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☑ Additional comments / Commentaires supplémentaires: Continuous pagination.

DIARY FOR APRIL.

1 Sat .... Last day for notice of trial for York and Peel.
2. SUN ... *5th Sunday in Lent.*
3. Mon ... County Court and Surrogate Court Term com.
8. Sat ... County Court and Surrogate Court Term ends.
9. SUN ... *6th Sunday in Lent.*
10. Mon ... York and Peel Spring Assizes.
14. Frid.... *Good Friday.*
16 SUN ... *Easter Day.*
23. SUN ... *Low Sunday. St. George.*
25. Tues... *St. Mark.* [Last day for Comp Ass Rolls.
29. Sat. ... Articles, &c., to be left with Sec of Law Society.
30. SUN. .. *2nd Sunday aft. Easter.* Last day for Non-Res. [to give lists of their lands.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

APRIL, 1865.

LAW BILLS OF LAST SESSION.

The third Session of the Eighth Provincial Parliament closed on the 18th of last month.

The usual number of bills was introduced by members active, printed at the public expense, and then voted upon by members passive. Some of them introduced after much careful consideration and with the honest intention of remedying defects or supplying wants in the present law, and others merely introduced by members ambitiously desiring to appear to be doing something for their country, without for an instant imagining that their productions would go farther than being simply printed and distributed, or perhaps being read a second time and then thrown out.

The bill of fare was, of course, very promising, both as to quality and quantity.

In the Upper House we were promised by the Hon. Mr. Currie:—

An Act to amend the fourth sub-section of the fifth section and to repeal the sixteenth section of the Act for the better assignment of Dower.

An Act to prevent County Judges from practising as Conveyancers. We are sorry to contemplate the possibility of such a provision being necessary.

An Act relative to summary convictions by Magistrates, for the purpose of preventing the failure of justice arising from formal defects in Magistrate's orders and convictions, &c.

In the Lower House:—

An Act for quieting titles to real estate in Upper Canada; it being "expedient," it recites, "to give certainty to the titles to real estate in Upper Canada, and to facilitate the proof thereof, and also to render the dealing with land more simple and economical." This bill, introduced by the Attorney General, is similar to that brought in some time ago by the present Vice Chancellor Mowat. The subject is a very important one, and will require most careful legislation.

An Act to provide for the taxation and recovery of Arbitrators' fees. A Government Bill with the same object in view was introduced by the Attorney General, which proposed to fix a reasonable scale of fees to arbitrators, professional and otherwise, to provide for the taxation of the arbitrator's charges, and for any refusal or delay to make and deliver the award.

An Act to amend the Insolvent Act of 1864. No act requires amendment more than does this, and when done, it should be done effectually. We question, however, whether the bill, as introduced by Mr. Abbott, will effect all that is required. We trust that some of the Upper Canada lawyers in the House who are conversant with this important matter will give their careful attention to it. The attempt to make a general law applicable to two systems of jurisprudence, so dissimilar in their practice and procedure as are those of Upper and Lower Canada, has not been altogether successful.

An Act to alter the law of Dower, and to regulate proceedings in actions for the recovery of dower—a Government Bill, introduced by the Attorney General. The right to dower is gradually dwindling away. It is, in fact, very questionable whether it would not be advisable to do away with it altogether; but, be that as it may, this act proposes that dower shall not be recoverable out of land in a state of nature at the time of alienation by the husband (reserving the right of the doweress to wood for firing and fencing), nor when the demandant has joined in any deed to convey the land or release her dower therein to a purchaser for value, although there might have been some informality in the acknowledgment required by law, &c. It also proposes to alter the practice in dower suits, making the primary

proceedings analagous to actions of ejectment, and declaring that the pleadings and practice shall, so far as possible, be regulated by the Common Law Procedure Act.

But by far the most important Bill introduced was the Registry Act which has been so long promised us. Most of our readers are aware of the prominent features of it. We think we are safe in asserting that a Registry law, to be efficient, must be complete, stringent and thorough. Time has shown that half measures will not answer, and the tende y of legislation is towards a more complete system.

Mr. Scatcherd has, of course, introduced his usual advertisement—his clap-trap bill to reduce law costs, to which we allude in another place. We should feel deeply for *him* if such a piece of absurdity ever became law.

None of these bills, however, have as yet passed. In whatever stage they were when Parliament dissolved, so they remain until next session, which may possibly commence some time in July, though probably not till later.

The law bills that go into the Statute Book this Session are but few, and may be enumerated as follows:—

An Act to amend the Consolidated Statutes of Upper Canada respecting the Court of Chancery as to certain matters of jurisdiction, but principally with reference to proceedings in Lunacy cases. Practitioners in the Court of Chancery will be glad to see this Act as soon as possible. We publish it in another place.

An Act to improve the proceedings in Prohibition and on Writs of Mandamus in Upper Canada.

An Act repealing the eighth section of the Interpleader Act, and substituting a new section authorising interpleader proceedings for the proceeds or value of any lands taken and sold under an execution, &c. We publish the Act in another column.

An Act, introduced by Hon. J. H. Cameron, to amend the Act respecting Attorneys We are enabled, through the kindness of the Treasurer of the Law Society, to give our readers an early copy of this Act. It will, amongst other things, enable the Benchers to use their discretion in certain cases, in which their hands were formerly tied, and many of our friends amongst the students will be glad to see it.

SHERIFFS' POUNDAGE.

The rights of sheriffs to poundage, in cases where a levy has been made, but no money has been actually realised, or, in other words where the money has not actually passed through the hands of the sheriff, but the writ has been satisfied in some other way, even though paid under pressure of the writ, has at length been judicially determined. We ventured an opinion in a former volume * that, under such circumstances as we have mentioned, a sheriff would not be entitled to poundage, and our opinion has proved to be correct. Great doubt, however, has existed on the subject in the minds of the profession, and much confusion and annoyance was the consequence. The sheriffs of course contended for what they considered their rights, and debtors on the other hand, under the advice of the plaintiff's or defendant's attorney as the case might be, strongly objected to pay fees which there appeared a good excuse for not paying.

The subject has recently come up for discussion in the Court of Chancery before His Lordship the Chancellor in *Winters* v. *The Kingston Permanent Building Society*. He decided against the sheriff's claim, as will be seen in the report of the case in another column.

The case of *Buchanan* v. *Frank* brought the same subject before a Court of Common Law. This case was first fully argued in Chambers, and was subsequently heard in the Court of Common Pleas during last term. The judgment of the Court is decisive on the point that no right to poundage arises unless the money has been actually realised by the sheriff, even though the pressure of the writ may have been the cause of the satisfaction of the debt.

Another case, relating to poundage, came before the Court of Queen's Bench last Term (*Thomas* v. *Great Western Railway Company*,) which turned upon the point whether or not a sheriff could maintain an action for his poundage against an execution debtor. The court decided in the negative, saying that the sheriff is in fact only the minister of the execution creditor, and therefore an action for poundage if maintainable at all, is only so against the execution creditor.

* 10 U. C. L. J. 113.

The law as laid down by the Chancellor and Court of Common Pleas will, in many cases, work a great hardship and injustice upon sheriffs, and not only upon them, but upon unfortunate debtors. The natural effect of it will be that sheriffs, instead of dealing leniently with debtors and facilitating any arrangement between the parties which would tend to the settlement or satisfaction of the debt without the loss and annoyance of a forced sale for cash, will proceed to make the money under the execution without delay, and perhaps entirely deprive the debtor of the power of making some settlement which might save him from ruin.

It is probable, therefore, that sheriffs will make some effort to have such a change made in the law, as will place themselves and execution debtors in a better position in the premises.

COUNTY JUDGES—THEIR LABOURS AND THEIR PAY.

In the beginning of the present year, a circular was issued from the Bureau of Agriculture and Statistics, calling upon various public functionaries to answer a number of questions in relation to their offices, which information was wanted for the Blue Book of 1864. The following are the questions:

1st.—Name of office?
2nd.—Name (or names) of incumbent (or incumbents) within the year 1864?
3rd.—Date (or dates) of appointment?
4th.—By whom appointed?
5th.—Amount of annual salary?
6th.—Amount received in fees?
7th.—Remarks (if necessary).
8th.—Number of years of service as public officer in any capacity whatever, mentioning the date of first appointment?

One of these circulars was addressed to a County Judge, who, in answering the questions, gave some information which we hope our legislators will take a note of when they next propose to impose a few more labours upon their "beasts of burthen," as County Judges have been forcibly called.

The answers to the questions, as given by the learned gentleman that we allude to, are as follows:

1st.—The office I hold is Judge of the County Court of the County of ———.

2nd.—My name is ———.

3rd.—The date of my appointment was ———.

4th.—My appointment was by the Provincial Government, under the Great Seal of the Province of Canada, during the administration of —.

5th.—My salary is $2,600.

6th.—I receive a travelling allowance of $200, as Judge of the Division Courts. I receive fees as *ex officio* Judge of the Surrogate Court, which, in 1864, amounted to $70 50. I am paid $4 per diem as *ex officio* selector of jurors, under the U. C. Jurors Act, which, in 1864, amounted to $24.

7th.—*Remarks.*—As Judge of the County Court, I am *ex officio* Judge of the Surrogate Court; Judge of the several Division Courts of the County; Chairman of the Court of General Quarter Sessions of the Peace; a Selector of Jurors, under the Jurors' Act; a Ballotter of Militia, under the General Militia Law; an Auditor of Accounts connected with the administration of justice; with various other *ex officio* offices and duties to perform under several of the Railway Acts, the Extradition Act, the continued Bankruptcy Act, the Common Law Procedure Acts, the Chancery Act, the General Election Law, the Common School Acts, the Absconding Debtors' Act, the Act respecting Arrest and Imprisonment for Debt, the Municipal Acts, the Insolvent Debtors' Act, the Insolvent Act of 1864, the General Road Company's Acts, the Act respecting the Partition of Real Estate, the Act respecting the Registry of Deeds, &c., the Overholding Tenants Act, the Act respecting the Support of Insane Destitute Persons, several Criminal Acts, the Assessment Acts, and various other statutes (in all upwards of twenty), which I cannot enumerate or remember: for any one of which, (excepting for those I have named in my answers numbered 5 and 6 respectively, and the occasional duties under the General Election law), I receive no salary, fees or allowance—not even for stationery, light, fuel or travelling expenses. All these duties are imposed by the different statutes I have referred to; and there are some new duties imposed upon the County Judge almost every session of Parliament, without any remuneration or fees being prescribed therefor. No provision or pension whatever is provided in case of inability from old age, accident, exposure, or decay in the service.

8th.—I have been in this service as a public officer upwards of and during eleven years.

It is scarcely necessary for us to enlarge on this matter. We have already and oftentimes expressed our views upon the impropriety and injustice of heaping one duty after another upon the devoted shoulders of County Judges: broad indeed must they be to

bear them. Such a course is unfair to the Judges; and it is both unfair and unjust to the public, whose servants they are. It is contrary to public policy, and tends to the injury of public business. It never seems to strike our law-makers that, in the ordinary business of life, increased remuneration goes hand-in-hand with increased labours and responsibilities; but, according to the practic now in vogue, whenever anything in the shape of local administration has to be done, County Judges are to be the doers of it, and—get nothing for it. Their duties under the Insolvent Act of 1864, is a sufficient example of this, without going further.

We have long been expecting a change for the better in this respect; and though it is long in coming, come it must; and we shall continue, as heretofore, to condemn a practice which we consider most pernicious.

PUBLIC TASTE IN HUMBUGS.

It has been said that the world is made up of knaves and fools—those that impose upon others, and those that are imposed upon. Mankind loves to be humbugged, and is humbugged accordingly. Every age has had its own peculiar species of vanity in this respect. In the good old times, the credulous public had wizards, witches, magicians, astrologers and such like; in these enlightened days we indulge in spiritualists, table-turners, electro-biologists, prestidigitators, clairvoyants, &c., according as fashion, fancy, or a clever humbug may lead the public taste.

The law does not trouble itself much about harmless nonsense of this kind, but leaves every one to please himself or herself as to the manner in which he or she will be cheated or humbugged. Occasionally, however, these "cunning" men and women, who claim to have familiar spirits at command, *ad lib.*, are too old-fashioned, or not sufficiently wide awake to cheat people after a legal fashion, particularly in some of the more remote parts of the old country, where they are not so civilized in this respect as we are.

In some of these places witchcraft, in its ancient potency, appears to be considered still to exist; and there is a curious instance of this in the case of *The Queen* v. *Maria Giles*, reported in 13 W. R. 327. The prisoner was indicted for obtaining money under false pretences, under the following circumstances: One Henry Fisher deserted his wife, of which the prisoner was made aware. Desiring to turn an honest penny by this incident in the married life of Mr. and Mrs. Fisher, or perhaps moved by the distress of the wife, and possibly duped by her own folly, the prisoner represented to the wife that she could bring her husband back, "over hedges and ditches," by means of some stuff she had in her possession. It was proved that the wife asked the prisoner to tell her a few words by the cards, to fetch her husband back; that the prisoner asked her how much money she had; that, when she said sixpence, the prisoner said that that would not be enough, whereupon the wife gave her another sixpence; that she said her price was high—it was five shillings; that she asked the wife if she had a clock at home, and if she had anything on that she could leave; that the wife said she had on a petticoat, but it was old; that the prisoner said that it was of no use; that the wife said she had two frocks on, and at the request of the prisoner she left one with her; and that after the prisoner had got the money, she said she *could* bring the husband back, having previously said she *would* bring him back. The jury found a verdict of guilty, but the case was reserved for the opinion of the court.

Chief Justice Erle, in giving judgment, said, that a pretence of power, whether physical, moral or supernatural, made with intent to obtain money, is within the mischief intended to be guarded against by this branch of the law, and that the indictment was good. He also considered that there was sufficient evidence to sustain the conviction. "I take the law to be," said he, "that a pretence, within the statute, must be of a present or past fact and that a promissory pretence that I will do something is not sufficient. The question is, was there a pretence of an existing fact, viz., a pretence before and at the time when the money was obtained, that the prisoner had power to bring back the husband? * * * I think, looking at the whole transaction, that she intended to pretend to the wife that at that time she had power to bring her husband back. I think that there was evidence to go to the jury that the prisoner was a fraudulent impostor, and that she ought to be convicted."

How much more circumspectly would the Davenport Brothers or "Professor" Simmons

have managed matters, and escaped the clutches of the law! But, as we before remarked, this old woman is behind the age.

COMMON PLEAS REPORTS.

After a fair trial, we think the profession have every reason to be well satisfied with the new series of these Reports, prepared by Mr. Vankoughnet. For our part, our thanks are due to him for his courtesy to us in various ways, in connection with them.

It is gratifying for us to be able to state that the punctuality which has so long distinguished the Reporter of the Queen's Bench, is now equalled by that of his *confrere* of the Common Pleas.

It is certainly a great satisfaction to know that within a very few days after the judgment in a case is delivered, the matter is in the hands of the printer and is soon afterwards laid before the profession.

Those who have ever taken the trouble to prepare a careful report of a case, will readily understand that reporting is not simply copying manuscript and reading proof, whilst all can and do appreciate reports that are correct in themselves, and are issued with promptitude and regularity.

CHANCERY REPORTS.

We are glad to see that Mr. Grant, the Reporter for the Court of Chancery, has reduced the price of his Reports to four dollars per annum, if paid in advance.

We sincerely hope he will not be a loser by the change, but rather a gainer, in a pecuniary point of view. The profession at all events will appreciate his enterprise, and many who have not hitherto taken these Reports, will avail themselves of the lowness of the price, and become subscribers. This is a move in the right direction, and should be supported.

ACTS OF LAST SESSION.

An Act to amend the Act respecting Attorneys.

Whereas, it is expedient to amend the Act respecting Attorneys in the manner hereinafter mentioned; therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1.—The third subsection of chapter thirty-five, of the Consolidated Statutes for Upper Canada, is hereby repealed, and the following subsection is substituted in lieu thereof:

"Any person who has been duly called to practise at the Bar of Upper Canada or who has been duly called to practise at the Bar of any of Her Majesty's Superior Courts not having merely local jurisdiction in England, Scotland or Ireland, and has been bound by contract in writing to a practising attorney or solicitor in Upper Canada, to serve him as his clerk for three years."

2.—The repeal of the said subsection shall not affect persons coming within its provisions who may be under articles at the time of the passing of this Act.

3.—The first subsection of the third section of the said Statute is hereby repealed, and the following subsection is substituted in lieu thereof:

"He has during the term specified in his contract of service duly served thereunder, and has during the whole of such term been actually employed in the proper practice or business of an attorney or solicitor by the attorney or solicitor to whom he has been bound at the place where such attorney or solicitor has continued to reside during such term (or with his consent) by the professional agent of such attorney or solicitor in Toronto for a part of said term, not exceeding one year."

4.—The second subsection of the third section of the said Statute is hereby repealed, and the following subsection is substituted in lieu thereof:

"2. He has attended the sittings of the Court of Queen's Bench or Common Pleas during at least two of the terms of such courts and has complied with the regulations of the Law Society in that behalf."

5.—The fourth subsection of the third section of the said Statute is hereby repealed, and the following subsection is substituted in lieu thereof:

"4. At least fourteen days next before the first day of the term in which he seeks admission he has left with the Secretary of the Law Society his contract of service, and any assignment thereof and affidavits of the execution of the same respectively, and his own affidavit of due service thereunder, and a certificate of the attorney or solicitor to whom he was bound, or his agent as aforesaid, of such due service, and a certificate of his having attended the sittings of the court or courts during two terms as hereinbefore provided, and (in the case of a person who has been called to the Bar or taken a degree as hereinbefore mentioned) a certificate of his having been so called to the Bar or taken such degree or a duly authenticated certified copy of such certificate."

6.—The fifth section of the said Consolidated Statute is hereby repealed, and the following section is substituted in lieu thereof:

"5.—In case the contract of service, assignment (if any), affidavit and certificate of due service or any of them cannot be produced, then on application to be made to the Law Society by a petition verified by affidavit to be left with the secretary of the society at least fourteen days next before the first day of the term on which the applicant seeks admission, the society on being satisfied of such fact may, in their discretion, dispense with the production of such contract, assignment, affidavits and certificate of due service or any of them, and may, notwithstanding such non production, grant the certificates provided for in the tenth section of this Act."

7.—The Law Society may—upon being satisfied that the applicant for admission has really and *bona fide* served and been actually employed in the manner in the said amended Act and in this Act specified, under articles for the term of five years, or shorter term required by this or the said amended Act, as the case may be, in their discretion and in accordance with rules to be established by them, with the approbation of the visitors—grant the certificates provided for by the tenth section of the said amended Act, although the terms or conditions by this or the said amended Act required, have not been strictly complied with.

8.—The eleventh section of the said statute is hereby repealed, and the following section is substituted in lieu thereof:

"11. Whenever any person has been bound by contract in writing to serve as a clerk to an attorney or solicitor, such contract with the affidavit of execution thereof annexed thereto, shall, within three months next after the execution of the contract, be filed with one of the Clerks of the Crown and Pleas at Toronto, who shall endorse and sign upon such contract and affidavit a memorandum of the day of filing thereof, and every assignment of such contract, together with an affidavit of the execution thereof annexed thereto shall be filed in like manner within the like period of three months next after the execution thereof"

9.—The twelfth section of the said Statute is hereby repealed, and the following section is substituted in lieu thereof:

"12. In case such contract of assignment (as the case may be) with the affidavit of execution annexed thereto be not filed within three months after the date of the contract or assignment, the same may nevertheless be filed with either of the officers before mentioned, but the service of the clerk shall be reckoned only from the date of such filing, unless the Law Society in its discretion shall for special reasons in any particular case otherwise order."

An Act to amend the Consolidated Statute respecting the Court of Chancery.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The Court of Chancery in Upper Canada shall have the same jurisdiction as the Court of Chancery in England has, in regard to leases and sales of settled estates, and in regard to enabling minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or otherwise concur therein.

2.—The Court shall have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possesses.

3.—In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the court may direct, or the Court may grant such other relief as it may deem just.

4. An Order or Decree for Alimony may be registered in any Registry Office in Upper Canada, and such Registration shall, so long as the Order or Decree registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the County or Counties where such Registration is made, and operate thereon for the amount or amounts by such Order or Decree ordered to be paid in the same manner and with the same effect as the Registration of a charge of a life annuity, created by the defendant on his lands would; and such Registration may be effected through a certificate by the Registrar of the Court of such Order or Decree.

5.—Where a commission of lunacy would have been heretofore necessary or proper, the Court in lieu thereof may, with or without the aid of a Jury (which the Court or a Judge thereof may cause to be empanelled as in other cases) hear evidence and enquire into and determine upon the alleged lunacy, provided that the alleged lunatic shall have a right in such cases to demand that the inquiry be submitted to a jury, or the Court may order that the inquiry be had before any Court of Record, and every such inquiry, whether under a commission of lunacy, or before any such Court of Record, shall be confined to the question, whether or not the person who is

the subject of the inquiry, is at the time of such inquiry of unsound mind and incapable of managing himself or his affairs, and the verdict rendered by a Jury shall in every case be returned unto the Court, certified by the Judge before whom the inquiry has been had, and shall be final as to the question on such inquiry unless the same be set aside.

6.—Where any such inquiry is had by the Court, with or without the aid of a Jury or before a Court of Record, no traverse shall be allowed, but the Court, if dissatisfied with the finding of a jury, may, at the instance of any party who would be entitled to traverse an inquisition under commission of lunacy, direct a new trial or new trials from time to time upon application therefor made to the Court within three months from the time the verdict is rendered, or such further time as the Court, under special circumstances, may permit, and subject to such directions and upon such conditions as to the Court may seem proper, and the Court may order any such new trial to be had before the same court in which the verdict was rendered or before any other Court.

7.—On every such inquiry, the alleged lunatic, if he be within the jurisdiction of the Court, shall be produced and shall be examined at such times and in such manner either in open Court or privately, before the Jury shall retire to consult about their verdict, as the presiding Judge may direct, unless the Court ordering such inquiry shall beforehand by order have dispensed with such examination.

8.—Any order by a single Judge in a matter of lunacy, shall be subject to rehearing before the full Court, and any order of the full Court shall be subject to an appeal to the Court of Error and Appeal respectively within the same times and under the same conditions as in other cases in the said Court of Chancery, unless the said Court or a Judge thereof, shall otherwise order.

9.—The Court may order the costs, charges and expenses of and incidental to the presentation of any petition for a commission of lunacy or any inquiry, inquisition, issue, traverse, or other proceeding in lunacy, to be paid either by the party or parties presenting such petition or prosecuting the same or such inquiry or other proceeding in lunacy, or by the party or parties opposing the same, or out of the estate of the alleged lunatic, or partly in one way and partly in another.

10.—The seventy-third section of the said Act is amended by inserting therein immediately after the words "*sui juris*" the words "*or non compotes mentis.*"

11.—The Court shall have the same powers of regulating the practice in matters of lunacy and in all matters under this Act as in other cases within the jurisdiction of the Court.

12.—Where a defendant or respondent in any suit or matter is absent from the Province or cannot be found therein to be served, the Court may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant, whose residence is unknown, or in any other manner that may be provided or ordered, if the Court shall, under the circumstances of the case, deem such mode of proceeding conducive to the ends of justice.

An Act to amend and extend the provisions of chapter thirty of the Consolidated Statutes for Upper Canada, intituled: "An Act respecting Interpleading."

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The eighth section of chapter thirty of the Consolidated Statutes for Upper Canada is hereby repealed.

2.—The following section is substituted for and shall be read in lieu of the said eighth section hereby repealed:

"In case any claim be made to any goods or chattels, or to any interest in any goods or chattels, taken or intended to be taken under an attachment against an absconding debtor, or under any proceedings under 'The Insolvent Act of 1864,' or in execution under any process issued by or under the authority of any of the said Courts, or to the proceeds or value thereof, or to the proceeds or value of any lan s or tenements taken and sold under any such process, by any person, not being the person against whom such attachment or proceeding or execution issued, or by any landlord for rent, or by any second or subsequent judgment or execution creditor claiming priority over any previous judgment or execution process or proceeding, then and in every such case, upon the application of the Sheriff (or other officer) to whom the writ is directed, made to the Court from which such writ or proceeding issued, or to any Judge having jurisdiction in the case, and either before or after the return of such process, or before or after any action has been brought against such Sheriff or other officer, such Court or Judge may, by rule or order, call before such Court or Judge as well the party who issued such process as the party making such claim, and may thereupon exercise for the adjustment of such claim and the relief and protection of the Sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and in case the claimant shall abandon his claim may order him to pay the Sheriff's costs of the application and may further require either or both of the parties to give security for the costs of the Sheriff or other officer, relating to such proceedings, and may order the money which forms the subject of the claim to be paid into Court by the Sheriff to await the result of the interpleader issue, and may make

such other rules and orders as appear just according to the circumstances of the case."

3.—The repeal of the said eighth section of the said Act shall not affect any cause, matter or proceeding now pending in any Court of Law or Equity in Upper Canada, but the same may be continued under the said "Act respecting Interpleading" as amended by this Act.

4.—This Act shall apply to Upper Canada only.

SELECTIONS.

LAW REPORTING—No. 2.

(*Continued from* 10 U. C. L. J., p. 317.)

In a former number we stated that the reports of those reporters whom we cited as examples of good reporting usually had three divisions. 1st. The case or statement of facts. 2nd. Argument of counsel on these facts. 3d. The *opinion* of the Court on what preceded; each of the parts being separate and *pure;* the statement or "case," pure fact; the argument of counsel, argument merely; the opinion, opinion simply, with the grounds assigned therefor.

Now wherein do the American reports, especially the reports of later times continually differ from these models? They differ from them in this respect chiefly, to wit: that the "statement" does not present facts at all, and that the opinions do present them largely. And the order of results has been, I think, this:

1st. That the arguments of counsel were unintelligible.

2d. That they have been suppressed.

3d. That "opinion" has become the whole "report;" a report generally not a good one and often positively bad: its value as "report" diminishing in exact ratio of its perfection as "opinion."

4th. That the law, so far as it is *a science of precedents* is becoming radically disturbed, and that instead of resting,—like that system of our English ancestors adopted by our American fathers of 1776 as their own—on known adjudications—adjudications which were respected ostensibly because they were solemn judgments—we are in danger of drifting into another system—a system more like that of Continental Europe—where jurisprudence shall be without soundings or chart, and without even a compass other than what this body of men or that may think good on principles of general equity; a system bad enough even when integrity characterizes its administrators; but woful if integrity should cease ever to be their portion.

This last proposition is a long one, and perhaps alarming. I think I shall show it to be true, if my reader will follow me through.

[I do not here think it worth while to refer at large to another class of reports—characterized by exactly opposite qualities, so far as respects the reporter's work—a class represented in perfection by those of Pennsylvania some years ago. These have a statement with a witness: for the reporters used to cast in as their "case," the paper book complete: testimony as taken at large upon the judge's notes; deeds, wills, &c., *in extenso*, with seals, signatures, acknowledgments, and all; the whole record in short as it came up. This disorderly congeries being nearly as unintelligible as no statement at all, the result was much as though none had been made in fact; as we may still include such reports within the class I treat of; that is to say the class where the reporter does *not* state the case and leaves the facts to be gathered from the opinion only.]

The following presents the form of report which I speak of as now common in several States of the Union, and is one of the better illustrations of what I deem a bad form: I do not mean to speak of the form as *universally* prevalent in America. It does not prevail in Massachusetts, nor in Rhode Island, nor in Connecticut, nor in Vermont, nor in New Hampshire, nor much, I think in New York:—I mean does not prevail in their Supreme Court Reports. Nor did it prevail in Virginia so long as she gave us reports at all. There are probably other States where it may not have place. At the same time it is a common form in our country, especially in the West, though it is not confined at all to the courts of that great and increasing part of our nation.(a) To revert however to our report. Here it is:

Smith v. Jones.

Executors to whom a power is given by will to sell land but who have all renounced the executorship, yet have power to execute a valid deed of the land; and this although they have not only renounced, but have agreed and assisted in the appointment of other persons as administrators *cum testamento annexo*, who are still alive.

This was a writ of error to Jackson county, the suit below having been ejectment to recover

(a) The reader seeking illustrations of the style, will find them in such cases as these. *Thomas* v. *Bowman*, 30 Illinois, 83; *Thompson* v. *Board of Trustees*, id. 99; *Huereth* v. *Franklin Mill Co.* id. 151; *People* v. *Auditor*, id. 434, or in *Spining* v *Blackburne*, 13, Ohio State, 131; *Dudley* v. *Geauga Iron Works*, id 169; *Plun. b* v *Robinson*, id. 299; *Port Clinton Co.* v. *Cleveland Co.* id. 545; *Ish* v. *Crane*, id. 575, or in *Therrard* v. *Carlisle*, 1 Patton & Heath, 13; or in *Stewart* v. *Rogers*, 1 Maryland, 99; *Haight* v. *Burr*, id. 131; *Weems* v. *Weems*, id. 345; *Stickney* v. *Gyaff*, id. 491; or in *Way* v. *Lamb*, 15 Iowa, 81; *Stuck* v. *Reese*, ip. 122; *Hunt* v. *Daniels*, id. 146; *Harper* v. *Drake*, id. 157; *Hershee & Huber* v. *Hershee*, id 185; *Humphrey* v. *Darlington*, id. 207; or in *Spear* v. *Whitfield*, 2 Stockton's Chancery, 108; *Clapp* v. *Ely*, id 179, *Holmes* v *Stout*, 419, &c.

Some of the reports begin without the *least statement* whatever of the case, thus:

"*Points and authorities of appellant.*

See in illustration of this style, *Sowers* v. *Duke*, 8 Minnesota, 23, *Rael* v. *Baasen*, 26, *Finney* v. *Gallendar*, 41; *Rutherford* v. *Newman*, 47; and in fact *per totum librum* In Stockton's Chancery Reports and in those of Beasely (both of New Jersey) there is frequently no statement at all; the reporters acting as mere *editors* of the opinions. This is particularly true of Mr. Beasely's.

I particularize the different volumes above mentioned, because they come first to my hand. But they represent a large class of reports throughout the country.

a tract of land *The facts are stated in the opinion of the Court.* [They would *properly* appear here.]

Green for the plaintiff in error. We agree, that executors, vested *nominatim*, with power to sell, may renounce the executorship, and yet execute the trust of *selling the estate.* But the case is different where the power is given to them *as executors*, which is the case in this will. Here, it will be observed, that not only had the executors renounced, but by their instance and act, three other persons had been appointed administrators with the will annexed. Their renunciation had thus been accepted in the most complete and effective way; they had renounced: their renunciation had been accepted: the place had been vacated, and being vacant, was now filled by new occupants. Admitting that a single renunciation filled in the office or delivered to the register, would be insufficient to destroy the validity of a deed made by the original executors, *no one having as yet displaced them*, the case is widely different when other persons are *in* the place. Then surely *they* must be out of it. Bacon, in his Abridgment,* says: "If an executor refuse before the ordinary, the ordinary may grant administration *cum testamento* to another person, and he can never be permitted to prove the will." In *Yates* v. *Crompton*,† an administrator *d. b. n.* filled a bill against the heir to sell, the executor having renounced. It was objected that the executor ought to have been made a party. But the sale *was decreed.*

Brown, contra: By well settled principles of common law, the executors had just as full power to exercise their power of sale after their renunciation as before it. The renunciation to the register or ordinary relates simply to personality; the only sort of estate over which either have any power whatever. The power to sell is given by the *will*, and might be exercised without any probate of it at all; *Yates* v *Crompton*, cited on the other side, is in our favor. The objection was that "the executors ought to have been made parties, for notwithstanding they had renounced, yet the power of sale continued in them." The objection was overruled, "there being *only* a power and no ESTATE divided." So too what Bacon says is true only by the civil law, but *whether or not, it* has no application here, for the executor don't ask to resume. Swinburne on Wills ‡ says, "If a man devises that A. B. and C. D., whom he makes his executors, shall sell his lands, and they refuse to be his executors, yet nevertheless they may sell because they are *named* by their proper names." For this he cites Fulbecke, an old but good writer. Here the power was to his executors hereafter to be *named*, and three particular persons afterwards are "named." Indeed the authorities go much further. Viner§ says, one wills that his executors may alien his land *without* naming them. The executors named refused to be executors; yet they may alien. This law is not only well settled now, but it has been settled from a very ancient date. It was expressly so decided by all the judges of England in Trinity Term, in the 16th year of Henry the VI., and is reported in the Year Book of that reign. The judges who gave opinions were Fineux, Chief Justice, and Reid, Tremaille, and Frowick, Justices.

This case is thus translated by Mr. Sugden in his work on Powers, *Appendix.*

"It was lately adjudged in the Exchequer Chamber, by all the Justices of England, that if a man makes a will of lands, that his executors shall sell the land and alien, &c., if the executor renounce administration and to be executors, there neither the *administrators nor the ordinary* can sell or alien, (*quod nota*); which was allowed by Rede and Tremaille for good law.

"And if a man makes his will that his executors shall alien his land without naming their proper names, if they refuse the administration and to be executors, yet they may alien the land, which was admitted by Fineux, C. J., and Tremaille, J., for *clear* law; Rede, J., not denying it.

"And if a man makes his will that his land which his *feoffees* have, shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, per Rede, Tremaille and Frowick, J. J., Fineux, C. J., said nothing to this this day, but the day before he in a manner affirmed this. Conisby, J., said that the feoffees shall alien; but this [fact] was denied, for executors have much greater confidence in them than feoffees have."

Here is our point, fully, clearly and precisely stated, between three and four hundred years ago, as being "clear law" in that day. It was reported at once; printed soon after with the invention of printing, and has stood and been cited from that time to this, as an authoritative decision. Sugden, for example, says:‖ "It remains only to be observed that where the power is given to executors they may exercise it, although they may renounce probate of the will." And Preston:¶ "Athough executors renounce the probate of the will as to personal estate; they are not by such renounciation disqualified to execute an authority of sale over real estate." The American author, Mr. Hood,* says: "At common law, executors who have formally renounced the administration of a will, may nevertheless execute a power given by will to sell lands."

The opinion of the court was delivered by TOMPKINS, C. J.

Courtney, who had originally owned the land, made his last will and testament on the 11th August, 1835, by which he directed and empowered his executors thereinafter to be named, to sell, convey and make over any part of his real estate, and he appointed two friends of his, Campbell and Roberts, his executors. He died in 1840. The executors, by instrument of renunciation filled with the surrogate and in his office, declined the executorship, and at their suggestion and desire two other persons, White and Green, were appointed administrators, with the will annexed. In 1850, however, the original

* Vol. 2, p. 405, Tit. Executors and Administrators, 9.

† 2 Peere Williams, 308.

‡ Vol. 2 p. 731, ed. of 1803.

§ Vol. 8 p. 466, pl. 9.

‖ Powers, vol. 1, p. 139. (15 and 16 Law Library.)

¶ Abstracts of Title, vol. 2. p. 262.

* Trest. on Executors, p 243.

executors, Campbell and Roberts sold the land, making a deed in which, reciting the will and their own appointment as executors, they granted and conveyed it to the defendant, Jones. The question was whether after this renunciation they had power to sell the estate: a point which the court below ruled affirmatively and which same point was now here on error.

The question raised in this case is not without some difficulty, and it is perhaps remarkable that no American decision has been discovered in which the point has been brought up. It is however a general rule that the probate has to do with the personalty only; for it is over the personalty only that the surrogate's power extends. A renunciation of the executorship filed with the surrogate is at most but a renunciation of the executorship of the personalty. It may apply to matters within his jurisdiction, but not to matters outside of it. Hence the executors in this case, although they renounced the administration, might, without inconsistency, execute the trust respecting the land. Independently of Viner and Swinburne,† we have the case which the research of counsel has furnished us from the Year Book of Henry VII. I have examined the Year Book, and the citation is correct. Upon the strength of these authorities, as well as general principles the court is of opinion that the executors had power to sell, after they had renounced the administration of the personal estate.

Judgment affirmed.

Now here, it is obvious is a different disposition of things from that which I have spoken of as common in Burrow, Durnford & East, and other good reporters. The reporter states no facts. The judge states them all. What is the result? The first result is that the arguments of counsel, apparently characterized by learning are—as given in the place where they *are* given—unintelligible simply. They are not upon a preceding or presupposed case, but are upon a case to be stated and to be understood hereafter; a case in the *paulo-post-futurum*. The arguments are therefore largely or wholly "in the air." To understand, the reader must, first of all, *skip* them: and passing to the opinion get from *it* the facts. Well—he passes to the opinion and reads it until he sees that he has finished reading the *facts* which it presents. Being now, for the first time, in a state to understand the argument previously skipped, he turns back to read *it*. Having read it, he turns forward again, and skipping the facts which he has read, passes over to the spot where the opinion proper begins.

Any man having a good sense of order would say, I should suppose, that it would have been better if the *reporter* had put things in his book, into that shape, which in spite of the book, the reader is compelled to put them in his mind. We should thus have had facts or "case" first; argument of counsel next, and opinion separate from case and after arguments—in other words, opinion proper—last: and the reader would have read in a sequent order without this operation of the "Forward and back," "Forward, cross over," that exactly which he reads only after the whole movement is performed. * * * *

The difference is that in the form we suggest the "case" is put before the argument, and as the entire *statement*, while in the one copied it appears after the argument and as a part of the *opinion*. Can any man doubt which is the right form?

But the report as given, though in a bad form, is not a report calculated to reveal the full defects of the school of reporting to which it belongs. The suit involved but a single question. The facts were few and simple. They are stated by the judge in the opening of his opinion; and they are stated fully, in a clear, terse, consecutive form; and a form strictly narrative. The printer's aid comes in to help the effort; and a new paragraph shows where the "case" has ended and where the opinion proper now begins. In such an instance the style of the report imposes no great inconvenience on the reader. He has only to skip arguments and go forward, read facts and go backward, read arguments and go forward again, skip facts and read opinion pure—and be done. We shall give a more complicated form of the case in a future number, where the defects of the bad style of which we speak will be more patent, and we shall also afterwards pull it into proper shape as we have done the one given in this number.

But the difficulty is that in many cases while the reporter speaks the truth when he says that "facts are stated in the opinion of the court," he speaks it to a common intent only; whereas in referring his readers any where for "the case"—that case which is the foundation of everything—he should speak it to a certain intent in every particular. I have looked at many cases in American reports, in which the reporter thus refers his readers. And while indeed we find facts, we find frequently that they are either

1. Stated imperfectly, that is to say, not stated fully, *or*

2. Not stated consecutively, and all in one place, to wit, the beginning of the opinion, *or*

3. Not stated in the narrative as distinguished from the argumentative form.

In other words, facts are stated to that extent, and in that way, and with that form in which a judge may to some degree properly state them; that is to say, they are stated by way of inducement and to show the grounds and reasons of the opinion, but are not stated to that extent and in that way and with that form in which a reporter should state them when he seeks to put his case before his reader, as the base of argument, opinion and sentence alike. The statement indeed is neither *totus, teres, nesque rotundus*. — *Legal Intelligencer.*

† See Swinburne, 408; 8 Viner, 466, P. E.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* Chris. Robinson Esq., Q.C., *Reporter to the Court.*)

Edgar v. Newell.

Slander—Evidence of character—Justification—New trial.

In an action for slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification, *Held* that evidence of the plaintiff's general bad character for honesty was properly rejected

Semble, per *Hagarty J.* that it would have been inadmissible even with the justification; but that, if not guilty only be pleaded, defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that before uttering the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged.

The evidence in support of one of the pleas of justification was very strong, sufficient to have warranted a conviction, if the plaintiff had been on his trial. The charge however was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $150 damages, the court refused to interfere.

[Q. B., H. T., 1865.]

Slander, the words charged being "Edgar is a thief, and I can prove it." *Pleas*, 1. Not guilty. 2 and 3, Justification. The second plea alleged that the plaintiff before the said time when, &c., to wit on, &c., feloniously did steal, take, and carry away certain goods and chattels, to wit, one over-coat, two horse-blankets, and one bag containing empty bags, of one William Snider. The third plea charged the plaintiff with stealing a barrel of salt of one J. P. O'Higgins.

The case was tried at Stratford, before *Draper* C. J. The words were proved, and defendant gave very strong evidence to shew that the theft charged in the second plea had been committed by the plaintiff about three years previously. He attempted to make out the charge alleged in the third plea as well, but the proof offered was insufficient, and was not pressed before the jury. He also tendered evidence that the plaintiff's character for honesty and his general reputation in that respect was bad, which the learned Chief Justice rejected, on the ground that there was a plea of justification on the record

The jury found for the plaintiff, $150 damages.

Christopher Robinson, Q.C., obtained a rule *nisi* for a new trial, on the ground that the justification pleaded in the second plea was clearly proved; or on the ground that the learned Chief Justice improperly rejected evidence tendered by the defendant of the plaintiff's general reputation for dishonesty, and bad character as regards that particular trait or quality.

Robert Smith shewed cause. He contended that the plaintiff having been in effect placed upon his trial on a charge of felony, it would be contrary to the established practice in such cases to interfere with the finding of the jury in his favour, even though it might seem to be against the weight of evidence—*Symons* v. *Blake*, 2 C. M. & R. 416: that the defendant having failed to prove his second plea of justification, the verdict on that issue was clearly right, and a new trial, which would disturb it, should not be granted—*Baxter* v. *Nurse*, 6 M. & G. 935: that the jury might have been properly influenced in their view of the whole case by the fact of such plea having been pleaded without sufficient ground; and that the evidence as to character was properly rejected—*Jones* v. *Stevens*, 11 Price 235; *Thompson* v. *Nye*, 16 Q. B. 175.

Robinson, Q.C., in support of the rule, cited, as to the motion for new trial on the evidence, *Mellin* v. *Taylor*, 3 Bing. N. C. 109; *Regina* v. *Johnson*, 1 L. T. N. S. 513, Q. B.; *Peters* v. *Wallace*, 5 U. C. C. P. 238; *Swan* v. *Cleland*, 13 U. C. Q. B. 335: As to the admissibility of the evidence of character, *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Knobell* v. *Fuller*, Peake Add. Cas. 139; *Earl of Leicester* v. *Walter*, 2. Camp. 251; *Inman* v. *Foster*, 8 Wend. 602; *Bell* v. *Parke*, 11 Ir. C. L. Rep. 424; ——— v. *Moor*, 1 M. & S. 284; *Bennett* v. *Hyde*, 6 Conn. 24; *Bracegirdle* v. *Bailey*, 1. F. & F. 535; *Myers* v. *Currie*, 22 U. C. Q. B. 470; *Jones* v. *Stevens*, 11 Price, 235; *Foot* v. *Tracy*, 1 Johns. 46; *Wyatt* v. *Gore*, Holt N. P. C. 299; *Newsam* v. *Carr*, 2 Stark. N. P. C. 70; *Douglass* v. *Tousey*, 2 Wend. 352; *Wolcott* v. *Hall*, 6 Mass. 514; *Ross* v. *Lapham*, 14 Mass. 275; *Sawyer* v. *Eifert*, 2 Nott. & McCord 511; *Root* v. *King*, 7 Cowen 613; Taylor on Evidence, 4th Ed., 355-6; Rose. N. P. 576; Add. on Torts 730. As to the effect of a justification being pleaded, Starkie Ev., 3rd Ed., vol ii, 806 note *k*, 641-2; *Cornwall* v. *Richardson*, R. & M. 305; *Snowden* v. *Smith*, 1 M. & S. 286, note *a*; *Root* v. *King*, 7 Cowen, 613.

Hagarty, J., delivered the judgment of the court.

As to the merits. This is one of the many cases in which the court is asked to set aside a verdict of which it cannot approve on a calm consideration of the evidence. The testimony certainly was very strong. It would have sufficed most likely to convict the plaintiff, had he ever been put upon his trial for the offence; and had any right, estate or franchise, or large sum of money been at stake, we think it would be only right to submit the case to another jury. But we hardly see our way to interfere in a case like the present. The charge was made long after the alleged offence had been committed. No person had thought proper to prosecute the plaintiff for it, and the defendant, having no especial interest in the matter, charges the plaintiff generally with being a thief. He does this at his peril, and when sued for damages tries to prove the charge, and fails to convince the jury.

It does not follow, because a man has once committed an offence, that a jury will always regard with favour a person who persists in casting it up against him at any period, however remote. A person may make the charge relying on his being able to prove it to the satisfaction of a jury. We think he must always run this risk. But we do not think a court is bound to set aside, as a matter of right, a verdict rendered against the weight of evidence, but may leave the defendant to the consequence of his own rashness. It is not usual to put a plaintiff, deliberately charged with fraud or felony in a civil action, twice, as it were, upon his trial; at all events, an action for slander is not one in which the ordinary wholesome rule should be set aside.

We think we cannot properly interfere on the merits.

The rejection of the evidence tendered as to character opens a wide field for discussion.

1. Should it be permitted under any circumstances?

2. If admissible in mitigation of damages, can it be received after evidence offered in bar on a plea of justification?

It seems to me that the doubt suggested as to this evidence, is felt more by the text writers than the judges.

Mr. Taylor, in his last edition, page 355, after giving the different views, says, "Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favour of the admissibility of the evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea."

He cites a great number of cases. I have examined them. The American authorities certainly support his view. I doubt if the English cases go so far. Most of the cases are *nisi prius* decisions. I am not aware of any express decision of the court in Banc except *Jones* v. *Stevens*, 11 Price, 235, which is directly against its reception.

In *Thompson* v. *Nye*, 16 Q. B. 175, the question rejected was whether the witness had not heard from other persons that the plaintiff was addicted to certain practices, the subject of the slander. The court refused to decide the general point, but held the question rightly rejected, as it should have been confined to rumours existing before the utterance of the slander. Patterson and Wightman, J. J., say they give no opinion on the general question. Coleridge, J., says, "I will only go so far as to say, that I do not wish it to be supposed that I am in favor of allowing the question to be put even in its most limited form. My present impression is against doing so." Erle, J., says, "It is not necessary to give any opinion as to the admissibility of the question in a qualified form. Many learned judges have admitted it, but they all acted on a decision at *Nisi Prius* (*Earl of Leicester* v. *Walter*), which it was not worth the plaintiff's while to question. But in *Jones* v. *Stevens* the point was brought before the full Court of Exchequer; and there the question was held inadmissible in its general form."

No doubt, *Earl of Leicester* v. *Walter*, 2 Camp. 251, is the chief authority. It was a decision of Sir James Mansfield, and as the plaintiff had a verdict he did not of course, move. In deciding to admit the evidence, Sir James says: "In point of reasoning, I never could answer to my own satisfaction the argument urged by my brother Best" (the objecting counsel) "at the same time, as it seems to have been decided in several cases that, if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always possessed a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted.

In a case in Ireland, in 1860, *Bell* v. *Parke* (11 Ir. C. L. Rep. 326,) Pigot, C. B., is decidedly of opinion, "that the great preponderance of authority is in favor of reception of the evidence." He cites the passage from Starkie on Slander, (vol ii., page 88,) relied on by Mr. Robinson in his very able and exhaustive argument on the authorities. Fitzgerald, B., treats it as an unsettled question, Hughes, B. concurring with him. In the last edition of Starkie on Evidence, the point is not touched upon.

In *Bracegirdle* v. *Bailey*, 1 F. & F. 536,—in slander, and not guilty alone pleaded—Byles, J., after consulting Willes, J., held, "that no evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either on cross-examination or examination in chief, and that he could not ask any thing to prove the libel true."

In this court, in *Myers* v. *Currie*, 22 U. C. R. 470, (slander imputing theft), a motion was made for a new trial, because Richards, C. J., rejected evidence of the plaintiff's general bad character previous to the speaking of the words. After consulting the judges of the Common Pleas, the judges of this court refused a rule, for the reasons given in the report.

In this state of the law we think we should discharge the rule for rejection of evidence, and leave the defendant, if he think proper, to endeavour to have the law finally settled by a court of Error.

If it be necessary to decide the point, I should say that I think the fact of defendant pleading specifically the truth of his words and endeavouring to prove them, as a matter of reason, if not of clear authority, should operate to the exclusion of evidence of rumours or of general bad character.

Where a defendant pleads only not guilty, and endeavours to shew that he was not actuated by any malice or actual desire to injure defendant, he stands, in my judgment, in a very different position from one who deliberately places a justification on the record. This at once takes away from his conduct that palliation which he can naturally urge on not guilty.

I am inclined to hold, notwithstanding the doubts expressed in *Thompson* v. *Nye*, that with only not guilty pleaded, a defendant might be allowed to shew, solely in mitigation of damages and to rebut the presumption of malice, that prior to his utterance of a specific charge, it was a common talk or rumour in the neighbourhood that the plaintiff had been generally spoken of as having done the thing charged.

This would tend to shew that defendant may have acted not from malice, but rather from heedlessness. If, on the other hand, he put a justification on record, he deliberately charges the plaintiff with the crime as a fact, and I think he should not be permitted to resort to what could only be a palliation and indication of the absence of malice. The justification suggests a wholly different idea of defendant's conduct, and is always held to aggravate it.

General evidence of the plaintiff's bad character for honesty, &c., seems to me to open a far wider

field of enquiry, and should not, I think, be received with or without a justification pleaded. A plaintiff, as has been often said, cannot be expected to be prepared to vindicate every act of his life. The existence of a common fame and rumours that he had done a particular act is a fact, not a mere opinion, and when shewn to be current prior to defendant's utterance of the slander, and wholly unconnected therewith, might, I think, be receivable strictly in mitigation of damages.

The state of the authorities on both points is most unsatisfactory.

We think the rule for a new trial should be discharged.

Rule discharged.

Campbell v. Patrick Delihanty and William Delihanty, John Toomy, and Margaret his Wife.

Alias Fi. Fa. lands—When sale may take place under.

Held, conforming to previous decisions in this court—*Nickall* v. *Crawford*, Tay. Rep. 376, and *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 500—that where *fi. fa.* against lands had been in the sheriff's hands for twelve months, and returned, nothing having been done upon it, the sheriff might sell under an alias writ issued thereon without waiting for a year from its receipt.

[Q. B., H. T., 1865.]

Ejectment for the east half of the east half of lot one, in the second concession of Chatham. Defence by Patrick Delihanty for the whole.

The claimant gave notice of title under a sheriff's deed from John Mercer, Esquire, sheriff of the county of Kent, to the plaintiff, of all the interest of Patrick Delihanty in the premises The defendant claimed title as yearly tenant of John Toomy and Margaret Toomy, who were grantees of William Delihanty of the same.

The case was tried at Chatham, in October, 1864, before Hagarty, J.

The plaintiff put in an exemplification of a judgment recovered in the County Court of York and Peel, in a cause of John Cameron against Patrick Delihanty, entered on the 10th of March, 1857, upon promises, for £51 7s. 10d. damages, and £3 0s. 7d. costs; also of a *fi. fa.* against goods in the same cause, issued on the 7th of September, 1860, returned £25 made, and *nulla bona* for the residue; also of a *fi. fa.* for the residue against lands, tested 13th February, 1861.

He also put in an *alias fi. fa* for the residue against lands and tenements, tested 15th February, 1862, and received by the sheriff on the 20th of the same month. All these writs of execution were directed to the sheriff of Kent.

It was admitted that a patent granting this land was issued in 1828: that the foregoing judgment was duly recovered, and a certificate thereof was registered on the 26th of March, 1857, and was re-registered.

By deed dated 5th July, 1861, John Mercer, Esquire, sheriff of Kent (under the said *alias fi. fa.* for residue), in consideration of $198.96 paid by the plaintiff, conveyed to him the premises in question, and all the estate, right, title and interest which the now defendant Patrick Delihanty had therein on the 20th of February, 1860—*habendum* to the plaintiff in fee.

The sheriff proved the execution of this deed: that he received the first execution against lands on the 15th of February, 1861, and the second on the 20th of February, 1862. He returned the first of these writs, nothing having been done upon it, and advertised the lands immediately on the receipt of the second writ, and sold on the 5th of July, 1862.

On the defence, it was objected that the writ, on which the lands were sold, was not a year in the sheriff's hands, and on this objection the plaintiff was non-suited, with leave to move to enter a verdict for him if he was entitled to recover.

In Michaelmas Term *Hector Cameron* obtained a rule on the leave reserved, citing *Nickall* v. *Crawford*, Tay. Rep. 376; *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495.

In this term *Douglas* shewed cause. He relied on the statute 43 Geo. III., ch. 1, re-enacted in the Consol. Stat. of U. C., ch. 22, section 252, "nor shall the sheriff expose the lands to sale within less than twelve months from the day on which the writ is delivered to him."

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

If the question were *res integra*, we should have probably hesitated a good deal before we arrived at the conclusion that where a writ of *fi. fa.* has been placed in the sheriff's hands and remained there for twelve months, during which nothing was done upon it, and then it was returned, "no lands," and an alias writ thereupon issued, that the sheriff could sell lands under the last writ within twelve months from the day on which he received. But such has, within my own experience, been the practice for upwards of thirty years, and on reference to the Master, to search into similar proceedings in his office, he has traced it for nearly forty years back, and probably it is older. In *Nickall* v. *Crawford* Tay. Rep. 376, it was so adjudged, and that case is referred to as authority by Burns, J., in *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495. So many titles would probably be shaken by a contrary decision, that we deem it better to uphold the course so long followed, leaving to a higher authority either to confirm or change it.

Rule absolute.

CHAMBERS.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law*.)

Watson v. Yorston.

Rescinding order for security for costs—Grounds therefor—Practice.

Where after an order made for a stay of proceedings till security for costs was given, plaintiff came within the jurisdiction of the court, made affidavit "that he is now residing in Toronto, that when he left Canada he intended to return, his absence from Canada being merely temporary, and that he now intends to remain in Toronto until after judgment has been obtained in this suit by or against him," and undertook not to leave the jurisdiction of the court without leave of the court or a judge or of the defendant, until after the expiration of a reasonable time after the period within which the defendant might properly enter judgment against him, on order was made discharging the order for security for costs.

Quære—As to relief in such a case if security for costs were actually given and not merely an order staying proceedings till security given.

[Chambers, December 27, 1864.]

Plaintiff obtained a summons calling on the defendant to shew cause why the order made in this cause on the 16th December, 1864, ordering the plaintiff to give security for costs herein, should not be discharged.

The grounds on which this application was made are those stated in the affidavits filed, which were to the following effect:—The plaintiff himself swore, that before the commencement of this suit he resided for some time in Upper Canada; that about the time of the commencement of this suit he went to New York, and resided there until the 18th December, 1864; that he has now returned to Canada and is now residing in the City of Toronto; that he never intended permanently to reside in New York, but when he left Canada he intended to return, his absence from Canada being nearly temporary; that he now intends to remain in Toronto for some time, and at all events until after the trial and decision of this cause; that the business in which he is engaged may occasion a temporary absence from the Province—since he first came to reside here he had intended to return hither, and whenever for the future such occasional absence may occur he intends to return here; that he intends his residence shall be within this Province, except with such occasional absence, at least until after judgment has been obtained in this suit by him or against him; that he is a natural born subject of Her Majesty, and has never taken the oath of allegiance to the United States Government. The plaintiff's son swore, that about two months ago and for a long time before that, his father and his family resided in Toronto; that about two months ago his father and himself left Canada and went to the United States, where they have since been living, and remained there to the present time, and the remaining parts of his affidavit were to the same effect as the plaintiff's affidavit.

The defendant filed the affidavit of John Hirst, who swore he knew the plaintiff, that he had been for some time past in New York, and the plaintiff and his family have been residing there for a short time; that about two months ago the plaintiff's wife and family, except one son, left New York, and as deponent was informed by those who saw them set sail and as he believes, went to England where he believes the plaintiff's family now is, except the son aforesaid; that the plaintiff is residing with the said son at the New-bigging House in Toronto; that deponent is informed and believes the plaintiff intends almost immediately to leave for England; that the plaintiff's wife told deponent she was going to England; and that when the plaintiff left Toronto he gave up the house in which he was residing, and disposed of his furniture.

Hodgins, for the plaintiff, referred to *Hawkins* v. *Patterson*, 9 U. C. L. J. 324; *Durell* v. *Matheson*, 3 Moo. 33; 8 Taunt 711; *Wells* v. *Barton*, 2 Dowl. P. C. 160; *Kemble* v. *Mills*, 1 M. & G. 565; 8 Dowl. P. C. 836; *Nelson* v. *Ogle*, 2 Taunt. 253; *Blakeney* v. *Dufaur*, 2 DeG. M. & G. 771; 17 Jur. 98; *Crispin* v. *Doglione*, Sw. & Tr. 522; 1 L. T. Rep. N. S. 446.

McMichael, for the defendant, cited *Badnall* v. *Haley*, 7 Dowl. P. C. 19; 4 M. & W. 535; *Gill* v. *Hodgson*, 1 U. C. Pr. R. 381; *Oliva* v. *Johnson*, 5 B. & Al. 208.

Adam Wilson, J.—The general rule as to requiring security for costs is to direct security to be given if the plaintiff reside *permanently* abroad or out of the jurisdiction of the court.

There are various exceptions in favour of those in the military or naval service, and of those who have sufficient real estate within the jurisdiction of the court, but these do not apply to the plaintiff.

There are very many decisions on this subject and not all very accordant, but the later ones seem to be more in agreement with each other than the earlier ones.

In *Dowling* v. *Harman*, 6 M. & W. 131, a foreigner who usually resided abroad, but who was in England at the time when the application for security for costs was made, and who swore he intended to remain till after trial, was not ordered to give security for costs.

In *Tambisco* v. *Pacifico*, 7 Exch. 816, *Dowling* v *Harman* was affirmed; Pollock, C.B., said, "The plaintiff (who was a foreigner) states that he came from Greece for the purpose of bringing this action and that he is here now and that he fully intends to remain here until judgment is obtained in it." Alderson, B. said. "It is suggested that he ought to go further and state that he intended to take up his permanent residence here; but such a statement would be of very little avail for he might change his intention the moment judgment had been given—the fact of his being actually resident here is the true criterion by which the question is to be settled."

In *Blakeney* v. *Dufaur*, 2 DeG. M. & G. 771, an absence from May till November in Jersey of an Englishman who was embarrassed, and who could not be readily found while he was in England in consequence of his embarrassment, was held a sufficient absence abroad to be *permanent*, so as to entitle the defendant to security for costs. Lord Cranworth, L.J., said, a party goes to reside abroad within the meaning of the rule, who goes for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs on the suit.

The case of *Gill* v *Hodgson*, 1 U. C. Pr. R. 381, cited by the defendant, is no doubt opposed to the case just referred to in the Exchequer. It was decided by Sir J. B. Robinson in Chambers, who held that an Englishman coming from England to this country to remain here only until the suit was decided, was within the rule which required that he should give security for costs.

In *Crispin* v. *Doglione*, 1 Sw. & Tr. 522, Sir C. Cresswell, said, (the plaintiff was a foreigner), "The case in 7 Exch. 816, in which all the former cases comes to this, that when the party is in England and there is no reason to suppose that he is on the point of going away, no order will be made for security for costs, and this seems to be recognized in the Queen's Bench: if he does go abroad you may stop the proceedings till security is given."

In *Thrasher* v. *Busk*, 2 Dowl. N. S. 51, was an application to discharge the rule for security for costs, on the ground that the plaintiff had returned within the jurisdiction of the court and was residing at, &c. Wightman, J., said, "the plaintiffs

attorney's clerk has made the affidavit of the plaintiff's intention to remain in this country, instead of the plaintiff himself. The present rule must be discharged. No doubt it is true that the temporary absence abroad is not a ground for compelling the plaintiff to give security for costs."

In *Place* v. *Campbell*, 6 D. & L. 113, an application was made to rescind an order for security for costs, no security having been given, the plaintiff made a davit he had returned from abroad and had no intention to leave the jurisdiction. *Per cur* —"In *Badnall* v. *Haley*, security had been given for costs; but here only an order requiring the plaintiff to give security had been made and no security given. The affidavit of the plaintiff states that he has returned from abroad and does not intend again to quit England. That, we are of opinion, is sufficient; the rule will therefore be absolute."

In *Badnell* v. *Haley*, 7 Dowl. P. C. 19, one of the plaintiffs sureties for costs applied to have the bond delivered up to be cancelled. The affidavit stated that the plaintiff had removed from the Isle of Man in or about the month of January, 1837, and that he had been from that time up to the present time resident in England as a householder at Cotton Hall in Stratford, at which place he was altogether domiciled. Parke, B. said, "I know of no precedent for such an application." Alderson, B. said, "The plaintiff commences an action under such circumstances, that the court impose upon him certain terms. Surely those terms must last while the suit goes on It is very possible this may be a fraudulent return in order to get rid of the bond." Rule refused.

The present case is, to discharge the order directing a stay of proceedings until security for costs be given by the plaintiff, upon such affidavits as he has now filed. "That he is now residing in Toronto; that when he left Canada he intended to return, his absence from Canada being merely temporary, and that he now intends to remain in Toronto until after judgment has been obtained in this suit by him or against him. No order for security for costs would probably have been made because "the plaintiff said he intends to remain till after judgment, and the fact of the plaintiff being actually resident here, is the true criterion by which the question is to be settled." And perhaps upon the whole facts of the case, the affidavits of both sides, no relief would have been given to the plaintiff if the security had been actually entered into; although I do not understand the effect of any decision to be, that after security has been given, it cannot be ordered to be rescinded upon any case which may be made out for relief by the plaintiff, however strong that case may be. No doubt relief would not be very readily given, because a plaintiff might adapt his movements so as to have the security set aside and then harass the defendant in the meantime with vexatious proceedings, then leave the country and oblige the defendant again to apply for protection for his costs; and this process the plaintiff might repeat to the annoyance of the defendant; every time pushing on his case a little further, till he had accomplished his purpose of finishing his suit without security to the defendant and with perfect immunity to himself. Such a scheme will always be guarded and provided against when anything of the kind is feared; and under any circumstances the court or a judge will act very circumspectly before they afford relief to a plaintiff in such case, while such relief can only be granted by depriving the defendant of a security which he is already possessed of. But this is not the case here. Security has not been given by this plaintiff to the defendant. If the plaintiff had stated in his affi lavit, "That he did not intend again to quit Upper Canada," that would have been sufficient ground according to the case of *Place* v. *Campbell*, 6 D. & L. 113, to have entitled the plaintiff to be relieved from the stay of his proceedings by the present order. The question then is, whether the statement which the plaintiff does make, "That he intends to remain in Toronto, until judgment has been obtained in this suit by him or against him" is equivalent to or can be received in lieu of the allegation, "that he does not intend again to quit Upper Canada" If it be, the order applied for should be granted. If it be not, this summons must be discharged.

It must be confessed that the actual security which a successful defendant has for his costs against an unsuccessful plaintiff merely by the residence of the plaintiff being within the jurisdiction of the court, when such plaintiff has no means of paying the costs claimed by him, or no means which can be effectually reached, is of the very slightest and most unsatisfactory description. He may by the act of last session be examined as to the means he has of paying such costs, and perhaps a judge may have the power to commit him if he do not satisfactorily answer as to his means; but although, if it can be called *security* at all, it is of a very shadowy character, and yet is the utmost which a successful and perhaps an ill used defendant can have against an unsuccessful. and it may be, a fraudulent resident plaintiff for the costs he has been put to.

It is of great consequence to a defendant to have some substantial guarantee that he will not lose his costs if he win the cause when he is sued by an insolvent plaintiff, or by one who has no property which can be reached by the process of the court, and of which he should not lightly be deprived.

On the other hand, the policy of our law is to have the courts open to all suitors poor as well as rich, for the prosecution of their rights without let or restriction, so long as the suitor is within the jurisdiction of the court; any security therefore which is demanded of him as a condition to his bringing a suit or as a condition to his prosecution of it, is an impediment thereon in the way of his getting his rights, or at all events of his trying them. He is entitled to carry on his suit free from all such security, if his residence has hitherto been and if it be still within the jurisdiction of the court, although he may intend shortly to leave it. But if his residence has hitherto been abroad, he is nevertheless entitled to carry on his suit without giving any security, if he be "within the jurisdiction of the court," provided also, according to one case, "he intend to remain within it, until judgment is obtained in the suit," or provided, according to another case, "there is a reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs in the suit."

This is all the restraint which is reasonable, and it is all the restraint which the law can properly enforce; for it can scarcely be reasonable to require that the plaintiff shall pledge himself by oath "that he does not intend again to quit Upper Canada;" for such a stay cannot be necessary for the purposes of the suit, and such a statement can be of no sort of value, for the plaintiff may change his intention the moment judgment has been given.

For all practical purposes therefore, it appears to me that the declaration of the plaintiff that he intends to remain here "until judgment is obtained," is substantially equivalent to a declaration that "he does not intend again to quit Upper Canada," considering he may safely change his mind, the moment judgment had been given, without any fear of perjury, or without affording the court any greater control over him or over the suit which he was carrying on.

It may be that there is much cause for apprehension on the part of the defendant, that the plaintiff will not, although he does remain here until after judgment, be forthcoming when he is called upon for costs, and this is the principal point of difficulty which I have to deal with in this case; for the question is, whether I ought not to require the plaintiff by affidavit to declare that he will not leave the jurisdiction of the court without the leave of the court or of the judge, or without the leave of the defendant, until a reasonable time after the period within which the defendant may properly enter judgment, so as to enable the defendant to take any proceedings against him for the costs which the defendant may be entitled to recover. In this way it might be said that the plaintiff will have given security that he will be forthcoming when he is called upon to pay the costs. Not more than this, I think, should properly be demanded of a plaintiff before security has actually been given, and perhaps also even after security had been given to enable the plaintiff to be relieved from giving security for costs, or to be discharged from the security already furnished.

If the plaintiff could in this country, as he may in England, be taken on a *ca. sa.* for costs, I should think he had made a sufficient case on these affidavits to be relieved from the order now standing against him; that is, I think the statement, "that he intended to remain here until after judgment had been obtained against him," was sufficient to sustain this application; but as he cannot be taken here for costs, his staying here "until after judgment" is obtained, is of no use to the defendant, for the defendant cannot examine him as to his means immediately upon getting judgment, and therefore I think he ought to state as before intimated, that he will not leave the jurisdiction of this court "without the leave of the court or of a judge, or of the defendant, until the expiration of a reasonable time after the period within which the defendant may properly enter judgment against him," so as to enable the defendant to take any proceedings which he may be advised, for the costs which he may be justly entitled to, and if the plaintiff can make such an affidavit, I shall give him leave to apply again. See *Zychlenski* v. *Maltby*, 14 C. B. N. S. 326.

Plaintiff made a subsequent application, and upon giving the undertaking suggested, had the order for security for costs discharged.

Winks et al. v. Holden et al.

Ogilvy et al. v. Holden et al.

Con. Stat. U. C. cap. 26, ss. 8, 10 & 11—Insolvent debtor—Application for discharge—Recommittal.

Held, 1. That upon the facts and circumstances disclosed in the answers of defendant to interrogatories administered to him in one case, and in his oral examination in the other, that, notwithstanding the statements of the debtor to the contrary, it sufficiently appeared he had wilfully contracted the debts for which the judgments were recovered, without having had at the time a reasonable assurance of being able to pay or discharge the same.

Held, 2. That, under the circumstances, it was the duty of the judge to whom application was made for the discharge of the debtor, on the ground that he was not worth $20, under Con. Stat. U. C. cap. 26. sec. 11, to recommit him, which was done, until 1st June next — defendant having been in custody since 28th May, 1864, and having made his application for discharge before Michaelmas Term last.

Held, 3. That if plaintiff so desired, it should be a condition of the discharge that the debtor should make an assignment of his interest in the assets and effects of the firm of which the debtor was a member.

[Chambers, January 3, 1865.]

This was an application on behalf of John Henry Holden, a prisoner in execution for debt, who had been in custody since 28th May, 1864, to be discharged from custody, pursuant to sec. 8 of Con. Stat. U. C. cap. 26, on the ground that he was not worth $20, exclusive of his necessary wearing apparel, &c.

In one of the suits above mentioned interrogatories had been administered to the defendant, John Henry Holden, which he answered, and in the other, an order had been obtained for his oral examination, to which he submitted and was examined.

It appeared that defendants went into business at Merrickville in April, 1860, with a capital of $4,000; that defendant, John Henry Holden, considered the firm were doing a successful business, and had made some little profit, the exact amount of which he could not then state, up to the time of their taking stock in the spring of 1862; that in the month of March, 1863, they again took stock, the goods on hand amounting to about $1,200, about the amount he expected there would be on hand; that between 1862 and 1863 they had lost about $7,000 in a butter transaction, and about $1,000 by accommodation endorsing, and in fact their assets at the time of the taking of stock in 1863 were at least $8000 less than their liabilities: that in June, 1863, John Henry Holden went to Montreal and bought goods from various merchants amounting to a large sum of money, and from the plaintiffs to about $840; that the father of defendant is one Charles Holden, a merchant residing at Merrickville; that in 1853 he had been carrying on the mercantile business at North Gower, which business he sold out to his son Horatio and took his notes for the stock, and Charles Holden also sold to Horatio his book debts, notes, &c., of that business; that subsequently in 1860 it was arranged that John Henry Holden should go into business with Horatio and one Lindsay at North Gower; that John Henry Holden was to put $2000 into that concern; that Horatio was to to make up his share of the stock there to $2000;

that Lindsay was to put in $400 in cash; that the profits were to be divided equally; that John Henry Holden's $2000 was made up by the father accepting that amount of Horatio's stock and indorsing it on the notes he held against him: that the Merrickville stock which had belonged to the father was transferred by him to the two sons in this way; that Horatio gave his individual note for $2000 to Charles; that the father wanted John Henry to give his note for $4000 to cover $2000 of the Merrickville stock and $2000 of the North Gower stock; that John Henry declined to do this, because his father, when Horatio got married, released him from $4000, which Horatio owed him on the purchase of the North Gower stock and debts; that John Henry thought his father ought to do as well by him and so declined giving his notes for the $4000; that this caused an altercation between him and his father at the time; that the father insisted on John Henry giving his notes for the $4000, and the latter persisted in his refusal, when Horatio interfered between them, and after a little his father "dropped the matter," and John Henry added in his answer to the 23rd interrogatory, "though he did not by any means forego his claim upon me for the said amount of $4000, but from his intimating to me that if all things went well he would eventually do equally as well towards me as he had already done for my said brothers, I did hope and continued to hope that he would not call upon me for payment of the said $4000." In his examination before the County Judge he said, "I expected that my father would never call upon me for the $2000 worth of stock at North Gower, nor the $2000 worth at Merrickville. He gave me to understand that if all went well he never would call upon me for it." He afterwards explained that his examination before the County Judge lasted many hours, and he was much harassed and fatigued, and when the answers were read over to him he was not in a condition to give them that attention that would have enabled him to correct any error that might have crept into the examination; that the answer taken down from his interrogations since is the correct one; that the firm gave their note to Charles Holden for the balance of their stock over the $4000. John Henry further stated that in the latter part of August or beginning of September, 1864, Messrs. Leeming & Co., of Montreal, sued the firm; that Charles Holden having heard of it came to John Henry and demanded that he should give him his promissory note for $4000 worth of stock which had been transferred to him in the spring of 1860; that he consented and did give his individual note to his father for the $4000, who requested him to get it guaranteed by his brother Horatio; that John Henry got Horatio to guarantee the note, and then Horatio asked him to guarantee his notes which he had previously given for stock to his father, and in compliance with his brother's request he did guarantee Horatio's notes to the amount of about $3000; that the next day after giving the note to his father and guaranteeing Horatio's note, Charles Holden produced his account against the firm for rent of shop, money lent to the firm, and some other such matters, and wished John Henry to give him the note of the firm for the whole amount of his account, as well as for the $4000 note he had given him as for $2,976 of Horatio's notes guaranteed by John Henry; that John Henry gave him the note of the firm for $8,738.40; that at this very time Charles Holden owed the firm on a book account $1090, but this was not deducted from the indebtedness to him but his notes at one and two years for the amount were received in payment payable to their order at the same time; that the father sued on his note for $8738.40; that they did not defend the action, but defended actions brought by all the other creditors, except one brought by Leeming & Co.; that Charles Holden recovered a judgment against them on the 14th November, 1863, and put his writ in the Sheriff's hands; that their stock in hand was sold under the writs of plaintiff, and in Leeming's suit; that Charles Holden the father became the purchaser of the stock at fourteen shillings in the pound; that the sale took place in January, 1864; that whilst the first execution was current, and on the same day it was placed in the Sheriff's hands, and before the other creditors (except Leeming & Co) had been able to get a judgment against the defendants, Charles Holden, who had endorsed for the defendants to a large amount, went to the Ontario bank and retired all the paper in that bank on which he and one Andrews were endorsers, amounting to $8898, some of which was due and some not due; that he did this without the knowledge or consent of the defendants, and gave his own notes for the amount endorsed by Andrews; that on the 14th of November he brought the acknowledgment of the bank to defendants; that all their notes in that bank had been paid and then demanded defendant's note for the amount he had paid or agreed to pay to take up the others, and consented to abate the interest on such as were not then due; that John Henry then gave his father, Charles Holden, the note of the firm for the amount of the notes to the Ontario bank after abating the interest; that the father sued that note and got another judgment against them by default before any of the other creditors had obtained a judgment against them; that they had of customers notes and book debts after the sale of their stock in trade, which the defendants consider good and collectable, between six and seven thousand dollars, of which they transferred to their father about four thousand dollars.

In explanation of his purchasing goods when the firm was in a state of insolvency John Henry states that only the amount of stock was taken and added up when the stock was taken in March, that the other debts and assets due the company were not then taken into consideration, and that when he made the purchases in Montreal in June, 1863, and up to the closing week of July "he had no reason or ground to believe or suspect, nor did he in the slightest believe or suspect that the financial position and standing of the firm was any other than a perfectly safe and solvent position, and he fully and honestly believed that the firm had more than a sufficiency of assets to meet all of their liabilities."

In explanation of the giving of his note to his father for $4000, he said in effect that he was justly and honestly indebted to his father in that sum, but he had hoped he would never call on

him for it; that his father had largely endorsed for them, and he expected to get his assistance in enabling them to meet the liabilities of the firm that were then pressing and to get time for the balance, and it was not prudent for him to run the risk of his father refusing to give the firm the assistance of his name, and so he consented to sign the $4000 note and get his brother to guarantee it. He added, "I did not think nor believe that he was getting the same with any intent of suing it, nor did I give it to him with any such intent," as he then hoped that with the assistance of his father the business would go on.

He assigned the same reasons for giving the note of the firm to his father the next day, and said he did not consider he and his brother were in a position to be able to refuse giving the note his father demanded. He considered his father could have sued him for the $4000 of stock, and could have sued his brother for the amount he owed him, and when he gave the note of the firm for their individual liabilities he did not suppose he had given his father any better security than he had before, and he thought if his father had intended to sue them he could have brought three suits instead of one, and it was for the advantage of the firm to give the one note to cover the three demands at the time he thought the assets of the firm would be liable to satisfy the individual debts of the partners just as much as their joint debts. He added that at the time he gave that note of the firm he did not know nor believe that his father intended to sue the firm thereon. He explained that his father insisted that for his indebtedness to the firm they should take his note at one and two years, because he had wanted that length of time for payment of the stock he had sold them, and he, John Henry, on that reason being given, consented to take the father's two notes for his indebtedness to them at one and two years, whilst he gave the note of the firm to him for their indebtedness, either on demand or at three days date. John Henry further stated that in giving the note of the firm to his father he had not "the slighest motive or purpose or intension of thereby giving his father a preference over other creditors of the firm. And when his father gave the note to an attorney for collection the firm stopped payment. He said the reason why he allowed his father to obtain judgment was that the defendants hoped to be able to make some reasonable compromise with their creditors, and they felt assured that if they succeeded in compounding their father would not press his judgment and would not strive to crush them; and moreover he was an accommodation indorser for them to a large amount, and they thought they were doing no more than right and justice demanded in making his claim as secure as might be amongst the scramble that was then being made by the creditors of the firm to secure the payment of their respective claims.

He explained as to giving the note for the amount of the notes that were in the Ontario bank; that the father was also indorser for other $6000, besides which he would have to take up and that he could sue them from time to time as the Ontario bank notes matured, and that this would make numerous costs, which would jeopardise the prospect of a compromise with their other creditors, and he, John Henry, knew their stock in hand would not satisfy the judgment their father already had against them, and as far as the rest of the creditors were concerned it would matter very little whether their father obtained the second judgment for the full amount of the notes or those only which were due. For if the defendants failed to compromise with their creditors the prospects in everything in the shape of available assets would be swallowed up to satisfy the father's first judgment; so, to avoid the costs of additional suits and wishing that the defendants should be placed in as favourable a position as possible to effect a reasonable compromise with their creditors, John Henry gave the note of the firm to his father on which the second judgment was obtained. He added that when he gave this note to his father he did not know that he intended to put the same in suit, though "he did suppose" at the time he would put the said note in suit against them as soon as possible, "but it was not given to him with any intention or disposition whatsoever upon his, John Henry Holden's part directly or indirectly, that he, the father, should thereby get a preference over other creditors of the firm." He stated also that when they stopped payment his father was worth over $20,000 over and above what would pay all his debts except such as he was liable for for endorsing for defendants, and he had been compelled to mortgage every dollar's worth of his property to the Ontario bank, and he believed if the bank and other creditors of the firm insisted on immediate payment of the suits his father was liable to pay solely on account of his becoming accommodation endorsers for the firm he would be absolutely ruined and beggared, and every dollar's worth of his property sold to satisfy alone the liabilities so named by him for and on account of the firm.

Robt. A. Harrison for the application.

S. Richards, Q. C., contra.

Richards, C. J.—Notwithstanding the statements of the defendant, John Henry Holden, to the contrary I feel bound to come to the conclusion that at the time he purchased the goods from the plaintiffs for the sum for which these actions were brought, he wilfully contracted such debt without having had at the same time a reasonable assurance of being able to pay the same. It is now admitted by him that at that time the liabilities of the firm exceeded their assets by at least $8000, and had so exceeded their assets when they took stock of the spring of 1863, in the month of March. He further states that when the stock was taken the previous year, the firm was perfectly solvent and had more than sufficient assets to meet their liabilities, and yet admitting that he knew they had lost at least $7000 in a butter speculation and $1000 by indorsing, he states in very positive terms he had no reason to believe or suspect, nor did he in the slightest suspect that the financial position of the firm was any other than a perfectly safe and solvent position. I cannot understand how he could arrive at the conclusion supposing the facts to be as he has himself admitted them.

Up to March 1862, I should infer he barely considered the firm safe and solvent with perhaps a small surplus, and yet between that and 1863 he

knew they had lost $8000, and yet doing a business that could not realize in any year a very large amount he considered their position perfectly safe and solvent, and had no reason to suspect the contrary.

He admits that he made a further purchase from these plaintiffs after he knew he was insolvent, but says at the time he contracted the debt he thought he would be able to pay it.

His explanation about giving his note to his father for the $7000 is of such a character that it is difficult to view it in the light he now represents it. He had refused to give the note when he first got the stock, and continued to do so until he was clearly and undoubtedly insolvent, then he gave his own note and got his brother to guarantee it, and he guaranteed his brother's notes, and yet all that time he did not think or believe his father was getting the same with any intent of suing it, and the next day when his father ordered him to give the note of the firm for the debt of his brother and himself, and the father's account against the firm, he then did not believe his father intended to sue the firm on the note. He did not deduct from his father's account the amount he owed the firm, but gave the note of the firm payable immediately for the full amount of his father's claim, and took the father's notes for their account against him at one and two years. When sued on this note he put in no defence, but did defend the actions brought by all the other creditors, except Leming, and his father obtained the first judgment, yet he says, in giving the note of the firm to his father, he had not the slightest intention of thereby giving his father a preference over the other creditors of the firm, and when his father gave this note to an attorney he stopped payment, but he did not defend the action nor inform his creditors how he had been induced to give the note to his father for $4000 at that particular juncture, when he had always refused to give that note before, nor why he had guaranteed the payment of his brother's note.

Then in giving the note for the demands which his father took up at the Ontario bank he "did not know," but "did suppose" at the time his father would put that note in suit, but it was not given to him with any intention on his, John Henry's part, directly or indirectly that his father should get a preference over the other creditors. He did not defend this suit or give his creditors any notice about it, and yet he takes great pains to state the particulars of his father's liabilities on account of the firm, and how he would be ruined on their account if pressed for his liabilities on their account.

It is difficult to come to any other conclusion than that the giving of all the notes was in fact to enable the father to obtain a large judgment against the firm, that through the means of that judgment the other creditors might be compelled to accept such compromise as they might offer, or in the event of the compromise not being accepted that his demand against the firm might be paid and secured as far as the assets of the firm would permit to the exclusion of the other creditors.

To show the peculiar views that John Henry has on the subject of insolvency and failing circumstances it is only necessary to refer to the foot of the seventh page of his examination before the County Judge when he says, "I did not consider myself then (on last of September or first of October) in failing circumstances, and I did not consider myself so until sued by Leming. I was hard up, but thought I would get through like others." This was when he gave his note to his father for the $4000, and this was after he was fully aware that the assets of the firm were at least $7000 less than their liabilities. If I am to place a meaning on the language used by him so as to gather what his ideas of insolvency are, I shall be compelled to hold that they are not those usually held by business men as seemingly intelligent as he is. One prominent reason urged for giving the note on which his father's second judgment was obtained was to save the costs of the suits on the several notes as they might from time to time mature, yet he was conscious that the judgment his father then had would sweep away all the stock in trade of the concern, and as far as the rest of the creditors were concerned it would matter but little. Nevertheless he was anxious to save the costs of the suits. His anxiety on this ground was commendable, but it would seem to be more on account of his father than of his other creditors.

In a matter of so much importance to the defendant I am surprised that some steps were not taken to procure an affidavit of the book-keeper, Mr Hilyard, verifying the supposed solvency of the firm in the spring of 1863, and when the purchases were made of goods in Montreal. The distance to Cleveland is not so great but communication might be had with him and an affidavit obtained. The defendant does not seem to have considered that necessary, nor does he give a satisfactory account of how or why he should have laboured under the hallucination that he was perfectly solvent when he contracted the debts now sued for.

I have carefully read and considered the answers of the defendant to the interrogatories, and the reasons and grounds on which he relies to sustain the conclusions put forth by him, and I am compelled to decide against him.

In looking at all the circumstances as they are presented before me, if I discharged the defendant out of custody I think I would be making that portion of the statute a nullity, which requires the Judge to recommit a defendant when he appears to have wilfully contracted a debt without having had a reasonable assurance of being able to pay the same.

Having arrived at the conclusion that he did wilfully contract the debt in this cause without having had a reasonable assurance of being able to pay the same I am compelled under the statute to direct his recommittal.

The defendant has been in prison since the 28th May as I understand, and this matter was discussed before me previous to last Michaelmas term. I think the ends of justice will be answered by my ordering the defendant, John Henry Holden, to be recommitted to the custody of the Sheriff of the United Counties of Leeds and Grenville, and that he be there detained in custody until the first day of June next.

If the plaintiffs should also desire to obtain an assignment of his interest in the assets and effects of the firm of J. H. Holden & Brother, I will

also make it a condition of his discharge that he make such assignment. The matter may stand over until the first February next to learn if the plaintiffs desire such an assignment. If they do not, then the order can go for his discharge next June.

Order accordingly.

ELECTION CASE.

(Reported by R. A. Harrison, Esq., *Barrister-at-law.)*

The Queen ex rel. Heenan v. Murray.

Election of Reeve—Procedure—Time—Efficiency of election.

Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as reeve was put and seconded, and no dissent was expressed, whereupon the clerk, in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the reeve was held to be duly elected.

Though the statute declares that the members of every municipal council shall hold the first meeting *at noon*, and at such meeting organize themselves as a council by electing one of themselves as reeve, an election at six o'clock, p.m., on the same day, is a sufficient compliance with the statute.

[Common Law Chambers, March 12, 1864.]

The relator complained that Thomas Murray, of the village of Pembroke, merchant, had not been duly elected, and had unjustly usurped the office of reeve of the municipality of the said village of Pembroke, under the pretence of an election, held on Monday, the 18th January, 1864, at the town hall in the said village of Pembroke; and declaring that he the said relator had an interest in the said election as one of the municipal councillors for the said municipality of the village of Pembroke, and a candidate at the said election for the said office of reeve, showed the following causes why the election of the said Thomas Murray to the said office should be declared invalid and void, viz.: first, that there was only two members of the said council, viz., the said Thomas Murray and John Supple, present when the said alleged election took place; second, that no vote in favor of the motion to elect the said Thomas Murray was given by any of the said councillors; third, that the clerk of said council illegally declared the said Thomas Murray duly elected reeve, without taking the vote of the councillors upon the motion to elect him as reeve; fourth, that the said election did not take place at noon of the third Monday in January, as required by law, but about the hour of six o'clock in the evening of that day.

The relator made oath, that he was one of the councillors for the municipality of the village of Pembroke for the year 1864; that the council of the said village of Pembroke is composed of five members; that on Monday, the 18th day of January, instant, the following four members elect of the said village council, viz, John Supple, Michael O'Meara, the said Thomas Murray, and the relator, met at the town hall of the said village of Pembroke; that Alexander Moffatt, one of the councillors elect, was not present at said meeting; that Andrew Irving, the clerk of the said council, presided at said meeting; that after the said four members of council had made their declarations of office and of qualification, it was moved by the said John Supple, and seconded by the said Thomas Murray, that the said Thomas Murray be reeve of said county; that upon the motion being put by the said clerk to the said council for their vote on the same, the relator objected to the election of the said Thomas Murray to the office of reeve, and made his objection known to the said clerk and members present of said council; that the said Michael O'Meara also objected to the election of said Thomas Murray as reeve, and made his objection known to the clerk and members present of said council, calling out in answer to the said question the words "No, no;" that thereupon, and before any vote was taken upon the said motion, the relator and the said Michael O'Meara were in the act of going out of the door of the said council room, having left their seats at the council for the purpose of leaving the same, and without any vote having been taken on the said motion, the said clerk, Andrew Irving, said that if no amendment was made to the said motion, he would have to declare the said Thos. Murray duly elected reeve of the said village of Pembroke; that no vote was taken or given by any member of the said council on or for the said motion; that the said Thomas Murray accepted the said office of reeve, and received from the said clerk, Andrew Irving, a certificate under his hand and the seal of the said corporation to enable him to take his seat as a member of the county council of the united counties of Lanark and Renfrew.

Michael O'Meara made oath, that he had heard read the statement and relation of Jas. Heenan in this matter, and that the same was true in every particular; that he also heard read the affidavit of the said James Heenan, and knew the statements therein contained to be true.

C. S. Patterson showed cause, and filed the affidavit of John Supple, wherein it was sworn, that he was one of the municipal councillors of the village of Pembroke; that on the 18th day of January, 1864, he attended, as such councillor, a meeting of the councillors of the said village, held in the town hall; that the following councillors were present, viz., Thomas Murray, Michael O'Meara, James Heenan, and deponent, at said meeting; that the said councillors then made the declaration of office required by law; that after the said councillors made the declaration of office, and whilst the four of them were still present, Andrew Irving, the clerk of the municipality, called the council to order and said, "Now is the time to elect your reeve," or words to that effect; that immediately after the clerk made the announcement, and whilst the four councillors were present, a resolution was placed in the clerk's hands, moved by deponent and seconded by Thomas Murray, to the effect that Thomas Murray be reeve; that the clerk read the resolution to the council, the four being still present, and said if there were no amendment offered he would have to declare it carried; that after a sufficient time had elapsed for an amendment to be put in, and there being none moved, and whilst the four councillors were still in the hall, Thomas Murray called "Question!" when the clerk again read the resolution, and, there being no dissenting voice, declared the motion carried, and that Thos. Murray was duly elected reeve of the village of Pembroke; that at the time the clerk declared the said Thomas Murr

elected, the four councillors were still present, and must have heard the declaration of the clerk, as he spoke in a loud tone of voice, and the room in which the meeting was held is small; that the said relator, James Heenan, was not a candidate for the said office of reeve, nor was there any other candidate for the said office at the said election except the said Thomas Murray, nor was the said James Heenan's name mentioned, or any other person, at said election, in connexion with the said office, other than the said Thomas Murray.

The affidavit of John Supple was corroborated by the affidavits of Richard Fallow and James P. Moffatt, both electors, who happened to be present when defendant was declared elected by the clerk.

R. A. Harrison supported the summons, and cited Con. Stat. U. C. cap 54, secs. 130, 132.

Hagarty, J.—The statute directs, that the council, being at least a majority of the whole number of the council when full, shall, at their first meeting, after making the declarations of office and qualification, organize themselves as a council, by electing one of themselves to be reeve, &c. (Sec. 132.)

At the first meeting here, four councillors were present, and they should, according to the statute, have chosen their reeve.

The relator and his fellow-councillors admit that a resolution naming Murray as reeve was put and seconded; that he (relator) and the others expressed dissent, and rose to go away; that while in the act of going, the clerk said that if no amendment were moved, he would have to declare Murray elected.

Two witnesses swear in reply that no dissent was expressed to the resolution; that after ample time had elapsed, a member called "Question!" and there being no dissenting voice, the clerk declared Murray elected; that when he did so the four councillors were present, and must have heard him do so.

The fact of their being present, and hearing the clerk ask if no amendment moved, &c., is admitted.

It is quite true that the reeve should be elected by a majority. It is equally true that the councillors should, in obedience to the law, have elected, or at least fairly tried to elect, a reeve, at this their first meeting.

The relator and his friend do not assert that when they heard the clerk say he would have to declare Murray elected, they protested or made any further expression of dissent. I think, therefore, we must assume the law to have been complied with, and that when the clerk, trying to do his duty, and to obey the law, in the hearing and presence of the four councillors, declared publicly that if no amendment were moved he would have to declare Murray elected, and no one dissenting therefrom, the latter was elected by a legal vote duly made.

We all know that in representative bodies the great majority of resolutions are passed without any formal voting by yeas and nays.

I cannot but consider that this election should stand.

I think the relator and his friend tried to prevent the law being obeyed. They suggested no candidate of their own, and made no *bona fide* attempt to have a formal vote taken. Taking their own account, they rose to go away, leaving their legal duty unperformed, and heard notice given that Murray would be declared elected, if no amendment were offered.

The other objection, that this election did not take place till six o'clock, is too trivial to require serious notice.

The summons must be discharged with costs, to be paid by the relator.

Order accordingly.

CHANCERY.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law,*) *Reporter to the Court.*

Patterson v. Johnson.

Injunction—Trade fixtures.

The purchaser of the equity of redemption in certain mortgage premises erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a wood-cutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached to the machine shop except by belting or similar means, when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery, or doing any damage to the realty in any way.

Held, on a motion to dissolve an injunction which had been obtained *ex parte*, that these articles were removeable as trade fixtures.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty, considered and doubted.—*McDonald* v. *Weeks*, 8 U. C. Chan. Rep. 297, considered and approved of.

In this case an *ex parte* injunction had been granted restraining the defendant from removing certain articles placed in the machine shop, in the pleadings mentioned by the defendant since he had gone into possession of the premises, he having purchased from the mortgagor his equity of redemption in the property upon which the shop was erected. The defendant now moved upon affidavits to dissolve this injunction, on the grounds stated in the head note and judgment.

Tilt, for the motion.

Crombie contra.

Vankoughnet, C.—This was a motion to dissolve an *ex parte* injunction, restraining the defendant from removing from the premise certain machinery, among which are three lathes, a wood-cutter, a planing machine and a circular saw. It is as to these articles that a dissolution of the injunction is sought. The plaintiff is the mortgagee of the land, and the defendant the assignee of the equity of redemption. The defendant, and not the original mortgagor, erected upon the land a machine shop, in which he placed a boiler, engine, and the articles above mentioned, with some others. Such of the machinery as can be treated as having been affixed to, and thus become part of the realty, are doubtless covered by the plaintiff's mortgage, though placed on the land subsequently to its execution. But the defendant contends that the articles above named never were in any way affixed to the realty—never became a portion of it; were but deposited in the machine-shop—worked there from time to time, but in no way attached to it except by belting or some such means when in motion—in every way disconnect-

ed with it, or any of the fixed machinery, and capable of being removed without disturbing it or doing any damage to the realty in any way—in fact portable. This contention of the defendant is, I think, established, although the affidavits on behalf of the plaintiff would lead to the contrary conclusion, and give the idea that all these portions of the machinery were fastened in and to the building, so as to be immoveable without drawing nails or bolts. Yet I think the defendant's affidavits more explicit and reliable as to the exact state and position of the machinery, and accordingly I will for the present, assume them to be true, giving to the plaintiff the opportunity to cross-examine the defendant's witnesses if he desire it, he proceeding promptly to do so.

Assuming, then, the state of facts represented by the defendant to be true, I am of opinion that I cannot treat the machines in question as part of the realty, but must consider them as chattels removable at the will of the owner, subject to sale by him and to execution against his goods. I have read carefully and with great interest the judgments of the Queen's Bench here in *Gooderham* v. *Denholm* 18 U. C. Q. B. 203, and of my brother Spragge in *McDonald* v. *Weeks*, 8 U. C. Chan. R. 237. I think there is strong reason and good sense in the remarks of my brother Spragge in the latter case. It does seem in many cases that could be put, but a flimsy distinction that articles are fixtures, when nailed or screwed or bolted into a building, and are not so when their own weight gives them steadiness in their place without such aid. Take the case of a house which by its own weight sustains its position on the ground; the owner does not want a cellar, perhaps, has no need to let it into the ground, or to require any foundation for it other than the surface of the ground itself. Could it be said that this was a chattel which did not pass under a deed of the land, which the owner evidently intended to improve and benefit by the erection of it? But while there might be little difficulty in treating such a structure as part of the realty, the character to be given to such articles of less bulk, such as machines used on the realty or in connection with the fixtures (in the literal sense of the term,) erected on the land, is not so plain. Where such an article as a boiler or engine is built into a house or fastened upon the land, it may well be called a fixture: it literally is so, and the owner may be considered as having devoted so much of the realty, at all events, as is necessary for the use of such machinery, to the purpose of it, and of having thus intended to benefit the realty. But there is great difficulty in extending this character to articles of machinery which have not been actually affixed to the land, such as those in question here. As I understand the evidence, the defendant erected a machine-shop, into which he fastened a boiler and engine. With this engine, to the extent of its power, he could drive any machinery for which the building was adapted, and which he chose to introduce into it. He has there at present a circular saw, a wood-planer, and lathes. He may choose to abandon this description of machinery and introduce something else. He has not in any way declared his intention of making these part of the realty: he has not in fact made them part by attaching the one to the other. The articles are all portable—can be moved by hand from place to place in the building, and out from the building. It is true they are there to be used with certain fixed machinery, with which they can be connected from time to time for the purpose of moving them. But can I say that for this reason they have become fixtures?

I have had the advantage, since the decisions in our own courts above quoted, of examining the following recent authorities bearing more or less upon this question. *Wilson* v. *Whateley*, 1 John & H. 436; *Jenkens* v *Gething*, 2 John & H. 520; *Haley* v. *Hammersley*, 7 Jurist, N. S. 765, in which Lord Campbell approves of the judgment of Vice-Chancellor Wood, in *Mather* v. *Fraser*, 2 Kay & J 536, *Bates* v. *Beaufort*, 8 Jur. N. S. 270: *Gibson* v. *Hammersmith*, &c., 9 Jur. N. S. 221. While in many cases articles which have been merely attached to the freehold by nails or screws have been held removable as chattels, when this can be effected by simply drawing the nails or screws without doing damage, I find no case in which portable machines, such as the present, have been treated as fixtures irremovable, when they have not been fastened or attached in some way to the land. This distinction seems to be preserved, not merely for convenience, but because the law leans in favor of trade by treating, when it properly can, articles used in trade as disposable chattels. While, as I have already remarked, on the one hand, the distinction between articles resting by their own weight in a particular position, and articles sustained in it by nails or bolts seems a flimsy one, and not readily sustained by any principle, (a distinction, however, not always observed, as pointed out before;) on the other hand, where this evidence of intention to make any article, in itself a chattel, a part of the realty, and when the act of affixing it there are wanting, it will be almost impossible, in any case, to say what things remain chattels, and what have become part of the freehold.

I think I must treat the machines in question here as chattels.

GORDON v. ROSS.

Mortgagor and mortgagee—Insolvent Act—Power of sale.

Where a mortgagor becomes bankrupt the mortgagee is not compelled to go in under the act, but may proceed to sell the property under a power of sale in his mortgage.

This was a motion for an injunction to restrain the sale of a steamboat by a mortgagee under a power of sale contained in his mortgage. The plaintiff was the assignee in insolvency of the mortgagors.

Hoskin for the motion contended that under the Insolvent Act of 1864, section 5, sub-sec 5, a mortgagee's only remedy was to file a claim in the matter of the insolvency, when the proceedings would be taken which that sub-section points out. He referred also to 9th and 12th sub-sections.

Crombie, contra, referred to the 4th and 5th sub-sections as shewing that it was not compulsory on the mortgagee to proceed under the insolvency.

MOWAT, V. C., refused the injunction, and held

that a mortgagee was not obliged to file a claim, but was at liberty, in lieu thereof, to exercise the power of sale contained in his mortgage.

CHANCERY CHAMBERS.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

Winters v. the Kingston Permanent Building Society.

Sheriff's poundage—Con. Stat. U. C., c. 22, sec. 271.

The plaintiff had obtained a decree in this cause against the defendants, by which money was ordered to be paid, and on which the plaintiff issued execution and lodged it in the hands of a sheriff. After seizure under the writ, but before the money was levied, the defendant moved for and obtained leave to re-hear the cause, and a stay of the execution, on the terms of paying the money into court, which was done; *Held*, that the sheriff, not having actually levied the money under the execution, was not entitled to poundage, but to fees only for services actually rendered, to be settled by a judge in chambers.

A decree had been pronounced herein in favor of the plaintiff, directing the defendants to pay him a certain sum of money and his costs of the suit. Execution had been sued out by the plaintiff to enforce the payment of these amounts, and placed in the hands of the sheriff of Frontenac; after the sheriff had seized under the execution, but before any sale had taken place, or any money been levied, the defendants moved for and obtained leave to re-hear the cause, and the execution had been stayed on the terms of paying the money into court, and the costs to the plaintiff's solicitors, they undertaking to pay them if the decree should be reversed. The money and costs had been duly paid accordingly, and a re-hearing had taken place, and the decree been upheld; and now the the sheriff presented his petition, praying payment, by the defendants, of his poundage on the money and costs.

S. H. Blake, for the petitioner. The sheriff is entitled to poundage if goods are seized and the money made, though the money be not paid to him or pass through his hands: *Morris* v. *Boulton*, 2 U. C. Cham. R. 60, 67, 70; *Thomas* v. *Cotton*, 12 U. C. Q. B. 148; *Brown* v. *Johnson*, 5 U. C. L. J. 17.

Sullivan contra. The application is improperly made by the sheriff; the sheriff's remedy is against the plaintiff, not the defendants.* The case of *Morris* v. *Boulton* was decided on the authority of English cases which have since been overruled on this point, by the case of *Miles* v. *Harris*, 31 L. J. C. P. 361; 6 L. T. N. S. 649.

S. H. Blake, to cure the objection as to the mode of the application, appeared for the plaintiffs also, and consented to the order going.

Vankoughnet, C.—The execution having issued out of this court under the decree originally made in the cause, the sheriff seized under it certain mortgages of the defendants for the purpose of making the money. The defendants thereupon presented a petition for re-hearing, and applied to have execution stayed in the meantime. Both applications were granted on the defendants paying into court, as they subsequently did, the full amount of the debt, interest and costs, not including the sheriff's fees or poundage, as to which no provision was made. The petition of re-hearing was dismissed, and the money in the court paid out to the plaintiff. The sheriff now presents a petition, asking that the defendants may be ordered to pay his fees and poundage upon the money brought into court, alleging that he would have made that money under the writ in his hands, had not its execution been stayed by the order of this court. Independently of the statute to which I shall presently advert, there seems to have been no settled notion, as to the practice which prevails here in similar cases at law. *Morris* v. *Boulton*, 2 U. C. Cham. R. 60, before Burns, J., decides, that, under such circumstances as the present, the sheriff is entitled to poundage; see on the same subject *Brown* v. *Johnson*, 5 U. C. L. J. 17; *Thomas* v. *Cotton*, 12 U. C. Q. B. 148. The language of the two judges, Erle, C. J., and Willes, J., who expressed their opinions on this question in the recent case of *Miles* v. *Harris*, 31 L. J. C. P. 361, is not quite reconcileable, although they concurred in judgment. The 271st section, however, of the Common Law Procedure Act, ch. 22, of the Con. Stats. of U. C., which assumes to condense and explain, though it materially alters in this respect, the provisions of the Statute 9th Vic., ch. 56, sec. 2, enacts that "In case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs." The practice of this court is, by statute, made analogous to that at law, on proceedings by execution. It seems plain, therefore, under the clause of the statute just quoted, that the sheriff is not entitled to poundage, but only to fees for services actually rendered, to be fixed by the court or a judge in Chambers. The words "money actually levied," contrasted with the preceding words, mean, I think, money actually obtained by the sheriff himself, out of the goods. There would have been a difficulty in the application at the instance of the sheriff, had not the plaintiff appeared in support of it. The immediate remedy of the sheriff is ordinarily against the party who sets him in motion, and the plaintiff might have made such arrangements with the defendants as would have deprived him of any right, and the sheriff of any right in his name, to proceed against them. The plaintiff, however, consenting, and the proceedings having been stayed for the benefit of the defendants, let the petition stand over with liberty to the sheriff to produce before me evidence, to satisfy me what charges it would be reasonable to allow him, for his action in the matter, and for the recovery of these he may be allowed to proceed on the execution which is now in abeyance.*

* See *Thomas* v. *Great Western Railway Co.*, Q. B., Hilary Term, 1865.—Eds. L. J.

* See Editorial remarks on page 86, *ante*.

(*Reported by* Thos. Hodgins, Esq., LL.B., *Barrister-at-Law.*)

Beaton v. Boomer.

Security for Costs—Form of Bond—Practice.

Held, 1st. That it is for the plaintiff's convenience to submit the name of the proposed surety to the opposite party before filing the bond, as he may risk the surety not being successfully objected to by the defendant, and it is not necessary that the surety should be first approved by the defendant's solicitor or the registrar, nor is a plaintiff bound to give more than one surety unless he alone is insufficient.

2nd. That the bond for security for costs should contain the condition, to the effect, that upon the surety (and not the plaintiff) paying the costs, the obligation should be void.

This was an application by one of the defendants to take off the files of the court a bond given on behalf of the plaintiff for security for costs, on the following grounds: 1. That the plaintiff did not deliver to the defendant's solicitor a note of the name and description of the person proposed as surety before executing and filing said bond. 2. That the bond was filed before being allowed, as sufficient security, by the defendant's solicitor or the registrar. 3. That the bond contains the name of but one surety instead of two, and no opportunity was given the defendant's solicitor to ask for two sureties. 4. That the condition of the bond is to the effect, that if the plaintiff should pay the costs awarded against her, the obligation to be void; whereas it should be upon the surety or sureties paying such costs, the same should be void.

Boyd for the defendant Somerville.

Hodgins for the plaintiff.

Vankoughnet, C.—I do not think there is anything in the first three objections. The practice in England, though I am informed it is not usually followed in this country, appears to be for the plaintiff's solicitor to submit to the opposite solicitor the name of the proposed surety or sureties, and if no objection is made to them, then to prepare the bond. This is a course rather for the plaintiff's own convenience, which he may or may not follow as he pleases (Smith's Ch. Pr. 775, 6th ed.) If he chooses to risk the surety not being objected to successfully, he may file his bond and give notice thereof. The plaintiff is not bound to give more than one surety, unless he alone is insufficient (Smith's Pr. 775; Ayckbourn's Pr. 409). Indeed, the order for security provides for procuring as surety a sufficient person or persons. I think, however, that the fourth objection must prevail. In all forms of bonds to be found, the condition of the bond is absolute that the sureties will pay the costs: and this form, so universally adopted, should be adhered to. Indeed the order for security requires an absolute, not a conditional undertaking. It was, doubtless, intended that the defendant should not be driven first to make a demand upon the plaintiff living in a foreign country, or to prove that he had not paid the costs before calling upon the surety to pay them.

INSOLVENCY CASES.

(Before His Honor S. J. Jones, Judge County Court Brant.)

(*Reported by* H. McMahon, *Esq., Barrister-at-Law.*)

Henry v. Douglass.

Attachment under Absconding Debtors Act—Attachment under Insolvent Act—Priority.

Where a writ of attachment under the Absconding Debtors Act is received by a sheriff and acted upon by attaching defendant's goods, and afterwards writs of *fi. fa.* are placed in his hands against defendant, and he subsequently receives an attachment against defendant under the Insolvent Act of 1864, *Held*, that defendant's property passed to the official assignee, but that the assignee would be obliged to give the execution creditors the priority to which they would be entitled.

A writ of attachment had issued against the defendant under the Insolvent Act of 1864, to which the Sheriff of the county of Brant made the following special return: — "That before he received the writ he had attached all the defendant's property under an attachment out of the county court of the county of Brant against the defendant as an absconding debtor, at the suit of John Gardham, and that he held such property to satisfy such attachment, and also a warrant of attachment out of the division court, at the suit of James Weyms, in which judgment was obtained and execution issued before the receipt of the writ in this matter, and also for the benefit of any other attaching creditor, under the Absconding Debtors Act, who should attach in due course of law. That the personal property attached being perishable, he had caused it to be sold, and that the proceeds were insufficient to satisfy the said attachments. That also, before he received the said writ, two *fi. fas.* against the goods and one *fi. fa.* against the lands of the said defendant, were placed in his, the said sheriff's, hands, and that, therefore, he could not place the property and effects of the said defendant in the hands of an assignee or guardian until relieved from the responsibilities and liabilities to the said attaching and execution creditors."

A summons was obtained by *VanNorman*, on 14th December, 1864, on reading the plaint in the declaration, and the writ of attachment issued under the Insolvent Act of 1864, and the sheriff's return thereto, calling on the sheriff of the county of Brant to shew cause why he should not amend his return, and why he should not execute said writ, and make a proper return thereto. On the return of the summons the sheriff appeared in person, and contended that under the writ of attachment against the defendant as an absconding debtor (at the suit of Gardham) he was compelled to seize and hold the property; and that as the plaintiff in this suit was one of those who, by his affidavit, procured the issuing of Gardam's attachment, he is now estopped from seeking to set aside Gardham's writ.

Totten on the part of the creditors holding *fi. fas.*—The attachment under the Absconding Debtors Act, the *fi. fas.*, and the attachment under the Insolvent Act, are all issued from the same court—that is, the county court, and consequently they must take precedence according to their priority in point of time. By sec. 2, sub-sec. 7, and sec. 3, sub-sec. 22 of the Insolvent

Act, the writ in insolvency can only affect the estate of the insolvent as it stood at the time of the issuing of the attachment under the Insolvent Act, and at that time the Insolvent had no estate —it was in *custodia legis*.

Griffin, in support of summons.—Sec. 3 Insolvent Act of 1864, makes the act of absconding an act of insolvency, otherwise any creditor taking out an attachment against an absconding debtor would defeat the Insolvent Act (*Notley* v. *Buck*, 8 B. & C. 160; Arch. Bkp. Law 176). Here the sheriff has notice of the insolvency proceedings before he pays over the money. The assignee has power to investigate fraudulent claims and settle priorities. An attachment against an absconding debtor is only the taking and holding the defendant's goods as a security for the plaintiff's claim, and the claims of such other attaching creditors under the Absonding Debtors Act as shall attach in due course of law. As to how creditors shall be dealt with who have securities, see sec. 5 sub-sec. 5 Insolvent Act.

Jones, Co. J.—I will refer to those sections of the Insolvent Act relating to the matter in question. Sec. 2, sub-sec. 7 provides that the assignment shall vest in the assignee the books of account and all the estate, &c., of the insolvent, *which he has* or may become entitled to at any time before his discharge, &c. And by sec. 3, sub-sec. 22, it is enacted that (in cases of compulsory liquidation like the present) by the effect of the appointment of the official assignee the whole estate and effects of the insolvent, *as existing at the date of the issue of the writ*, and which may accrue to him up to the time of his discharge, shall vest in the said official assignee, in the same manner and to the same extent and with the same exceptions as if a voluntary assignment had at that date been executed in his favor by the insolvent. Sec. 4, sub-sec. 9 provides that the assignee may in his own name sue for the recovery of all debts due to the insolvent, and in the prosecution and defence of suits may take all proceedings the insolvent could, and may intervene and represent the insolvent in all suits by or against him *which are pending at the time of his appointment*, and may have his name inserted in place of that of the insolvent.

Sec. 5, sub-sec. 4 enacts that in the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor, *which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this act.* And the 9th sub-sec. of the same sec. provides "that the costs incurred in suits against the insolvent after due notice of an assignment or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of said act, shall rank upon the estate of the insolvent."

I had delayed giving judgment in this matter in hopes that the rules and regulations to be framed by the judges of the superior courts, as provided by the 18th sec. of the act would throw some light on the point in question; but although a tariff has been made, no rules have been published. In the English Act special provision is made for cases like the present. There the sheriff is not the officer who executes the process issued out of the bankrupt court, and the whole procedure in bankruptcy is so different from ours as to afford but little assistance in construing our statute. It is to be hoped that the legislature will, by proper amendments of the Insolvent Act, place the law in question on a more satisfactory footing, and also provide some method by which a set of rules and regulations for working the act may be framed, that shall be applicable to the whole of Upper Canada, instead of leaving it, as it is at present, for every county judge to frame separate rules for his own guidance.

I have had great difficulty in arriving at a decision in this matter that is satisfactory to myself; but after carefully examining the act and the cases as far as I have been able, I have come to the conclusion that notwithstanding the writs at law in the sheriff's hands against the defendant's property, his whole estate is subject to liquidation under the Insolvent Act, and that the attaching and execution creditors must come into that court, where they could no doubt claim such priority as they would be entitled to, on account of the proceedings that they have taken at law. As far as the executions are concerned, there can be no doubt, if the judgments are regular, and the writs are properly in the sheriff's hands before the issue of the attachment from the insolvent court, that they would have a priority, and would require to be first satisfied out of the insolvent's estate. But as the whole property, real and personal, of the insolvent is held by these writs, and this property may, for aught we know, be far more than sufficient to satisfy these writs, and as it is impossible to separate as much as may be sufficient to satisfy these executions from the residue of the insolvent's estate, the only course in my opinion that can be adopted is, for the whole estate to pass into the hands of the assignee, who would be obliged to give the execution creditors that priority that they would be entitled to. This is also the course that I think would be suggested by sec. 5, sub-secs. 4 and 9, above cited, and the other clauses of the act above referred to are reconcilable with the assignee giving to these creditors their priority in the distribution of the assets of the estate.

In holding that the *fi. fas.* in the sheriff's hands cannot have the effect of keeping the estate out of the hands of the assignee, it follows, of course, that the attachments against the defendant as an absconding debtor cannot have that effect. The Absconding Debtors' Act, it is true, provides for a certain distribution of an insolvent's estate; but I think it could never be argued that the Legislature in passing the Insolvent Act, intended that it should be inoperative merely because one creditor, after an act of bankruptcy committed by his debtor absconding, should choose to take out an attachment against him as an absconding debtor, especially where, as in this case, no other creditor could adopt that proceeding, the defendant being now within the jurisdiction of the court.

The Insolvent Act does not contemplate any other equitable distribution of the insolvent's estate except under that act. And it even provides that any *general assignment* for the benefit of creditors (no matter how equitable) made by the debtor, except it be made under the provi-

sions of that act shall not only be ineffectual but shall be an act of ipsolvency, rendering the estate liable to compulsory liquidation under the act (see sec 3, sub-sec. i.) If the attaching creditor has a priority by virtue of his attachment, it will be the duty of the assignee to allow it to him under sec. 5, sub-sec. 4 of the act.

I therefore order that the sheriff do amend his return to the writ of attachment issued in this matter accordingly. The costs of the plaintiff's attorney to be costs in this matter.

GENERAL CORRESPONDENCE.

Scatcherd's Cheap Law Bill.

Toronto, Feb. 25, 1865.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Will you not again take up the subject of Mr. Scatcherd and his Law Costs bill or motion, and advise the profession in the matter?

Would it not be well for a meeting of attorney to be called, and a committee appointed, to draft a petition in the premises, and have it duly presented to the House of Parliament?

Something should be done.

Yours truly,

An Attorney.

[In April, 1863, we fully expressed our views on Mr. Scatcherd's Cheap Law Bill. (See 9 U. C. L. J. 85.) Our remarks then made received the approval as well of the public as of the profession. Some one, unknown to us, did us the honor of having our remarks republished in the form of a circular, and mailed to members of Parliament and others.

We had hoped that even Mr. Scatcherd would by this time have seen the folly of his pet bill. If he aspires to the dignity of half a statesman, we shall look for something better from him than this stupid piece of buncomb. It is a mistake to suppose that lawyers are especially interested in the death of such a measure. The persons really interested are the public. To cheapen litigation will be to make it more plentiful; and lawyers, like other members of the human family in the social scale, can prosper on "small profits and quick returns." If the bill, or anything half as absurd, become law, we venture to affirm that lawyers will have twenty suits for every one that is now entered in court. The profession, in a pecuniary point of view, will not suffer; but the public, whose interest it is that there should be little litigation, will be the real sufferers.

Some people are astonished that in Canada, with a population so sparse, compared with that of the mother country, suits are so plentiful—that while in some of the larger cities of England we read of two or three records at most entered for trial at an assize, we find twenty times the number in towns in Upper Canada, where the population is twenty times less than at home. The secret is, that in Canada a suit costs at least five times less than a suit in England. Then cheapen the suit in Canada by making it five times less than it now costs, and the certain increase in number is a mere matter of computation. Men of ordinary intelligence are alive to this state of things, and it is to be hoped that Mr. Scatcherd, if really in earnest, will some day or other acquire sufficient intelligence to realize the depth and breadth of his folly.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

T. T., 27 Vic.

Hogan v. Morrissey.

Judgment against executor—Action on—Plene administravit—Replication, lands—Effect of.

Action on a covenant recovered against an executor. The declaration set out a judgment recovered; alleged the issuing of a *fi fa.*, and return of "*nulla bona*," and suggested a devastavit. Plea, that in the action on which the action is founded, the defendant pleaded *plene administravit;* that the plaintiff replied lands, on which judgment was given; that the lands were assets in the hands of the defendant as executor. The defendant then avers that the lands are sufficient, and that plaintiff has not proceeded against them.

Demurrer to pleas, on the ground that where judgment has been recovered, and a devastavit shown, it is not a sufficient reason to excuse the defendant from personal liability, that the plaintiff has obtained a judgment to recover of the lands of the testator.

Held, that the replication of lands is a full admission of the truth of the plea of plene administravit; that the plaintiff, by his replication to the former action, being estopped from setting up a devastavit now, the defendant is at liberty to show the true state of the case, to save himself from personal liability; that the replication (of lands) commonly used since *Gardiner* v. *Gardiner*, is both illogical and unnecessary. (14 U. C. P. 441.)

T. T., 27 Vic.

Roe et al. v. McNeill et al.

Ejectment on sheriff's deed—Improper recitals in—Purchaser not estopped by.

An action of ejectment on a sheriff's deed which recited "That by a *ven. ex.* I have seized as the lands of A. M. that certain tract, &c., and whereas the said premises since the seizure by me, made by virtue of the said writ of *ven. ex.*, after due notice were exposed to public sale," &c., and then granted to the purchaser.

It appeared that the lands had been seized under a writ of *fi. fa.* previously issued, and placed in the sheriff's hands, and that the *venditioni exponas* ordered him to expose to sale and sell the lands so seized.

Held, that the misrecitals of the acts of the sheriff in the deed did not invalidate the deed itself; that the purchaser was not nor were the plaintiffs estopped by such recitals, and therefore plaintiffs might shew what the facts were; that recitals did not exclude the presumption of a proper seizure on the *fi. fa.*

That as the debtor attorned to the purchaser the defendant could not impeach the purchaser's title so long as she retained the possession of the person making the attornment.

This decision is not inconsistent with that in the same case, reported in 13 U. C. C. P. 189. (14 U. C. C. P. 424.)

M. T., 28 Vic.

Gaynor et al. v. Salt.

Practice in sending papers filed to Nisi Prius.

Papers filed in court should not be sent away to be used as evidence at *Nisi Prius*, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission; and in that case the officer sending should take a voucher from the officer receiving them. (24 U. C. Q. B. 180.)

Ex., Jan. 18.

Boosey v. Wood.

Libel—Pleading—Accord and satisfaction—Acceptance of.

To an action of libel—plea, that it was agreed to accept, in satisfaction, certain mutual apologies, to be published in certain newspapers, which were published accordingly.

Held, a good plea of accord and satisfaction. (13 W. R. 317.)

Ex. C., Nov. 26.

Tipping v. St. Helen's Smelting Co.

Nuisance to land.

Every man is bound to use his own property in such manner as not to injure the property of his neighbour, unless, by lapse of time, he has acquired a prescriptive right to do so. The law does not regard trifling inconveniences, and every thing must be looked at from a reasonable point of view. In an action for a nuisance to property by noxious vapours, the injury must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining the question, all the circumstances must be taken into consideration; and in places where great public works develop the material wealth of the country persons must not stand upon extreme rights. (13 W. R. 289.)

Q. B., Jan. 26.

Anon v. Parr.

Practice—Interrogatories—C.L.P. Act 1854, *s.*51.

Interrogatories will not be allowed to be administered for the purpose of eliciting from the defendant whether the plaintiff has a legal cause of action, or what cause of action he has, but only in aid of a cause of action stated by him.

Quære, whether the plaintiff can apply to administer interrogatories before declaration. (13 W. R. 337.)

Ex., Jan. 26.

Mason v. Mitchell.

Married Woman—Desertion—Order for protection.

An order for protection obtained by a married woman who has been deserted by her husband, does not protect property acquired by her by immoral practices. (13 W. R 349.)

E. & A.

Westacott v. Powell.

Seduction—Loss of service—Birth of child.

In an action for the seduction of the daughter of the plaintiff, the action may be maintained before the birth of the child; but

Per curiam, (Spragge, V.C., and A. Wilson, J. dissenting) the statute (Con. Stat. U. C. cap. 77) does not dispense with evidence of a pecuniary loss or damage, such as was required before the act. (2 E. & A. Rep. 525.)

CHANCERY.

L. J., Jan. 14, 16.

Parkinson v. Hanbury.

Settled account—Mortgagee in possession—Agent—Wilful default—Sale under power.

Where a defendant sets up by his answer a settled account in which no specific errors are charged by the bill, the bill is properly dismissed.

Mortgagees, under a conveyance in trust to sell, to secure principal and interest, take possession, not as mortgagees, but as agents of the mortgagor.

In a suit for redemption, *held* (1) that the mortgagees will not be ordered to account on the footing of wilful default; (2) that a purchase by the mortgagees of the mortgaged property from a prior mortgagee, selling under a power of sale, will be set aside as a purchase by a trustee, of trust property. (13 W. R. 331.)

Chan. Cham.

Montreal Bank v. Auburn Exchange Bank.

Amendment of bill in respect of matter arising subsequent to the filing of it.

The plaintiffs had obtained a judgment at law against P., one of the defendants, upon confession, and, as judgment creditors under that judgment, had filed their bill to set aside a prior judgment of other defendants, and had moved for and obtained an injunction to restrain a sale of the goods of P. under such prior judgment. After the injunction had been granted, the plaintiffs obtained another judgment against P., not upon confession, but by default. Under these circumstances, a motion for leave to amend the bill, by alleging the recovery of the second judgment, was granted. (Gr. Cham. Rep. 283.)

Chan. Cham.

Ruttan v. Smith.

Enlargement of motion.

Where a party moving is not in a position to sustain his motion, the court will not grant an enlargement so as to enable him to place himself in a position to sustain it; the motion must lapse. (Gr. Cham. Rep. 286.)

Chan. Cham.

Follis v. Todd.

Staying suit till security given for the costs of a prior suit at law.

The plaintiff (a vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a *fi. fa.* goods to recover the costs, which was returned *nulla bona*. Afterwards the vendor filed his bill in equity to enforce specific performance of the contract. On motion of the defendant in the suit, the proceedings in equity were stayed till security for the costs at law should be given. (Gr. Cham. Rep. 285.)

INSOLVENTS.

Andrew Smith	Manilla.
W. H. Vantassel	Sidney.
Patrick Langrill	Toronto.
Daniel J. Woodward	Tp. Rawdon.
M. Elliott	Cainsville.
Jacob Bowman	Harrisburg.
Chas. F. Smith	Belleville.
P. F. Canniff	Thurlow.
D. L. Comins	Madoc.
George Baghurst	Montreal.
N. Bloodsworth	Cainsville.
Richard Benner	Hamilton.
Chas. Roy Lapense	Levis.
Wm. Dickson	Montreal.
Henry Murren	Montreal.
Henry Weeks, John Weeks	Woodstock.
John Mathie	Lindsay.
James Ross	Tp. Whitby.
Wm. Wade Rutledge	Guelph.
Smart & Beamish	Port Hope.
D. N. Black	Stratford.
Duncan McNaughton	Chatham.
S. D. Merick	Easton's Corners.
J. C. Thauvette	St. Marthe.
John Brown	Toronto.
J. T. Taylor & Co.	Hamilton.
Zephin Lizee	Montreal.
Joseph Parker Lane	Morven.
Wm McBain, Francis Stephen	Montreal.
Van Every & Rumball	Goderich.
Peter Z. Romain	Montreal.
W. D. Woolsey	Quebec.
Jas. Crawford	Kingston.
Thos. Davis	Windsor.
John T. Wilson	Woodstock.
R. T. Routh	Montreal.
Fortunatus P. Wood	East Farnham.
John M. Baker	Sterling.
Wm. H. Birt	Mitchell.
Matthew C. Brown	Simcoe.
Joseph Faulkner	Hamilton.
Henry Webster	Uxbridge.
Geo. Wilson	Port Dover.
Boswell Hensman	Montreal.
R. H. Burtch	Tp. Blandford.

APPOINTMENTS TO OFFICE.

SURROGATE CLERK.

SIR JAMES LUKIN ROBINSON, Baronet, of Osgoode Hall, Barrister-at-Law, to be Surrogate Clerk, under the provisions of the chapter 16, Consolidated Statutes of Upper Canada. (Gazetted March 4, 1865.)

COUNTY ATTORNEY.

EDWARD TAYLOR DARTNELL, of Osgoode Hall, Esq., Barrister-at-Law, to be Clerk of the Peace and Crown County Attorney, for the United Counties of Prescott and Russell. (Gazetted March 4, 1865.)

CORONER.

GEORGE C. McMANUS, Esq., M.D., Associate Coroner, County of Simcoe. (Gazetted March 18, 1865.)

NOTARIES PUBLIC.

GEORGE AIREY KIRKPATRICK, of Kingston, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

SAMUEL BICKERTON HARMAN, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

ARTHUR MANDEVILLE RICHARDS, of Clinton, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

HUGH McKENZIE WILSON, of Brantford Esq., to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

JOHN M. BRUCE, of Hamilton, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 18, 1865.)

JAMES SWIFTS, of Kingston, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 18, 1865.)

TO CORRESPONDENTS.

"An Attorney"—under "General Correspondence."

"L." We hope to make use of the contents of your letter of 10th February, in our next.

"Several Readers"—"A Subscriber"—"B. S. B."—will receive attention in our next.

"One who sat next Mr. K. at the oral."

We find that you are correct in stating that Mr. Kirkpatrick was not "called" without a *viva voce* examination. The papers of the gentleman who *was* passed without an oral were most creditable. The next in number of marks would probably be our correspondent.

Whilst regretting that any mistake should have occurred in this matter, we cannot forbear to remark upon the extreme difficulty which we, amongst others, have experienced in obtaining from the proper authority information with respect to matters of this kind, in which there is not the slightest reason or excuse for withholding, except the whim or caprice of its custodian. Our Correspondent, naturally enough, imagines that the party alluded to affords us every information (consistent with his duties to his office and ease to himself) connected with the *public*, so to speak, proceedings of the Law Society. Such however is not the case, and we have hitherto been obliged to obtain our information from various sources, as best we could.