in the affidavit made by him of the loss.

That the plaintiff himself unlawfully and feloniously procured the goods to be burnt.

That the fire happened from a defect in the stove pipe, which is a risk specially excepted.

And that the plaintiff did not produce a justice's certificate of the loss, &c., as is required by a condition in the policy.

Those pleas were filed on the 30th April, 1858, and issues joined on them all on the 6th October, 1858.

The plaintiff's attorney swears that all means possible have been used by the defendants to delay and defeat the plaintiff.

That unless this action is tried this Spring, the plaintiff will most probably lose some of his witnesses, two having already gone to the United States, and another being about to remove to Lower Canada.

The goods were first insured by Gillespie, in 1855, in defendants' office. Gillespie then sold out, with defendants' consent, to plaintiff, and assigned the policy to him.

The policy, however, was afterwards renewed in the name of Gillespie, and early in 1857 the goods were destroyed by fire.

The plaintiff sued defendants on the policy in his own name; defendants insisted that he had no right to sue on the policy granted to Gillespie, but on plaintiff's threatening to apply to the Court of Chancery to compel defendants to issue a policy in his own name, that would cover the risk, the defendants issued a policy to plaintiff of the same date (before the fire) as the one that had issued to Gillespie. On this policy the present action was brought, on the 6th March, 1858.

The defendants insisted on the plaintiff's paying the costs of the former action brought by him on the policy issued to Gillespie, and had proceedings stayed until those costs were paid.

That plaintiff fell ill; defendants had interrogatories put to him, and the cause was in consequence delayed till the Assizes in the Autumn of 1858.

That plaintiff is very ill from consumption, and not likely to survive until the next Assizes.

That plaintiff applied to have the venue changed to Kingston, for a former assize (the Assizes there being later than at Whitby), and failed.

That the plaintiff then gave notice of trial for the Assizes at Whitby, now going on; but Mr. Justice Burns, being a stockholder in the company, declined to try the cause.

That unless plaintiff can be allowed to try his cause at the approaching assize at Toronto, or at some other assize this Spring, he will be greatly delayed and may lose his witnesses; and the plaintiff will probably not be living; that the plaintiff has already lost an important witness by his removal from Upper Canada.

The defendants' attorney made an affidavit.

That the only one of the plaintiff's witnesses living abroad, whom he had been able to find, has been examined fully, and his evidence reduced to writing to be used in this cause, and that the plaintiff has been unable to procure the others to attend at Whitby, if the cause had been tried there.

That the plaintiff's action had been delayed solely by his want of diligence in carrying it on.

That the plaintiff brought his action in the county of Ontario, merely to hurry on his cause, nothing relating to the suit having occurred there, and the witnesses not living there.

That his own delay in declaring made him too late for the Assizes for Northumberland, where the fire occurred and the witnesses resided.

That the writ issued in Belleville on the 6th day of March, and was not served till the 30th March, 1858. Declaration was served on the 12th April. Order allowing interrogations to be proposed to plaintiff, issued on the 27th April.

That they were not answered until the 11th of September, and the answers not served till the 12th October.

That the policy sued on has been assigned by the plaintiff to Gillespie, as security for a debt; and the plaintiff being insolvent, an order was obtained on him to give security for costs.

That to prove the various matters of defence pleaded, much local evidence will be necessary—six or eight of the defendant's witnesses, residing in or about Colborne; and that to try the case at Toronto will occasion great expense, from the distance of the witnesses on both sides, and the long time the assizes for Toronto commonly last.

That one Ross, a material witness for the defendants, is now absent in the United States, and his place of residence there is not yet ascertained; and that defendant will not be able to go to trial without him.

This being an action on specialty, the venue, strictly speaking, was not confined to any particular county.

The plaintiff did not in fact lay his venue in the county of York, where his policy was executed, or—which would have been the more natural and reasonable course—in the county of Northumberland, where the fire occurred; the circumstances of which fire, and the loss sustained by it, when it was known that the claim is to be resisted, might be expected to be the subject of enquiry, to be investigated through the testimony of a number of witnesses residing in the vicinity of the place where the fire occurred.

The plaintiff, however, laid the venue in neither of these counties, but in the county of Ontario, fifty or sixty miles away from that neighbourhood. That seems to have been done by the plaintiff, in order to get a verdict sooner at that assize than he could in Toronto or Northumberland; and the defendants contend that he selected that place for the venue without regard to the inconvenience or expense it might occasion to the defendants, and merely from a desire to get judgment as soon as possible.

It is but fair that he should be left to take the chance in that respect of the selection which he made.

The plaintiff's object in going to Whitby appears to have been defeated; for, his action having been brought on the 6th March, 1858, a few days only before the assizes were to commence, though the fire occurred in 1857.

The defendants applied under the statute to be allowed to put certain interrogatories to the plaintiff, and these could not be or were not answered by the plaintiff in time to allow of his carrying his cause down to trial.

The plaintiff then omitted for many months to answer the interrogatories put to him in April, and his answers were not delivered till October; and the plaintiff not being able to get down for trial at the autumn assizes for Ontario, endeavored to have the venue changed to the county of Frontenac, with the same view that he is now making this application, namely, to prevent his being thrown over the autumn assizes altogether.

But that application was refused by the judge in chambers, to whom it was made; and so the case has stood over to the present assizes, when we may suppose it would have been tried at Whitby, the venue laid in the declaration, but for an accident, which neither party in the cause has anything to do with, nor could have remedied.

The plaintiff desires, in consequence, to have the cause tried in Toronto, which will of course make it necessary to bring many witnesses much farther from their homes, and, from that and other causes, stated in the defendants' affidavits, will much increase the costs of the trial.

The defendants object, on account of that expense and inconvenience; and they insist that the plaintiff, by an extraordinary method of proceeding, has had his cause pending for an unusual and unnecessary length of time; and that, as the loss occurred early in 1857, he might have commenced his suit much earlier than he did; and that there was no reason why he should not have had the cause tried at Cobourg in the spring of 1858, if not before, where all the witnesses could have been had with the least inconvenience and expense;—that when he resolved to lay his venue in Whitby he should have brought his action earlier;—that he allowed several weeks to elapse, after his process was served, before declaring; and after he had declared, did not proceed as diligently as he might have done; and that there was nothing at least to prevent his going to trial in the autumn of 1858;—that having lost that opportunity by his want of diligence, he brought upon himself the inconvenience of the accident which has prevented his cause being tried at Whitby this spring, and cannot reasonably be allowed to increase the costs of the trial to the defendants by now changing the venue to Toronto, in order to save time of which he has been so little careful through his whole proceedings.

The plaintiff, on the other hand, contends that want of diligence hitherto has nothing to do with the merits of the present application;—that the delay has been in some measure occasioned by impediments thrown in his way by the defendants;—that the necessity for this application arises from a circumstance that he could not have foreseen;—that he has reason to fear the loss of important testimony if a further delay takes place; and the plaintiff's dangerous and precarious state of health is also urged as a reason for granting the application.

I think the circumstance of the judge who presides at the court in Whitby, and also at Cobourg, during the present assizes, being unfortunately disabled from trying the cause, is one which should lead the court to favor a change of venue, in order to remedy that inconvenience, if it can be done without hardship or injustice to the defendants.

If the trial could have been had this spring at Cobourg, provided the plaintiff had laid the venue there, I should, I think, have left him to take the consequence of having, to suit his own purposes merely, taken the case unnecessarily from that county, where it should more naturally have been tried. But the same reason which has prevented the cause being now tried at Whitby, would equally have prevented its being tried at any place nearer or more convenient than at Toronto.

The defendants, while the case has been pending, do not appear to have moved on special grounds to have the venue changed to Northumberland; and so far they seem to have acquiesced in the cause having been taken to a county in which the characters of the plaintiff and of the witnesses are probably no better known than in Toronto.

I can only, therefore, consider the disadvantages arising from increasing expense; and as the plaintiff asks for the change in order to expedite the trial, I think it reasonable to make it a condition that he shall pay to the defendants or their attorney, in any event of the cause, any extra expense, as well of witnesses as otherwise, to which the defendants may be subjected by the change of the venue.

As to the difficulty the defendants may have in procuring the attendance of the witness Ross, spoken of in the affidavit, it is one which is at present only apprehended, and it may not occur. If it should occur, it will always be in the power of the defendants to apply to have the trial put off. Order granted.

CHANCERY.

(Reported by THOMAS HODGINS, Esq., LL.B., Barrister at Law.)

CRAFFORD v. MCDONAGH.

Fraud—Setting aside settlement—Trustees—Life estate.

A settlor filed a bill to set aside a settlement on his wife and her heirs, alleging fraud by the Trustees, in inducing him to make the settlement. The wife died leaving no children by him, but leaving children by a former husband. The allegations of the bill failed, and it was accordingly dismissed but it was *Held*, that this settlement only vested a life estate in the Trustees, and *Semble*, that the settlor could defeat the settlement by a sale.

(28th April 1859.)

This was a bill by one John Crafford, against William Patrick McDonagh and Daniel Cassidy, as Trustees under a settlement, and also against James Malory, William Murphy, and Mary his wife, as *cestuis que trusts* under the settlement. The bill stated that plaintiff being seized in fee of certain lands, was desirous of making provision by will out of the same, for Anne Crafford his then wife, (since deceased,) in the event of her surviving him. That defendants McDonagh and Cassidy, being great friends of his said wife, persuaded him that it would be more advantageous for him and his said wife, if he were to make the provision by deed rather than by will, and to convey said lands to them in trust for plaintiff for life, and after his death, if he should survive the wife, then in trust for his said wife, her heirs and assigns. That plaintiff being illiterate, and relying upon the pretended kind intentions of said defendants, did so convey to them upon said trusts, and that the conveyance was prepared by a solicitor. That his intention was to settle said lands upon his said wife, only in the event of her

surviving him. That he had no professional assistance, save that of the solicitor who was instructed by the Trustees. That his said wife died on or about the 29th September, 1854, bearing no children by plaintiff; but leaving the defendants James Malory and Mary, now the wife of the defendant William Murphy, her children by a former husband, her co-heirs her surviving—the said James and Mary being infants, under the age of 21 years. That he has tendered conveyances of said land to said Trustees, but that they decline to execute the same. Prays that the deed may be corrected, and that the Trustees be decreed to convey.

The defendant McDonagh answered, that the deed was executed by the plaintiff of his own free will, without persuasion on his part. He denies advising plaintiff, or giving instructions to the solicitor, as set out in the bill, and states that he consented to act at the request of the plaintiff, and went with him to the solicitor's office, where the deed was read over to the plaintiff, and he expressed himself satisfied with it, and it was thereupon executed. Submits that the trust deed only conveys a life estate to the Trustees, that they cannot convey in fee; admits the tender of a deed, but the *cestuis que trusts* were unwilling that the Trustees should convey. He then submits to act as the Court should direct, and asks his costs.

The cause having being put in issue, evidence was gone into, but the plaintiff failed as to the fraud, and his own ignorance or illiterateness, in executing the deed.

Barret, for the plaintiff.

Roaf, for the defendants, the trustees and infant children of Mrs. Crafford.

THE CHANCELLOR.—This is a bill to have a settlement on the plaintiff's estate, set aside. The bill states that being advanced in life, the plaintiff was induced by his Trustees thus to settle his estate, so as to provide for his wife; that being of a weak mind, and having no professional man to advise him, he did not understand the effect of the settlement; and that his estate is not settled as he intended. The evidence does not quite establish this. The plaintiff seems to be somewhat competent to manage his farm, and although he appears a man of no great aptitude to understand, I think if this deed were read over to him, he would understand it. In regard to the Trustees, the bill fails entirely. There is not the slightest evidence that they gave any instructions, or interfered in any way. The instructions, it is stated, were given by the plaintiff himself; or, perhaps, if I might be allowed to speculate, by his wife. One of the Trustees who has answered, has stated what he knew of the transactions, in a clear and satisfactory manner, and his answer appears to be that of an honest and straightforward man; and as against him, the bill fails entirely. The bill states that the provision was for the wife alone; and if that be so, the deed appears to be against the intention of the settlor. But it appears that the plaintiff had, at the date of this deed provided for his wife by will; and we must infer, that this settlement was to make other provision for her. In the will he had given his property to his wife in fee, if she survived him; and the deed was in the same terms, and further provided, that in the event of Mrs. Crafford not surviving him, then to her heirs. I have no doubt but that the plaintiff meant thus to provide for his wife and her heirs, and to have barred his own relatives; for it appears, there had been a quarrel between the plaintiff's relations and his wife, and that the plaintiff joined in taking her side—she having been arrested, through their instrumentality, for his supposed murder; and it is only natural, that being thus annoyed by his own relatives, he should seek to provide for his wife and her heirs, to their exclusion. There is, however, an entire absence of wrong influence; but the plaintiff can, if he pleases, defeat the settlement by a sale, as the estate is only a life interest. The Bill should, I think, be dismissed with costs.

SPRAGGE, V. C.—It appears to me, that the intention of the husband was to provide for his wife, in the event of her surviving him, and if she did not, then to heirs. Having no children themselves, the effect of the deed is, that the property should go to the wife's children by her former husband, or to whom she should appoint. It is unfortunate that both the conveyancer who drew the deed and the wife, are dead. Both, if living, might have shown the true intentions of the parties; that there had been no mistake.

Per Curiam. Bill dismissed with costs.

COUNTY COURTS.

In the County Court of the County of Lincoln, before His Honor Judge CAMPBELL.

CHAMBERS v. MODERWELL, SHERIFF OF PERTH.

In this case an application in Chambers was made for a summons to stay all proceedings, and that the plaintiff should bear and pay his own costs incurred or to be incurred on the following statement of facts appearing by defendant's affidavit, sworn on the 6th of July, viz., That a writ of *fi. fa.* out of the Court of Common Pleas, Toronto, against one U. C. L., dated 28th March, 1859, and received 31st March, and notice on said writ, he, defendant was directed to levy £40 8s. 4d. debt, £4 8s. 11d. taxed costs, with interest from 26th March, and 30s. for writ, with sheriff's fees, &c., and incidental expenses. That the defendant made £40 8s. 4d. £4 8s. 11d.; 11s. 6d. for interest on both, from 26th March up to 14th June, 1859, and 30s. for writ, &c., amounting to £46 18s. 9d. That on the 14th June he transmitted writ and return to M. & C. by mail, indorsed satisfied, and money made to the amount of $187 75, and authorised them to draw for that amount. That on the 21st of June, he received from M & C. a letter, advising him that they had drawn on the 18th for $188 40, adding to the amount of the return for four days' extra interest and one quarter per cent. for bank charges.

EXTRACT OF LETTER.

Damages	£40	8	4	
Interest from 26th March, 1859, to 18th June	0	11	2	
Costs	4	8	11	
Interest	0	1	3	
Writ and certificate	1	10	0	
				$187 93
Add ¼ per cent.				00 47
				$188 40

We have been obliged to charge you the bank agency, as the money is payable at Toronto, and if you paid it there we could get it without expense.

That he, defendant, on 21st June, replied in substance "that he had received the letter of advice of draft for $188 40, and regretted that they had drawn for more than he advised—he cannot accept—nor will pay more than received—the difference is in the interest and bank charges—he made the interest up to the date of the return—the writ was returnable in Toronto, but had he sent the money to the clerk it would likely cost you more than the bank."

That on the draft being presented afterwards by the agent of the bank, he tendered $187 75, but he declined accepting, and he, defendant, refused to accept the draft for $188 40.

That he was not directed by the writ or endorsement, nor justified in making bank charges out of the goods of the said L.

That on the 27th June, he was served with copy of a writ, and caused his solicitors to write M. & C., making a proposition for the settlement of the question whether or not he should properly pay the quarter per cent. or bank charges; and on the 2nd of July, a letter was received by his solicitors from M. & C., declining to accede thereto, of which he was advised on the 4th July, and the application intended to be made was delayed until the reply should be received. That he, defendant, has been always ready and willing to pay the sum collected, and has never refused payment, nor was the same ever demanded of him, but the plaintiff seeks to recover the $188 40.

It further appeared by affidavit, that on the 11th July, the sum of $187 75 was paid to one of the firm of M & C., and a receipt in full demanded and refused, and one on account offered, and that it was requested that the suit should be discontinued; which was refused, unless a sum to cover the costs were paid.

The particulars on the writ are as follows:—"$188 40, being money collected by the defendant as sheriff of the county of Perth, to and for the plaintiff."

On the return of the summons, Mr. Miller for the plaintiff filed his affidavit of the facts more at length than necessary, as he had not probably seen the defendant's affidavit. No new features of importance appeared, and nothing to vary the defendant's affidavit.

The execution produced appeared to have issued from the office of the Deputy Clerk at Niagara.

Mr. Miller contended, 1st, That it was the strict duty of the sheriff, in all cases, to pay the money levied upon an execution into the office of the clerk of the court, according to the command of the process itself, "and have those monies before," &c.; and it was his duty to return the writ to the office from whence it issued; or the sheriff may cause the money to be paid to the plaintiff's attorney.

2nd, That the sheriff should compute interest up to the time he could probably have the money paid over either to the clerk or plaintiff's attorney at a distance.

3rd, That the charge for remitting the money and the additional interest may be considered incidental expenses, and levied of a defendant.

4th, That no demand of money before suit is necessary, but if a demand of the money before this suit were necessary, the plaintiff did demand the money through the bank agent, and it was refused.

A difference of computation of interest may be found on the 80 days, from the 26th March to the 14th June, of a few pence, against the sheriff, which the plaintiff's counsel declared did not form any part of the foundation of this suit.

He knew of no case in which his propositions had been decided upon; and the one of *Gladstone et al v. French et al*, in the Common Pleas, in Hilary Term, was confined to the claim of per centage by the clerk of the court on a sum of money paid in by a sheriff, under a writ of execution.

Mr. Macdonald, in support of the application, contended that a sheriff cannot levy of the defendant's property any sum whatever for transmission of the proceeds, nor any interest beyond the day he receives it. That he is not authorised to pay money into court, and that the case alluded to in the Common Pleas, Hilary Term, does directly decide that point also; and in that case the Chief Justice referred to the decision in *Shuter v. Leonard*, 3 U. C. Rep. O S. page 314, to support his dictum.

He cited cases 8 B. & Adol. 696; 7 M. & W. 413; and 1 East. 339 (*Butler v. Butler*).

In the latter case the Court refused an application on the part of a sheriff to pay money into court.

CAMPBELL, Co. J.—In this case, I am pleased to hear the plaintiff's counsel declare that the error in computation by the sheriff of a few pence for interest could not have justified this action, and therefore I need not make any remark further as to the proper proceeding in a case where such computation may be manifestly erroneous, and the sheriff notwithstanding has returned execution satisfied in full, and insists upon such return.

It is asserted by counsel that no *express* decision has settled the duty of the sheriff upon the receipt of monies under an execution, and it would be strange if the point has not been raised long before this date, as it would be a matter of much convenience and advantage to practitioners of the law and suitors, if the duty of the sheriff required him to transmit the money either to the principal office or to the office from whence the process issued, or to the attorney, with interest up to the time of being received by the latter, and a great inconvenience and expense to the sheriff. The principles of justice and equity and common sense have probably been too plain to justify much litigation on the points. I am forcibly impressed with the view that to such causes we may attribute the absence of many reported formal decisions.

By an execution the sheriff is directed to make the debts, costs and interest, besides the expense of the process and his own fees, which are regulated by a tariff or by statute; and although he is commanded by the form of that process to "have those monies before," &c., it cannot be supposed that the officer of the court is to be the receiver and disburser of monies for suitors. The case of *Shuter et al v. Leonard*, 3 Q. B. Rep. O. S. 314, I think is in point, and does clearly decide that the payment of money into court upon an execution, in ordinary cases, is not the proper course to be pursued, and in that case the learned Chief Justice reviewed many cases applicable, some of which may be looked upon as justifying the sheriff in that course. The Chief remarks, "that the invariable usage is to pay the money to the party, and for this trouble and the responsibility of its custody, the sheriff is allowed in poundage."

It may be remarked also, that since the decision of the above case various changes in practice have been made in the province, and amongst them the provision that writs of execution may issue from the office of a deputy, and that the sheriff shall file his writ and return in the office *from which* the writ was sued out.—See Rules 101 and 103. In this case the execution was issued from the office at Niagara, and the plaintiff insisted that the chief officer at Toronto is the proper receiver of the proceeds. Such a practice as to either offices would be exceedingly inconvenient to suitors, as well as sheriffs, in the remote parts of the province; and I will be guided by the case cited in favor of "invariable usage," as being more consistent with common sense.

The dictum of Chief Justice Draper is also an indirect decision of the same point. I therefore in this case decide that it was not the sheriff's duty to pay the money levied into the principal office at Toronto, nor into that of the deputy, and that such payment would not relieve him of liability to the plaintiff.

I refer also to the case cited on the part of the sheriff, 1 East. 339.

On the second and third points raised, and which in reality are the foundation of this suit, I do not hear of any decided case; but as to the second one, it would clearly be extortion on the part of the sheriff to compel a defendant to pay interest beyond the date of satisfying the execution, for any portion of time, and it would be quite as unjust to seek the interest from the sheriff after the time he communicated to the party entitled to receive it that he had it ready to pay over. The interest accrues either upon an express contract to pay, or an implied one that the money has been used or withheld improperly by the holder; but where a sheriff promptly reports he has the money ready, and nothing is shown to prove that he used it in the mean time, it would be a great hardship to make him liable on an implied contract, as if he had used or invested, or refused to pay the amount, and this even if it should be his duty to cause the amount to be placed in the hands of the plaintiff's attorney, as to which reasonable time should be given. In this case the sheriff, living at Stratford, reported to the attorney, at St. Catherines, the money ready, on the same day he received it, and the plaintiff, on getting information four days after, added these four days' interest, and seeks to compel the sheriff to pay it. I am of opinion the sheriff is not liable, and is justified in having refused to pay a draft or sum including that interest.

On the third point, which is of more importance to sheriffs and suitors, my opinion is the defendant was not liable to the bank charges upon the draft for the money, no more than he would be liable to the expense of postage on it—nor of an agent who might come for it, nor of an express man. He could not levy any such sum of a defendant's property, and upon a large execution the sum would be very considerable. In the case hereinbefore cited of *Gladstone et al v. French et al*, the sheriff took the expense of remitting the money, but as the point was not in any manner involved in the question before the Court then, no allusion is made to its correctness or otherwise. I therefore am not aware of any decision, direct or indirect, on the point.

The poundage allowed to the sheriff could not have been established with any view to such a charge; and the varying rates of charge for transmission, according to the channel selected or necessary, would leave the sheriff exposed to risk or loss, besides the varying sums to disburse.

It is contrary to common sense and common justice that the sheriff should be compelled to pay the plaintiff or his attorney in whatever part of the province he may reside. Under such a view of the law, the sheriff at Lambton, upon a writ of execution received from Cornwall, would be obliged to pay the plaintiff or his attorney there, or be liable to an action in every case, and in the absence of bank agencies would have some trouble in remitting, and in all cases would be liable for the safe conveyance of the money.

In the case of an attorney receiving money for a client, I think his duty is at once to inform him the money is ready, and that he may draw for that amount, or it will be remitted as may be directed, or he will pay the amount on demand. A compliance on his part would be a due fulfilment of every obligation, legal or

moral; and in the case of the sheriff, I think he is not required to do more, and bear the expense and risk of transmission.

When therefore in this case a bank draft was presented to him for a larger sum, and covering the expense of remitting, I think he was right in refusing; and in offering the $187 75, being the actual amount in hand, he did all that could be required of him. He instructed the plaintiff's attorney to draw for that sum; they adopted *the mode* of receiving payment, but added a sum which the sheriff had not really received.

The case of *Slater v. Hames*, 7 M. & W. 413, was cited to show that a sheriff cannot make charges for incidental expenses not provided for by statute or tariff of fees.

On the fourth point, as to a demand of the money, it is strict law that a demand is not necessary before suit, inasmuch as the sheriff has received the money for the plaintiff's use, and should offer it, or inform him that he has it ready.

See 3 Camp. N. P. C. 347; 3 U. C. Q. B. Rep. O. S. page 314. Mr. Tidd thinks a demand necessary (9th Ed. 1019); but I think, in the absence of a reasonable demand, the Courts would on an application invariably stay the proceedings of a plaintiff without costs; and in this case, where the defendant admitted the amount, suggested the mode of payment which was adopted, and on presentation of the order *was ready to pay all he had received*, it is one peculiarly demanding the interference of the judge to relieve the public officer. See *Jefferies v. Sheppard*, 3 B. & Alderson (not B. & Adol. as cited in argument), 696.

If the action had been merely for 4d. erroneous under-computation, or for 11d. including that error, and the four days' additional interest demanded, I would term it an abuse of the process of the Court; but on the third point there is an important principle involved, and seems the main ground of this suit.

The defendant, I think, is entitled to an order as asked to stay all further proceedings, and that plaintiff bear and pay his own costs incurred in this action.

Order to issue accordingly.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—The amount of school money apportioned by the Chief Superintendent of Education under the 35th section of the Common School Act of 1850, to a County is, say $4,000, divided by such apportionment among the Townships of such County as follows, viz:—

In Township of		A.....	$1500
"	"	B.....	700
"	"	C.....	900
"	"	D.....	200
"	"	E.....	700

now in what manner should the County Council, under the 27th section, proceed to levy an equal amount from the several Townships; should it be by a ratable assessment upon the whole of the property assessed upon the Assessment Rolls of the County, (exclusive of towns and villages) of, say a cent. in the pound, or should it be by special assessment upon each Township of a sum equal to the sum apportioned to such Township by the Chief Superintendent?

An answer through the next journal would very much oblige your obedient servant.

A.

June 20th, 1859.

[The School Act (13 & 14 Vic., ch. 48, sec. 27, No. 1,) requires the County Council to levy upon the Townships of their County, an amount equal to the grant apportioned to the Townships by the Chief Superintendent; and this grant is apportioned to each Township by the Chief Superintendent (sec. 35, No. 1,) according to population, or some other equitable ratio. It is also provided (sec. 40) that in case of a deficiency in this school assessment, the Chief Superintendent may deduct from the next year's grant, an amount equal to the deficiency. As population is not the ratio for levying the rate, but property; and as some townships, from being longer settled, or other causes, have more assessable property than others, which may have about the same population, and in view of the penalty, it is clear we think that a special rate should be levied on each Township, so as to obtain an assessment equal to the grant apportioned to such Township by the Chief Superintendent.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN:—I should feel much obliged for your opinion on the following question:

Is it competent for a Law Student to hold the agency of an Insurance Company (life or fire), such agency in no way interfering with the regular time or duties of his office? Can he answer the question, "Have you been engaged in any other employment, &c." in the negative: if not, and seeing it in no way interfered with his duties, could it, or would it be possible for him to be rejected on the ground of having held such agency?

Please answer, and oblige yours,

A LAW STUDENT.

[We have more than once, before now, heard questions asked somewhat similar to the above, but we are not prepared to give any decided opinion on the point, as to whether it could or would be possible for a student to be rejected for having held the office mentioned. We incline to think that the object of the question is to ascertain if the student has held any office or situation, or been engaged in any employment incompatible with his position as a student of law, or which might be considered derogatory to the profession he was aspiring to enter

Acting as agent for an Insurance Company, with the consent of the attorney to whom he was articled, would not, we should suppose, be considered in itself a ground for rejecting a student.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX.C. FOX v. HILL. *Feb.* 8.

Gaming—Defence to action on a Mortgage deed that part of the consideration was money won of the defendant by betting on horse races—Direction to Jury—"Understanding"—"Agreement."

In an action of Covenant the defendant pleaded that the plaintiff had won money of the defendant by betting on horse races; that the deed was a Mortgage within 9 Anne ch. 14, and 5 & 6 Wm. IV., ch. 41 and that the money won was part of the consideration.

It appeared at the trial that defendant had been a loser in betting on the Derby, and had lost money to the plaintiff, who within a few days after the race advanced the defendant £2,000; that the

deed was then executed, and that subsequently on the settling day, the defendant paid the plaintiff the money, he, the defendant had lost. The defendant stated in his evidence that the plaintiff agreed to advance the money on condition that he paid the plaintiff his account. The plaintiff in giving his evidence stated that there was no condition or agreement of any kind that he was to receive back any money; but said that he assumed the defendant would pay him on the settling day as all others to whom he had lost; and that when he agreed to lend the money he assumed that it was to pay his debts on the settling day.

The jury were directed that if the money advanced in pursuance of a stipulation or agreement that out of it the plaintiff should be paid money won of the defendant by betting, that would be mere colourable evasion of the statute and they should find for the defendant, but that if there was no such agreement or stipulation, but the plaintiff advanced the money absolutely for the defendant as the lawful owner to dispose of it as he pleased, and the deed was given to secure that loan, then the deed was valid, although the plaintiff expected to be paid out of the money so lent. Upon objection on the part of the defendant that this direction was calculated to mislead the jury to suppose that the deed was valid unless there was some binding agreement; and that they ought to have been told that the "intention and understanding" between the parties was that the plaintiff should be paid out of the loan, the deed was illegal.

The jury found for the plaintiff.

Held, that the direction was right.

EX. C. *Feb.* 8.

PAUL (P. O. OF STUCKEY'S SOMERSETSHIRE BANKING CO.) v. JOEL.

Bill of Exchange—Notice of dishonor.

The holder of a bill of exchange, on the day after it became due, called at the office of J, the drawer, and on being told that he was engaged, wrote on a scrap of paper, and sent in to him the following notice:—"B's acceptance to J, £500 due 12th January is unpaid; payment to R. & Co., is requested before 4 o'clock." The Clerk who took in the notice said "it should be attended to."

Held, affirming the judgment of the Exchequer, a sufficient notice of dishonor.

Q. B. DEAN AND CHAPTER OF BRISTOL v. JONES ET AL EXRS.

Landlord and Tenant—Covenant to repair—Condition precedent.

In a lease for lives of a manor and demesnes the lessee covenanted to repair and keep the premises in all needful and necessary reparations having or taking in and upon the demised premises, competent and sufficient housebote for the doing thereof without committing waste.

Held, that the covenant was an absolute, and not a conditional covenant to repair, with a licence to take timber for housebote.

EX. C. REEVE v. PALMER. *Feb.* 7.

Detinue—Lost deed—Attorney and Client—Negligence of bailee.

Bailee of a chattel is answerable in detinue for its loss by negligence; A, an attorney acting for B, his client, has custody of a deed which is lost by him. No evidence is given of the circumstances of the loss but only the bare fact of the loss before demand.

Held, affirming the judgment of the Common Pleas, first, that the loss is *prima facie* imputable to negligence; and, secondly that the attorney is liable in detinue for the damage occasioned by such loss.

Q. B. SPARK v. HESLOP. *Jan.* 18.

Agreement—Contract to pay costs of action.

The defendant wrote to the plaintiff, "I shall feel obliged by your paying on my account a bill of exchange for £500, accepted by H. and endorsed by me, and I request you to bring an action against H. for the amount of the bill; and I agree to be answerable to you for the payment of the bill, and for all costs, damages, and expenses, which you may sustain by reason of such payment and the trying of the action." The plaintiff paid the bill, sued H., lost the action and paid H.'s costs; but his own costs were not paid, nor was any bill delivered by his attorney.

Held, that the plaintiff might recover the costs which he was liable to pay to his own attorney in the action against H., and that the defendant was primarily liable to pay such costs, and not by way of indemnity.

EX. C. *Feb.* 4.

WAITE v. NORTH EASTERN RAILWAY COMPANY.

Negligence—Child of tender years under charge of adult—Negligence of such adult contributing to accident—Railway Company.

Plaintiff, a child of 5 years of age, was under the charge of its grandmother, who purchased tickets for herself and the child to go from one station to another on defendant's Railway. In crossing the line previous to starting, defendant's train knocked down both the grandmother and child, severely injuring the child and killing the grandmother. There was negligence both in the defendants and in the grandmother.

Held, affirming the judgment of the Court of Queen's Bench, that the plaintiff was identified with the grandmother, so that her negligence was the negligence of the plaintiff, and that the action in his name could not be maintained.

EX. HARDCASTLE v. S. Y. RAILWAY AND RIVER DUN CO.

Nuisance—Highway—Excavation—Action for damage by excavation on land adjoining highway—Obligation to fence.

The owner of land adjoining a highway is not responsible for injury sustained by a person who wanders from the highway upon his land, and then falls into an excavation therein, and which was not in any way fenced from the highway. But he will be responsible if the excavation is so near that a person may fall into it while using the highway.

EX. KEEN v. PRIEST. *Feb* 8.

Distress—Beasts of the plough—Animals which gain the land—Sheep—Exemption—Cattle of stranger—Statute 51, *Hen.* 3, *st.* 4.

The 51 Hen. 3, st. 4, exempting from distress for rent animals which gain the land and sheep, where there are other goods on the premises sufficient to satisfy the distress, applies although such animals or sheep be not the property of the tenant, and the land is in the occupation of a sub-tenant.

Sheep were seized as a distress for rent, while there were upon the land a cart-colt, heifers and steers.

Held, that these were not animals that gained the land, and the seizure of the sheep was therefore unlawful; and that the measure of damages in an action for seizing the sheep in contravention of the statute was the value of the sheep.

EX. ASHTON v. DAKIN. *Jan.* 28.

Gaming and wagering—Purchase and sale as shares—Statute 8 & 9 Vic., c. 109, s. 18.

The plaintiff, a stockbroker at B. was employed by the defendant to purchase on his behalf shares in Railway Companies, with a view to sell them before the settling day on the stock exchange. The plaintiff employed K. a stockbroker in London, to buy the shares, and he having purchased them by the orders of the defendant through the plaintiff, sold them before the settling day. By the custom of the Stock Exchange, K. was responsible as the purchaser; he did not, however, pay money on the purchase and transfer of the shares, but was debited by the selling brokers with the amount, he having open accounts with them, and on the settling day the accounts were closed, and the balance ascertained.

Held, that as shares were really bought and sold, the transaction was not by way of gaming and wagering, and that the plaintiff was entitled to recover his commission, and the amount of losses on the sale of the shares.

CHANCERY.

V. C. K. HALE v. THE METROPOLITAN SALOON OMNIBUS CO.

Sale to defeat execution—Bill of sale act—Interpleader—Costs.

A sale of the entire stock in trade and furniture of a tradesman made with a view to defeat an expected execution, is valid; but in a case attended with great suspicion, although the sale is not proved to be *mala fide*, or unfair, the Court will make the purchaser pay his own costs. A receipt expressed to be for money paid for the entire stock in trade and furniture of a tradesman, is not a bill of sale within 17 & 18 Vic., ch. 36, and does not require registration.

Where execution creditors impeach the validity of a sale of goods made previously to a levy, the Sheriff may interplead.

L. J. HUMPHREY v. OLIVER. *March* 7, 8.

Appointment—Fraud on power—Corrupt bargain.

Instance of an appointment to a child being set aside because the fair inference from the facts was that the appointer intended to derive a benefit to herself, although it was not proved, that she actually did derive any benefit.

Per TURNER, L. J.—If such an intention existed at any time before the appointment, the burden rests on those who support the transaction to shew that the intention had been abandoned at the time of the execution of the deed.

V. C. K.

THE NEW BRUNSWICK AND CANADA RAILWAY AND LAND COMPANY (LIMITED) v. MUGGERIDGE.

Joint Stock Companies Act—Shareholder—Agreement to accept shares—Specific performance—Partnership—Plea.

A plea admitting the case made, but denying legal liability on that case is bad. A plea must bring forward a fact displacing the equity by something new.

A court of equity will decree specific performance of a contract to form a partnership, and will interfere in any case where a court of law cannot sufficiently redress the injury received by breach of the contract.

The same principle which governs a court of equity in decreeing specific performance of a contract to purchase land is also applicable to personal chattels, but the court will not make a decree which the defendant can render nugatory.

The difference between a partnership and a joint stock company is that a shareholder cannot dissolve the partnership by retiring, whereas a partner can; and therefore a decree specifically to perform a contract against a shareholder at the suit of the company would not be nugatory.

A defendant who agrees to accept shares in a joint stock company by a form filled up and signed by him, enters into a valid binding contract which this court will enforce, and a plea put in to a bill seeking to enforce such contract, which merely denies the legal liability, overruled with costs.

V. C. S. PAYNE v. MORTIMER. *March* 7, 8.

Voluntary bond—Effect of subsequent assignment to trustees of a settlement in consideration of marriage—Representations by obligor.

A. having entered into a voluntary bond or obligation for the payment by his heirs, executors, or administrators, to the obligees of the bond, of a certain sum, to be divided between his children as therein mentioned, with a gift over to the survivors on the death of any before the sum should become payable; one of his sons afterwards married, and assigned his share and interest under the bond to the trustees of his marriage settlement. Before the marriage the solicitor of the intended wife was furnished by A. with a copy of the bond, who represented it to be a provision for his son; and on the faith of that representation the marriage was contracted.

Held, that the valuable consideration of marriage having been imported into the bond, the trustees of the son's settlement were entitled to claim as against A's estate, not as volunteers, but as specialty creditors.

V. C. K. HENDERSON v. ATKINS. *March* 21, 22.

Demurrer—Trust—Statute of limitations.

The surviving trustee of a money legacy divided amongst a number of objects, makes his will stating that the whole of the trust fund has been applied except a sum of £——(leaving a blank) and declares that if the trust has not been fully performed it shall devolve upon E. A. to whom he devises his real estate for life after a limitation which fails, with divers remainders over. On the question whether this constitutes a charge upon the real estate

Held, that it does not; but that a bill might have been filed against the son of E. A. who was the next tenant for life of the reality, in his character of personal representative of the surviving trustee, in respect of the legacy.

On the further question whether the son of E. A. was an express trustee of the real estate in respect of the legacy

Held, that he was not, and that as more than 20 years had elapsed since any claim had been made, the statute of limitations operated as a bar.

M. R. *March* 16, 17.

TILLETT v. CHARING CROSS BRIDGE COMPANY.

Specific performance—Damages.

The court will not specifically perform an agreement where any essential particular is left to the decision of two persons named in the agreement or their nominee, and where no such decision has been given. In such a case damages will not be given; but *semble*, they might be given where the contract was originally such as the court could perform, but had become incapable of specific performance by reason of the expiration of the powers of an act of parliament necessary for its execution.

V. C. K. MOODIE v. BANNISTER.

Statute of Limitations—Admission of specialty debt by answer and letters.

An admission in the answer of the representative of a debtor that there is a bond debt of the amount claimed remaining unpaid, is sufficient under the 5th sec. of 3 & 4 Wm. 4 ch. 42, to revive such debt, though the statute runs.

The said section refers to any acknowledgment, though such acknowledgment does not amount to a cause of action or promise to pay.

Where an executor does not set up the statute of limitations a residuary legatee is not thereby precluded from doing so.

APPOINTMENTS TO OFFICE, &c.

REGISTRAR.

JAMES WEBSTER, Esq., Registrar, County of Wellington.—(Gazetted 16th July, 1859.)

CORONERS.

THOMAS C. PATRICK, Esq., Associate Coroner, United Counties of Peterboro' and Victoria.

WILLIAM BURKE, Esq., Associate Coroner, County of Hastings.

ROBERT J. FOSTER, Esq., Associate Coroner, County of Prince Edward.

GEORGE ADAM CORNER, Esq., Associate Coroner, United Counties of Frontenac, Lennox and Addington.—(Gazetted, 16th July, 1859.)

NOTARIES PUBLIC.

JAMES S SINCLAIR, of Goderich, Esq., to be a Notary Public.—(Gazetted 23rd July, 1859.)

DAVID ASHE SAMPSON, of Toronto, Esq., Attorney at Law, to be a Notary Public.

CHARLES McMICHAEL of Toronto, Esq., Attorney at Law, to be a Notary Public.

JAMES EDWIN FITCH, of Clifton, Esq., to be a Notary Public.

RICHARD KNILL MARTIN, of Guelph, Esq., to be a Notary Public.—(Gazetted, 30th July, 1859.)

TO CORRESPONDENTS.

JAMES STANTON—JAMES FOLEY—I. A.—J. T.—A. M.—under "Division Courts."

A.—A LAW STUDENT.—under "General Correspondence."