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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—*On the mode of appointing a Deputy Clerk*, we have had some questions put to us, and as the matter is of general interest we notice it under this head.

The authority for appointing a Deputy Clerk is given by the 10th section of the D. C. Act. There are two preliminaries,—first, the Clerk must be prevented by *illness or other unavoidable accident* from acting as Clerk—and second, the approval of the Judge must be obtained in order to render the appointment valid. On the first ground the Judge is the proper authority to determine whether such illness or unavoidable accident, within the meaning of the Enactment, exists, and it is unnecessary therefore to enlarge upon it. What is meant by *unavoidable accident* it is not easy to say, but as this is put in contradistinction, as it were, *to illness*, it leaves a wide margin for action. It is proper that application should in the first place be made to the Judge; it may be personally, or by letter entering into all necessary particulars for the Judge's information. The appointment should be made in writing, and may be in the following form:—

I, ———, Clerk of the ——— Division Court of the County of ———, being prevented by ("*illness*" or "*unavoidable accident*") from acting in my said office, do hereby, with the approval of ———, Judge of the County Court of the said County, appoint ——— of the ——— of ——— in the said County ("*Gentleman, &c.*") to be my Deputy during the period of such ("*my illness*" or "*unavoidable accident*") according to the tenth section of the Division Courts Act of 1850.

Given under my hand this —— day of ——— AD. 18 .

———,
Clerk of the said Court.

Approved by me,

———,
Judge, &c.

That the Judge should enter his approval *on* the Appointment is not indispensable, but it is better so, and may prevent any misunderstanding or difficulty afterwards.

There is no provision in the Statute enabling the *Judge* to appoint a *Deputy* Clerk, and in case of the inability of the Clerk to make such appointment the only means of having the office legally filled is for the Judge to appoint some person as Clerk, with an understanding that he go out of office when the cause of such appointment has ceased, and the former incumbent is able to resume his duties. In such appointment the usual Bond and Covenant must be executed and filed, for the party would not be a Deputy, but *Clerk in his own right*, and the Statute only makes the Clerk and his Sureties responsible for the acts and omissions of the *Deputy* Clerk. All papers requiring the Clerk's signature should be signed by his Deputy Clerk in that capacity.

The New Tariff.—We would be glad to hear from Clerks as to the working of the new Tariff; if they have experienced any difficulty in bringing it into practice; and if the Fees now given are sufficiently remunerative for the labour imposed: also, if any amendment in the law, as it affects them, is called for.

On one subject we have heard complaints—the want of proper accommodation in out Divisions for holding the Courts—and as no provision is made in the Act for securing a proper place that the Clerks are compelled to pay for such accommodation out of their small incomes, or that the Court is held in a Tavern, to the annoyance of the Officers, not to speak of the public injury resulting. The Judge has certainly a remedy to some extent in his hands, by appointing the sittings at some place where there is sufficient public spirit to provide a proper room, (not tavern) or to secure the use of a Town Hall or School House for the purpose; but the real remedy for this grievance can only be applied by the Legislature. We desire to know from Clerks if this complaint is general, and to learn what improvements occur to them as practicable.

If not in this number we will in the next be prepared to announce inducements for securing a complete guide to Officers—Clerks and Bailiffs—in the discharge of their numerous and important duties. As occasion required or as correspondents desired information on points of practice our columns have been open to them, and in nearly every case answers have been furnished by us; but we can see that there is something more necessary, and our efforts will be directed to procure for insertion in the *Law Journal* more systematised and more detailed information; at the same time we will continue to advise on points of practice as circumstances may suggest. The advocacy of all that may be justly advanced for improving the position of Officers and giving a fair return for the labours and responsibilities imposed upon them by law, we have had prominently in view from the first.

BAILIFFS.—*Note seized under execution, how sued.*—We are asked by "A Bailiff" if it be necessary for him to sue in his own name on a Promissory Note seized by him under a Warrant of Execution, and whether, if compelled to sue, he may not claim to be indemnified by the plt. against costs, in case the maker of the note, the person to be sued, should have judgment in his favor.

The enactment on the subject is contained in the 90th section of the D. C. Act, which only makes it incumbent on the Bailiff "*to hold* promissory notes" and other "securities for money" which

shall have "been seized or taken" for the benefit of the plt.; and it is provided that "the plt. may sue in the name of the dft. or in the name of any person in whose name the dft. might have sued" for the recovery of the sum or sums made payable thereby: the action therefore should be instituted by the Creditor (who must pay or secure all costs that may attend the proceeding) and not by the Bailiff. It is the Bailiff's duty to return the Note seized into Court, or to allow the plt. to take a copy that he may enter a suit upon it when the time of payment shall have arrived. The more convenient practice, it seems to us, would be for the Bailiff to hand over unmatured Notes seized to the Clerk—and it would be proper for him, when he can conveniently do so, to notify the maker of the Note, or other party responsible on a money security, that the same has been seized by him under execution.

When the creditor (the plt.) sues on the Note the Clerk will find it to be his duty under the 19th Rule of Practice to add a notice to the Summons cautioning the dft. that the creditor only has power to discharge the suit. To this notice the defendant's attention should be drawn by the Bailiff—especially when the party served is an illiterate person—to guard him against paying the amount to the party in whose name the suit is brought (the original dft.) or settling the suit in any way with him.

SUITORS.

FORM AND REQUISITES OF CLAIM AND DEMAND.

(Continued from page 161.)

Suing in special character.—If the plt. sues or the dft. is sued in a particular character, for example as executor or administrator, it should be shown in the particulars by adding after the plaintiff's or defendant's name the words "Executor" (*or* "Administrator") "of ——— deceased."

Statement of Cause of Action.—The claim or demand should in every case admitting thereof show the particulars in detail, and the sum claimed. Thus if the action be on a "Store Bill" or tradesman's bill, the items of the account are given; or if the account in detail *can be proved to have been already rendered*, it is usually sufficient to say, "To amount of account rendered £——." If the action be on a Promissory Note, "Stock Note," "Labour Note," or any other written contract, it is to be copied, or the substance of the document set down in writing—in practice it is usual to hand the original Note, &c., to the Clerk, who makes the copy, &c.

Where the action does not admit of detailed particulars, there must be a statement of the facts constituting the cause of action, in ordinary and concise language, and the sum of money claimed in respect thereto: thus if the action be for *assault* the particulars may be as follows:—

"A. B. of ———, states that C. D. of ———, did on the ———day of ———, A.D. 18 ., at the Township of ———, unlawfully *assault and beat the said A. B.* The said A. B. hath sustained damages to the amount of £——, and claims the same of the said C. D."

A. B.

Or if the action be for *taking property*, instead of the above between the asterisks, (*—*) say:—

"Take and convert one cow, *(or as the case may be)* the property of the said A. B."

Sufficient has been said to give a general idea of the way in which the particulars are to be made out. Any man of ordinary intelligence, keeping in mind what was said in our last number under this head—that a main object of the particulars is *to inform the dft. of what will be attempted to be proved against him at the hearing*—will not find any difficulty in framing the particulars: and any little mistake not calculated to deceive or mislead the dft the Judge will rectify, if objected to, at the hearing.

Leaving Particulars for Suit.—When the claim or demand is made out by the plt. it should be delivered to the Clerk at his office, and the necessary Fees paid on it, as soon as possible, for if left till nearly the last day for service the Bailiff may be out attending to his duties, or the dft. may happen to be from home at the time: the consequence is that the dft. is not served, and thus the needless expense of a second Summons must be incurred. If the plt. desires his case to be tried by a Jury, the proper time to notify the Clerk of his wish is when he enters the claim, and he must then deposit with him the Bailiff's fees and other charges on summoning a Jury.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 161.)

MODE OF COMPELLING THE APPEARANCE OF PARTIES.

The information or complaint having been properly laid, and it being determined to proceed by way of summary conviction, the next step necessary to be considered is, in what way the defendant's appearance before the Magistrates is to be secured to answer the charges against him: it is effected by the Magistrate issuing process for the purpose.

Process is of two kinds, viz., a *Summons* and a *Warrant*, and either may be used in the first instance according to the circumstances and nature of the case. In many Statutes the particular process to be used, whether summons or warrant, is

pointed out; but previously to the passing of the act 16 Vic. c. 178, there was no general provision regulating the practice, and it was left in a great measure to the discretion of the Magistrate whether a summons or warrant should issue in the first instance.

The following Act conferring summary jurisdiction on Magistrates, viz., the 4 & 5 Vic. c. 27, (*injuries to the person*) the 4 & 5 Vic. c. 25, (*malicious injuries to property*) may be cited as instances where express authority is given, in the Magistrate's discretion, to issue a warrant without previous summons upon oath of the offence; and the 7 Vic. c. 12, (for preservation of game) as an instance requiring a summons to issue in the first instance.

Where the proceeding is not regulated by the recent Act, the rule of practice may be thus laid down. In case information is laid under a Penal Statute (the informer entitled to half the penalty) and in every case *not* involving a breach of the peace, by *summons* is the proper mode of procuring the defendant's appearance: if the summons be disobeyed there is generally a provision for a warrant on proof of service of summons, or for the case being decided *ex parte*. If the offence is not deposed to on oath, a summons is the *only* proper process, and so also where the Statute acted under is silent on the point whether a summons or warrant should issue in the first instance.

There are many cases where different Statutes authorize Justices to issue a warrant in the first instance, without any previous summons, but even in such cases when the direction is not *imperative*, but left as a matter of *discretion* to the Justice *whether to issue a summons or a warrant; the* discretionary power to arrest without previous summons, should be cautiously and sparingly exercised, for it will be often found that the accusation is of a frivolous nature, or grounded for the most part on some bad feeling between the parties; so that, unless it be made appear *on oath* by the complainant, or a third party, that the objects of the prosecution may be defeated by the defendant's absconding, or the like, the Magistrate ought not to issue a warrant in the first instance. [*]

Where no mode of process is pointed out, the recent Statute (16 Vic., c. 178) will regulate the proceeding. A general rule is prescribed by that Act; sec. 1st enacts that in all cases where a Justice has jurisdiction it shall be lawful for such Justice or Justices—

"To issue his or their summons, directed to such person, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place, before the same Justice, or before such other Justice or Justices for the same Territorial Division as shall then be there to answer to the said information or complaint, and to be further dealt with according to law."

But it is also made lawful to issue a warrant in the first instance, in preference to a summons; sec. 2 enacts that it shall be lawful for the Justice—

"Upon oath or affirmation being made before him or them substantiating the matter of such information or complaint to his or their satisfaction, to issue his or their warrant to apprehend the party so summoned, and to bring him before the same Justice or Justices, or before some other Justice or Justices of the Peace, in and for the same Territorial Division, to answer to the said information or complaint, and to be further dealt with according to law; or upon such information being laid as aforesaid for any offence punishable on conviction, the Justice or Justices before whom such information shall have been laid, may, *if he or they shall think fit*, upon oath or affirmation being made before him or them, substantiating the matter of such information, to his or their satisfaction, instead of issuing such summons as aforesaid, issue, *in the first instance*, his or their warrant for apprehending the person, against whom such information shall have been so laid, and bringing him before the same Justice or Justices, or before some other Justice or Justices of the Peace in and for the same Territorial Division to answer to the said information, and to be further dealt with according to law."

Of the processes to secure the dft's. appearance, which may be made available under the Act—*Summons* and *Warrant*—the Magistrate must exercise a sound discretion as to which he will employ. In our judgment the safer and fairer practice that is most in accordance with natural justice, is by *summons*, to commence with.

[*] This statement, if contained in the information, may be as follows, "*and the said* ——— *further saith that he has good reason to believe, and doth verily believe that the* ——— *will abscond*, or unlawfully absent himself from and out of the said county in order to avoid conviction and punishment for his said offence."—See observations of Lord Tenterden in Reg. vs. Hirnie, 1 Mood and M. 160-5 Car & P. 288 s. c. See also, Hanway vs. Boumbee, 1 Mood & M. 10.—R. vs. Marter, 13 East 55.

ON THE DUTIES OF CORONERS.

(CONTINUED FROM PAGE 145.)

II.—PROCEEDINGS IN RELATION TO INQUESTS.

Form of Inquisition.—The Stat. 13 & 14 Vic. c. 56, declares that Inquisitions shall not, on mere technical grounds, be liable to be set aside; but that, if moved against, it shall be competent for any Judge of Assize, or any Judge of the Superior Courts at Common Law, to order the same to be amended. The 4th section provides:—

IV. That no Inquisition found upon or by any Coroner's Inquest, nor any judgment recorded upon or by virtue of any such Inquisition, shall be quashed, stayed, or reserved, for want of the averment therein of any matter unnecessary to be proved, nor for the omission of any technical word or words of mere form or surplusage; and in all such cases, and all others of technical defect, it shall be lawful for either of the Superior Courts of Common Law, or any Judge thereof, or any Judge of Assize or Gaol Delivery, if he shall think fit, upon the occasion of any such inquisition being called in question before them or him, to order the same to be amended, and the same shall be amended accordingly.

The following form of caption and attestation of Inquisition is in general use:—

Form of Caption and Attestation.

County of ———, } An Inquisition indented taken for our
To wit: } Sovereign Lady the Queen, at the dwelling house of N. N., in the Township of ———, in the County of ——— aforesaid, the ——— day of ———, in the ——— year of the reign of our Sovereign Lady Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and in the year of our Lord one thousand eight hundred and ———, before A. B., Esquire, one of the Coroners of our said Lady the Queen for the said County, on view of the body of H. H., then and there lying dead, upon the oath of ——— (*naming the Jurors sworn*) good and lawful men of the said County, duly chosen, and who being then and there duly sworn and charged to enquire for our Sovereign Lady the Queen, when, how, and by what means the said H. H. came to his death, do upon their oaths say, That &c.

In witness whereof, as well the said Coroner as the Jurors aforesaid, have hereunto set and subscribed their hands and seals the day and year first above written.

A. B., Coroner, [L.S.]
——— Foreman [L.S.]
The other Jurors sworn. [L.S.]

The subjoined Forms will be found useful, and can be adapted to the majority of cases:—

1. *Inquisition for Murder—by Stabbing.*

[*Caption as above, then proceed*]—That ———, late of the Township of ———, in the County of ———, labourer, otherwise ———, [or "*that a certain person to the Jurors aforesaid unknown*] on the —— day of ———, in the year aforesaid, with force and arms at the Township of ———, in the County aforesaid, in and upon the said H. H., in the peace of God and of our said Lady the Queen then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said ———, with a certain knife of the value of sixpence, which he the said ——— in his right hand then and there had and held, the said H. H. in and upon the left side of the belly, between the short ribs of him the said H. H., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said H. H. then and there with the knife aforesaid, in and upon the said left side of the belly, between the short ribs of him the said H. H., one mortal wound of the breadth of three inches and of the depth of six inches; of which said mortal wound he the said H. H., from the said —— day of ———, in the year aforesaid, until the —— day of the same month of ———, in the year aforesaid, at the Township aforesaid, in the County aforesaid, did languish, and languishing did live; on which said —— day of ———, in the year aforesaid, in the County aforesaid, of the said mortal wound did die: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said ——, otherwise called ——, [*or, "the said person to the Jurors aforesaid unknown, as aforesaid"*] him the said H. H. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our said Lady the Queen, her Crown and dignity.

[And the Jurors aforesaid, upon their oath aforesaid, do say that the said ———, otherwise called ———, [after the doing and committing of the felony and murder aforesaid, withdrew and fled for the same, and that the said ———, otherwise called ———,(*a*)] at the time of the doing and committing the felony and murder aforesaid, had not any goods or chattels, lands or tenements, within the said County or elsewhere, to the knowledge of the Jurors aforesaid: or, "And the Jurors aforesaid, upon their oath aforesaid, do say that the said ———, otherwise called ———, at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels contained in the inventory hereunto annexed, which remain in the custody of ———. (*b*.)

In witness, &c. [*Attestation as above.*]

2. *By Striking with a Stick.*

Caption *and commencement as above*] did make an assault; and that the said ———, with a certain large stick, of no value, which he the said ——— in his right hand then and there had and held, him the said H. H. in and upon the head of him the said H. H. then and there feloniously, wilfully, and of his malice aforethought, divers times did strike and beat, there and then giving to him the said H. H. by the striking and beating of him the said H. H. with the stick as aforesaid, in and upon the right side of the head of him the said H. H. one mortal bruise; of which said mortal bruise, he the said H. H. then and there instantly died: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said ———, otherwise called ———, him the said H. H. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our said Lady the Queen, her Crown and dignity. [*Concluded as in Form No.* 1.]

3. *By Beating with Fists.*

Caption *and commencement as above*] did make an assault; and that the said ———, with both his hands him the said H. H. did then and there in and upon the head and left temple of him the said H. H., feloniously, wilfully, and of his malice aforethought, strike and beat; and that the said ———, by the striking and beating aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, give unto him the said H. H. one mortal bruise in and upon the said left temple of him the said H. H., of the length of two inches and of the breadth of two inches, of which said mortal bruise he the said H. H. then and there instantly died; and so the Jurors aforesaid, upon their oath aforesaid, do say that the said ———, otherwise called ———, him the said H. H. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our said Lady the Queen, her Crown and dignity. [*Conclusion as in Form No.* 1.]

4. *By Shooting.*

Caption *and commencement as above*] did make an assault; and that the said ———, otherwise called ———, with a certain pistol of the value of five shillings, then and there charged with gunpowder and one leaden bullet, which said pistol he the said ———, otherwise called ———, in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, to, upon, and against the said H. H. did shoot and discharge, and that the said ———, otherwise called ———, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder, shot and sent forth as aforesaid, the said H. H. in and upon the belly of him the said H. H., upon the right side, near the hip, then and there feloniously, wilfully, and of his malice aforethought did strike, wound, and penetrate, giving to the said H. H.

(*a*) The finding of flight is not common.

(*b*) The finding with respect to goods is seldom resorted to in practice, and the omission of it will not vitiate. By 4 & 5 Vic. ch. 24, s. 10, the Jury empanelled to *try* a person *indicted* for treason or felony, shall not enquire concerning his goods, &c.; but this Statute does not apply to Coroners' Juries, who are summoned to enquire of the cause of the death only.

then and there with the leaden bullet aforesaid, so as aforesaid shot, discharged and sent forth out of the pistol aforesaid, by the said ———, otherwise called ———, in and upon the belly of him the said H. H., upon the right side, near the hip, one mortal wound of the depth of three inches, and of the breadth of one inch, of which said mortal wound he the said H. H. then and there instantly died: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said ———, otherwise called ———, him the said H. H. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our said Lady the Queen, her Crown and dignity. [*Conclusion as in form No.* 1.]

5. *Inquisition for Manslaughter.*

[The same as murder, omitting the words "of his malice aforethought" throughout, and the word "murder" in the conclusion.]

6. *Casual Death—Found Drowned—Name unknown.*

CAPTION *as before*] do upon their oaths say, That the said man, to the Jurors aforesaid unknown, on the ——— day of ———, in the year aforesaid, at the Township aforesaid, in the County aforesaid, was found drowned and suffocated in a certain river there called ———; and that the said man, to the Jurors aforesaid unknown, had no marks of violence appearing on his body, but how or by what means he became drowned and suffocated, no evidence thereof doth appear to the Jurors.

In witness, &c. [*Usual attestation.*]

7. *Casual Death—Found Dead.*

CAPTION *as above*] do upon their oaths say, That the said H. H., on the —— day of ———, in the year aforesaid, at the Township aforesaid, in the County aforesaid, in a certain field there, was found dead; and that the said H. H. had no marks of violence appearing on his body, but by the visitation of God, in a natural way, and not by any violent means whatsoever, to the knowledge of the said Jurors, did die.

In witness, &c. [*Usual attestation.*]

8. *Casual Death—Drowned by Bathing.*

CAPTION *as before*] do upon their oaths say, That the said H. H., on the —— day of ———, in the year aforesaid, at the Township aforesaid, in the County aforesaid, going into a certain pond there called ———, to bathe, it so happened that accidentally, casually, and by misfortune, the said H. H. was, in the waters of the said pond then and there suffocated and drowned, of which said suffocation and drowning the said H. H. then and there instantly died: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said H. H., in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise.

In witness, &c. [*Usual attestation.*]

9. *Casual Death—Death in Prison.*

CAPTION *as before*] do upon their oaths say, That the said H. H., being a prisoner in the Gaol of the County of ———, at the Town of ———, in said County, on the —— day of ———, in the year aforesaid, at the Prison aforesaid, by the visitation of God, in a natural way, to wit, of a fever, and not otherwise, did die.

In witness, &c. [*Usual attestation.*]

(TO BE CONTINUED.)

U. C. REPORTS.

CHANCERY.

GRAHAM v. BURR.

Riparian proprietors—Injunction.

The plaintiff and defendant were owners of mills on the same stream, the defendant's being lower down than, and erected before, that of the plaintiff. By the erection of the dam of the defendant, it was alleged that the plaintiff's mill privilege was affected injuriously. Although it was shewn that the plaintiff, in order to work his mill, was compelled to dam back the water so as to overflow lands higher up, the property of the defendant, the title to which he had obtained after the commencement of this suit, the court (Esten V. C. *dissentiente*) held the plaintiff was entitled to an injunction against the defendant, restraining him from damming the water back upon the plaintiff's property.

[1 U. C. Chan. Rep. 1.]

The bill in this case was filed by *William Graham* against *Rowland Burr*, and stated to the effect that plaintiff being the owner of eighteen acres of Lot No. 31, in the 10th concession of Vaughan, across which the river Humber flowed, began in April 1850, to erect a saw mill, and dig a mill race thereon: that defendant being the owner of Lot 31, in the 9th concession, had in July 1849 thrown a dam across the river on his premises, the effect of which was to pen back the water upon the mill of plaintiff: that *Burr* had leased his lot to one *McIntosh*, who, after the lease, had raised the dam to a greater height, whereupon plaintiff brought an action at law and obtained judgment therein, upon which execution had been sued out against *McIntosh* for £111 7s. 5d., and which was returned *nulla bona*: that *Burr* had obtained a surrender of *McIntosh's* interest in the premises, upon which the dam was still allowed to remain, whereby the plaintiff was hindered in the use of his mill by reason of the backwater of such dam.

The bill prayed a perpetual injunction against the defendant and all others the occupiers of the said lot, restraining them from permitting the said dam to remain at its then height or at any such height as might pen or dam back the waters of the said river over and above the usual and natural water marks of the said stream, or prevent the water escaping from the race of the plaintiff's mill. To this bill the defendant put in an answer. The cause, having been put at issue and evidence taken, now came on to be heard on the pleadings and evidence, the effect of which sufficiently appears in the judgment of the court.

Mr. *McDonald* and Mr. *Charles Jones* for plaintiff, cited, amongst other cases, the Duke of *Deronshire* v. *Elgin* (*a*) *Soltau* v. *De Held*, (*b*) and *Eden* on injunction 352.

The defendant in person.

The CHANCELLOR.—The plaintiff and defendant are mill owners on the river Humber. The plaintiff's mill is situated higher up the stream than the defendant's, and his complaint is that the defendant's dam pens back the water to an extent which impedes the working of his machinery, and materially injures his mill site. He prays that the continuance of this nuisance may be prevented by perpetual injunction.

The jurisdiction is not denied; it is of very ancient date,(c) although its exercise has become much more frequent in modern times; (*d*) but several objections are made to its application in this particular case. It is said—first, that the plaintiff's title must be tried at law;—secondly, that the evidence before us fails to establish a case for equitable relief;—lastly, that the plaintiff is himself a wrong-doer, and on that ground disentitled to relief in this court.

The plaintiff answers the first objection by the assertion that he has established his title at law; and, as proof of that

(*a*) 2 L. J. N. S. 495. S. C. 7 Eng. R. 39. (*b*) 16 Jur. 326.

(*c*) Bush v. Field, Cary 129; Finch v. Resbridger, 2 Ver. 390; Bush v. Western, Pre. chn. 530.

(*d*) Dewhirst v. Wrigley, C. P. Coop. 319; Elmhirst v. Spencer, 2 Mc. & G. 45; Rochdale Canal Co. v. King, 2 Sim. N. S. 78; Dawson v. Paver, 5 Har. 115; Gardner v. The Village of Newburgh, 2 J. C. R. 162, Ib. 272 & 3.

position, he produces the exemplification of a judgment obtained by him against one *McIntosh*, who occupied the premises in question when the dam was first constructed as tenant to the defendant, with a right to purchase. Upon the trial of that action, the plaintiff's damages were assessed at £60. As to the admissibility of this judgment, *Blakemore* v. *The Glamorganshire Canal Company* (*a*) and *Philips* on evidence, page 11, were cited.

In cases of this kind, where the jurisdiction which this court exercises is ancillary, it is certainly the practice, as a general rule, to require the plaintiff to establish his title at law. But that, although a general is not an universal rule; it is competent to this court, if it see fit, (*b*) to decree a perpetual injunction, without a trial at law. It is matter of discretion.

There are some obvious reasons why the practice which formerly prevailed in England on this subject, should not be pursued strictly in this court. In the first place, there are many cases of this class, in which this court is obliged to proceed without having the legal question determined by the proper tribunal; because the right of suitors in this court to have the opinion of a court of law is denied. Secondly, the necessity of having the legal title first established at law has been abolished by a recent statute of the Imperial Legislature.(*c*) Lastly, one principal ground of the practice which formerly prevailed was the imperfect mode of taking evidence previous to the recent statute. That reason has no application here; all the witnesses in the case were examined before the court.

Without determining the sufficiency of any of these answers, I am quite satisfied that this objection affords no ground for refusing relief in this particular case. The defendant makes no objection of this sort to the plaintiff's right to recover; on the contrary, his answer closes with this passage, "defendant is willing and begs that a competent person or competent persons be appointed by this court to survey, lay out and place monuments marking the height, width and depth this defendant's dam should and shall be, and the defendant shall abide faithfully by the said decision."

Again, the evidence adduced by the parties appearing to be insufficient, it was suggested that a new survey should be made by a person to be appointed by the court. This proposition was agreed to by both parties, and an order was drawn up, by consent, by which Mr. *Dennis* was directed to take the levels of the stream in its then state, and afterwards to cause the dams of both parties to be removed, so as to ascertain conclusively the effect of the defendant's dam. This order was complied with. Mr. *Dennis* has been examined before us as a witness; and, if the evidence be satisfactory, I am of opinion that it is our duty to dispose of this case now. It was competent to these parties to submit the question of nuisance to this court; they did so submit it, and the evidence before us is much more satisfactory than it is possible, in ordinary cases, to submit to a jury.

Lord Cottenham has discussed the law upon this subject in several of his most elaborate judgments; and in one of them, *Bacon* v. *Jones* (*d*), there are some observations very pertinent, as it seems to me, to the present case, "when the cause comes to a hearing," he observes, "the court has also a large latitude left it, and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the faame of the pleadings, the nature of the right, and of the evidence by which it is established,—these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties." And in *Cory* v. *The Yarmouth & Norwich Railway Co.*, Sir *James Wigram* says, "If, on the other hand, the court is clearly with him, the court may, in the exercise of its discretion, grant the injunction in the first instance, there being no doubt whatever, although the question is a legal one, and though a court of law is the proper tribunal before which such question should be tried, that a court of equity may decide the legal question if it thinks fit."

I am satisfied, therefore—subject to the question as to the sufficiency of the evidence—that this case ought to be disposed of here. Before proceeding to examine the evidence, it will be convenient to advert briefly to the state of the law upon this subject, which, at one period, would seem to have been greatly misunderstood. It is said in 1 Wm. Saund. 114 a. n. 9, that "a mistaken notion appears to have prevailed for some time that the right to flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it, and thereby gain a good title against all the world, excluding the proprietor of the land below, who may thereby be deprived of the benefit of the water, unless he has already applied the stream to some useful purpose." That doctrine is stated very plainly, as it seems to me, by Sir *William Blackstone* (*a*) in his commentaries, and, also by several judges of acknowledged learning. (*b*). Lord *Denman*, indeed, considers that the passage from *Blackstone*, and the dicta to which I have adverted, have been misconceived; but it is very difficult to reconcile the language to be found in the commentaries, and in the reported cases with the law as it is at present understood. In his chapter "on title to things possessed by occupancy," *Blackstone* says, "Thus too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy, * * * * * If a stream be unoccupied, I may erect a mill thereon and detain the water; yet not so as to injure my neighbour's *prior* mill or his meadow, *for he hath by his first occupancy acquired a property in the current.*" And in *Liggins* v. *Inge*, Chief Justice *Tindal* says, "Water flowing in a stream, it is well settled by the law of England is *publici juris*. * * And, by the law of England, the person who first appropriates any part of this water flowing through his land to his own use has the right to the use of so much as he then appropriates, against any other." *Bayley, J.* says, "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it." And in *Bealey* v. *Shaw*, Mr. Justice *Le Blanc* says, "The true rule is, that after the erection of works, and the appropriation by the owner of land of a certain quantity of the water flowing over it, a proprietor of other land afterwards takes what remains, the first owner, *however he might, before such second appropriation, have taken to himself so much more*, cannot do so afterwards."

These passages do not seem to me to admit of the construction which has been placed upon them by Lord *Denman*. But, however that may be, this doctrine, if it did prevail, is plainly erroneous; it confounds the corporeal thing, water, with the incorporeal right to have it flow in its accustomed channel; it treats the appropriation of a given portion of water from a stream as an appropriation of the current itself, which it plainly is not; for running water, from its very nature, is incapable of occupancy; and it assumes the absence

(*a*) 2 C. M. & R. 133.

(*b*) Farwell v. Wallbridge, 2 Grant 341, and cases cited; Cory v. The Yarmouth and Norwich Railway Co., 3 Rail Ca., 531.

(*c*) 15 & 16 Vic. ch. 86, sec. 62.

(*d*) 4 M. & C. 437.

(*a*) 2 Black. Com. pp. 14, 15, 402.

(*b*) See the judgment of Le Blanc, Bealey v. Shaw 6 East 208; of Holroyd, Saunders v. Newman, 1 B. & Al. 258; of Bayley, Williams v. Morland, 2 B. & C. 910; of C. J. Tindal, Liggins v. Inge, 7 Bing. 682.

of all ownership, where there had been an appropriation by operation of law for the common benefit of all riparian proprietors,

It is now well settled that every riparian proprietor is entitled to the natural flow of the waters, without diminution or obstruction. Mere appropriation confers no right. The language of Sir *John Leach* in *Wright* v. *Howard*, (*a*) has been cited by Lord *Tenterden* as furnishing a clear and comprehensive statement of the law upon this subject. "The right to the use of water," he says, "rests on clear and settled principles. *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of grant."

The nature and extent of this right have not been settled as yet with precision. In *Acton* v. *Blundell* (*b*) Chief Justice *Tindal*, delivering the judgment of the Exchequer Chamber, appears to treat it as an easement acquired by each riparian proprietor, through the assent and agreement of all the others, implied from immemorial usage. But in *Shury* v. *Piggott*, (*c*) *Whitelock J.* says, "There is a difference between a way, a common, and a water-course. *Bracton*, lib. 4, fol. 221-2, calls them *servitutes proediales*, those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. *A water-course doth not begin by prescription, nor yet by assent; but the same doth begin, ex jure naturæ, having taken this course naturally*, and cannot be averted." This opinion, in which the Chief Justice and the other judges concur, appears to me to assign the true ground and origin of the law; it has been adopted, I believe, in most of the States in the American Union, as it certainly has by two of their most eminent jurists, Mr. Chancellor *Kent* (*d*) and Mr. Justice *Story*; (*e*) and it has been recently approved by the Court of Exchequer in England. (*f*)

The proposition that every riparian proprietor is entitled to have the stream flow in its accustomed manner, without obstruction or diminution, involves two other propositions;—first, that each proprietor must have a right to apply the stream to those useful purposes for which it was by nature intended;—secondly, that no proprietor can have a right to apply it so as to produce injury to any other. To deny the first would be to subvert the principle upon which the law rests,—would be, in effect, to deny the right itself. It is an incident annexed to the land by operation of law, or, as Mr. Justice *Whitelock* has expressed it, *ex jure naturæ*, because nature plainly intended the stream for the common benefit of all; but, if there be no right to apply the stream to beneficial purposes, there is no benefit, and the foundation of the rule fails. To deny the second would be to negative the existence of the *common* right. If all be entitled to have the stream flow in its accustomed manner, for their *common* benefit, it is obvious that the injurious application of it by any is necessarily excluded. Every mode of enjoyment, indeed, will be attended by some diminution of the quantity of the water, or some variation of the current, but no mode of enjoyment, no diminution of the quantity of water, no retardation or acceleration of the current, is regarded as an infringement of the common right, unless attended with material injury to some other proprietor.

Such would seem to have been the rule of the civil law.

But it is said by Chief Baron *Pollock*, *Wood* v. *Waud*, that running water may be used for manufacturing purposes in the United States of America to an extent not permitted by the law of England, which allows an action to be maintained, he says, where a mode of enjoyment is adopted quite contrary to the ordinaay one, by which the water is diverted into a reservoir, and there delayed for the purpose of manufacture. I am not satisfied that there is any ground for that distinction. In neither country will the use of running water for ordinary domestic purposes, constitute a good ground of action, although the quantity of water be seriously diminished, and positive injury thereby produced, *æqua profluens ad lavandum et potandum unicuique jure naturali concessa*; but in both countries its application to manufacturing purposes will constitute, I apprehend, a good ground of action where that mode of enjoyment materially affects other proprietors in their application of the stream.

Williams v. *Morland*, to which I have already referred, is sometimes cited as an authority for the proposition that no riparian proprietor can maintain an action for the disturbance of his right, unless he have previously appropriated the water to some useful purpose. The case is not an authority for that position; but unquestionably there are dicta of all the learned judges who determined it to that effect. Mr. Justice *Littledale*, for instance, observes, "the mere right to use the water *does not give a party such a property in the new water* constantly coming as to make the diversion or obstruction of the water *per se* give him any right of action. This passage obviously confounds the corporeal substance with the incorporeal right. Strictly speaking, no proprietor has any property in the water itself. In that sense it is *publici juris*. The action is not for the abstraction of water in which a property had been acquired, but for the disturbance of the incorporeal right; and it would be contrary to all principle if such an action could not be maintained without proof of previous appropriation. Mr. Sergeant *Williams*, in his note to *Mellor* v. *Spateman* (*a*), says, "wherever any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for the invasion of the right, without proof of any specific injury." And the judgment of *Buller. J.*, in *Hobson* v. *Todd*, (*b*), is to the same effect. In *Mason* v. *Hill*, Lord *Denman* repudiates the doctrine attributed to several of he judges in *Williams* v. *Morland*, and *Bower* v. *Hill* (*c*) in the Common Pleas, goes far to establish the true rule. Chief Justice *Tindal* there says, "But independently of this narrower ground of decision, we think the erection of the tunnel is in the nature of, and, until removed is to be considered as, a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he received no immediate damage thereby. The right of the plaintiff to the way (a navigable water-course) is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction apparently

(*a*) 1 B & B. 203.
(*b*) 12 M. & W. 348.
(*c*) 3 Bulst. 339, and see Browne v. Best, 1 Wil. 174.
(*d*) 3 Kent Com. 434.
(*e*) Tyler v. Wilkinson, 4 Mason U. S. Rep. 397.
(*f*) Wood v. Waud, 3 Exch. 776.

(*a*) 1 Wms. Sand. 346, C.
(*b*) 4 T. R. 7.
(*c*) 1 Bing. N. S. 549.

permanent, to lights and other easements which belong to the premises. *The plaintiff's premises would sell for less whilst the tunnel is in existence if now put up for sale.*" Apylying *these principles to the case now before us, I am of opinion* that the plaintiff has established his right to equitable relief. That the water of the stream was penned back upon the plaintiff's land to an extent very injurious is now established beyond all doubt. It is shewn clearly that there is a fall of about eleven inches in the plaintiff's tail race. But when Mr. *Dennis* examined the premises, before any obstruction had been removed, he found the water in the bed of the river, opposite to the mouth of the tail race, standing at a level three inches higher than the upper surface of the plaintiff's mill apron; that is, he found that there was a fall from the river to the mill, instead of from the mill to the river. But when the obstruction had been partially removed, the water fell at the concession line eight inches, and not only the mill apron, but half the tail race, was quite free from water.

It is said, however, that this injury was not occasioned by the defendant's works, but by certain accumulations of drift wood in the stream which constituted a sort of natural dam. Mr. *Dennis's* opinion is quite opposed to this hypothesis. He says, *in his first report, "on lowering the defendant's dam* fourteen inches, and opening three drifts of logs and drift wood which had accumulated between the bridge and the said dam, the water fell at the said bridge eight inches. It is my opinion that, were the whole of the said dam removed, and the river between where it stands and the bridge referred to cleared out, the water at the latter point, at its ordinary flow, would stand still four inches, certainly two inches lower, *making the practical effect of the defendant's dam* to be that the water at the concession line stands ten inches higher than would be shewn by the natural flow of the stream at that point."

But it is said that the facts established by Mr. *Dennis's* survey would lead to a conclusion different from that which he has drawn, and it is argued that a mere speculative opinion is insufficient, at least under such circumstances, to warrant a decree. This was not an objection taken for the first time at the hearing; it constituted the defence in the action at law, and much of the evidence in this court tended the same way. *It is much to be regretted, therefore, that the plaintiff should* have failed to direct Mr. *Dennis's* attention to this point, which, had it been suggested, might have been set at rest by the first survey. Had the drifts been removed before the dam, Mr. *Dennis* would have had the means of determining conclusively the effect of the dam taken singly. But unfortunately this was not suggested. The dam was first removed, and it became impossible, consequently, to ascertain the effect of the dam, taken alone, as a matter of fact.

The force of this objection was felt by the court; and, for the purpose of removing the supposed difficulty, a second examination was directed. I cannot say that this further inquiry seems to me to have been absolutely necessary. Facts had been clearly ascertained, quite sufficient to justify the conclusion at which Mr. *Dennis* had arrived. For previous to the removal of either drifts or dam, he had required the defendant to set his saw mill in operation, which was found to lower the water in the pond by two inches and a half, and at the bridge, by an inch and a quarter. Now these facts demonstrate very clearly, as it seems to me, that the defendant's dam had an effect over and above that caused by the drifts; that it penned back the water to a higher level than would have been attained, had the drifts been the only obstacles; were it otherwise, the lowering of the water in the mill pond, before the drifts had been removed, would not have produced any effect at the bridge, a point higher up the stream than the drifts; but we find that a change of two and a half inches in the pond, did in fact produce a change of one inch *and a quarter at the bridge; to that extent, therefore,* the injury complained of must have been the effect of the dam and not of the drifts. It is true, that the subsequent lowering of the defendant's dam to the extent of nine inches failed to produce any perceptible effect at the bridge; but that fact, instead of weakening, greatly strengthens the argument in favor of the *plaintiff; so far as each obstacle was sufficient of itself, to* produce the given result, to that extent the removal of one only, must have been necessarily without effect; and, *e converso,* so far as the removal of one only, did produce a change to that extent, such one must have been the efficient cause of the injury which its removal remedied.

But the further enquiry, if not absolutely necessary, was, under the circumstances, expedient, and would seem quite satisfactory. Mr. *Dennis,* having reconsidered the whole *matter, reiterates his former opinion; and it seems to me* that the substantial correctness of that opinion has been clearly demonstrated. It had been ascertained by the first survey, that removing the drifts, and lowering the defendant's dam fourteen inches, caused the water in the plaintiff's tail race to subside eight inches, and left his mill-apron and one half of the race free from water. This experiment, as I before observed, was considered inconclusive, because it failed to determine whether this subsidence was attributable to the removal of the drifts or the reduction of the dam. But the further enquiry has quite removed that difficulty, for in the interval between the surveys the defendant's dam was reconstructed, by which means Mr. *Dennis* has been enabled to determine its effect, as a matter of fact, with perfect accuracy. It is now ascertained beyond doubt, that the defendant's new dam raises the water to nearly the old height, the level of the river at the plaintiff's tail race being at the time of the last survey one inch higher than the upper surface of his mill-apron. As a matter of fact, therefore, it can no longer be denied that the defendant's dam does throw the water back upon the plaintiff to the extent of about nine inches.

But it is said that the evidence still fails to make out a case for equitable relief. Mr. *Dennis* reports that the plaintiff's water privilege, though sufficient for the purpose of light machinery, as a cloth factory, for instance, is insufficient to work a saw mill, at least with advantage; and upon this evidence, it is argued that the plaintiff cannot come here to be protected in the enjoyment of a saw mill which his water power is insufficient to work; because, to entitle himself to equitable relief, he must show a substantial injury done to him in the application of the water to some useful purpose, which cannot be true when the attempt has been as in the present instance, to apply it to an impracticable purpose.

There are dicta in some of the cases, particularly in the *Attorney General* v. *Nichol,* (*a*) which appear to support this objection to some extent. Perhaps the observations to which I refer should be confined to interlocutory injunctions (*b*). But if those dicta are to be extended to applications for perpetual injunctions, at the hearing, where the legal right has been ascertained, there is great difficulty in reconciling them with principle, even when confined to the least favorable cases,—where no injury exists of the kind complained of in the present instance. In such cases, even, which are certainly much less favorable than the present, it is difficult to discover why equitable relief should be refused. Where rights of property (and such would seem to be the light in which easements of this class should be regarded,) are infringed, and where the *infringement is of a permanent character, producing a con*stantly recurring grievance which cannot be adequately remedied except by a perpetual injunction, in such cases there cannot be a doubt, I apprehend, that the court, as a general rule, will grant equitable relief. If such be the general rule, why should rights of this class, which our law both recognises and protects, constitute an exception. At common law, a nuisance, by act of commission, was remedied by an assize of nuisance, in which mode of proceeding the plaintiff was

(*a*) 16 Ves. 338; and see Wood v. Sutcliffe, 16 Jur. 75; S. C. 2, S. N. S. 163.
(*b*) Wynstanley v. Loy. 2 Swan. 333.

not only entitled to damages for the injury done, but to the abatement of the nuisance also. (a) And although the writ of assize of nuisance has given place to the action on the case, still a nuisance of this sort may even now be abated by the plaintiff himself. (b) Again, a reversioner, who cannot sustain any present damage, is permitted to maintain an action for the protection of his right; and, where the nuisance is continued after a first verdict, substantial damages may be recovered. In *Shadwell* v. *Hutchinson*, (c) Sir *Launcelot Shadwell*, after having brought a previous action, as reversioner, against the defendant, for darkening an ancient window, in which he recovered one shilling damages, brought this second action for the continuance of the same nuisance, and recovered £100 damages. This verdict the court refused to set aside. Now if courts of common law properly permit action after action to be maintained for injuries of this sort, and if verdicts for substantial damages are properly upheld, although no actual damage has been sustained, for the purpose of indirectly securing to the plaintiff the specific enjoyment of his right, I am quite unable to understand why this court, which can attain the same object directly, and by a single suit, should refuse relief.

But it is not necessary to determine the abstract point now. This is not a case of the kind supposed. The present complainant is the proprietor of a mill privilege, which is materially injured, as he has alleged and proved, by the nuisance of which he complains. Now, were that all, it would not be a defence, in my opinion, to an application for equitable relief, under such circumstances, that the water had not been applied to any useful purpose. A water privilege is a valuable property in itself—more valuable frequently than the soil to which it is annexed. But, obviously, its value may be for the time lessened, or even wholly destroyed by such a nuisance as is here complained of, which, while it lasts, is something more a than a mere prospective injury to the right when called into exercise. The very subject is for the time destroyed; the water privilege, for the moment, ceases to exist—and the present value of the property, as a necessary consequence, is proportionally diminished; for, as there is a substantial difference between an actually existent water power and one which is to be called into being by a course of litigation, it follows that there will be a substantial difference in the price also. Now, if the defendant's mill-dam be such a nuisance,—if it be productive of material injury to the plaintiff's water privilege,—if it deprives him of the enjoyment of his legal rights, and depreciates the present value of his property, (and I am of opinion that all this has been satisfactorily established)—then, it will not be denied, I think, that for such a wrong there ought to be, somewhere, an adequate remedy; and, it is equally clear, I apprehend, that the common law remedy is altogether inadequate. The power of bringing action after action, is not an adequate remedy. The necessity for such repeated litigation is, in itself, an intolerable evil, and affords sufficient ground for equitable relief. But the common law remedy is plainly inadequate, in other respects, to the ends of justice. It cannot wrest from the defendant that of which he illegally retains possession; it cannot secure the plaintiff in the specific enjoyment of his rights, nor can it restore his property to its real value. In all these respects, this court and this court alone, has the means of doing complete justice, because that cannot be accomplished otherwise than by the protection of the right in specie; and I am of opinion, therefore, that the plaintiff would have been entitled to a decree although no attempt had been made to apply the water power to any useful purpose. (d) But where, as in the present case, such an attempt has been made and prevented by the illegal act of the defendant, the right to equitable relief appears to me to be free from doubt.

The last ground of defence fails altogether upon the evidence. The defendant has not proved his title to Lot 33; indeed, neither is that fact, nor the defence which rests upon it, in issue in the cause, for the allegation is that the defendant's title accrued after answer filed, and no amendment has been made. (a) The evidence is materially defective in other respects. Mr. *Dennis* disproves the existence of any mill-site on Lot 33; and there is not enough to show that the injury, if any exist, would sustain an action. The facts go far, moreover, to establish the plaintiff's right to raise the water on Lot 33 to the extent of one foot. Upon the whole, apart from the fundamental difficulty to which I have adverted, and assuming that this defence would have been available, upon proper proof, (to which as at present advised, I am not prepared to assent) it ought not, in my opinion, to prevail in the present case. If there be such an equity as is suggested, the circumstances of the present case are not such as to warrant us in giving effect to it by way of defence. The defendant, if he be entitled to equitable relief, must file a bill for the purpose.

ESTEN, V. C.—The plaintiff and defendant are two riparian proprietors on the River Humber, the owners of mills; and the bill is to restrain the defendant from backing the water of the river upon the plaintiff's mill, whereby, as is alleged, its operation is impeded. The defendant erected his mills some time before the plaintiff erected his mill, and while the land, now owned by the plaintiff, belonged to one *Burgess*, who did not complain of this defendant's proceedings. *Graham* however having purchased about eighteen acres of *Burgess* bordering upon the stream, erected a saw-mill upon it, and has instituted this suit. The only mill that the plaintiff has is a saw-mill, and the sole object of the suit is to obviate injury to a mill of this description. The facts of this case, so far as the evidence extends, are free from doubt. It is quite clear that the defendant *Burr* backs the water upon *Graham* to the extent of about ten inches, and that *Graham* backs the water upon the lot above him—namely, Lot 33, to three times that extent and upwards, or about two feet six inches or more. This lot, when *Graham* erected his mill, belonged to one *Cunningham*, and it continued his property at the filing of the bill and the putting in of the answer; but it is stated that five days after this latter period the defendant purchased this lot of *Cunningham*, and that he is now the owner of it. The answer contains an allegation that the plaintiff backed the water of the river upon the defendant's property, and that if the water there were reduced to its proper level, the plaintiff's saw-mill would be wholly useless. This allegation cannot apply to the purchase by *Burr* from *Cunningham*, which I have mentioned, because it was not completed until afterwards. It is said, indeed, that *Burr* had then a lease of two acres of this lot, but this is not proved. The defendant, however, entered into evidence on this point, and the plaintiff endeavoured to prove an arrangement with *Cunningham* entitling him to back water on Lot 33 to the extent of one foot, which was only material with respect to this matter. The case also was argued at considerable length on this ground. I think therefore that the defendant should be let in to prove his contract and deed as to Lot 33, and it becomes necessary therefore to view the case with reference to those possible facts. With regard to the privilege of raising the water a foot on Lot 33, I think it proved that the elder *Cunningham*, when the owner of the lot, granted that privilege to *Graham*, and *Graham* had proceeded to build his mill on the strength of it without any interference on the part of *Cunningham*, he might be bound, and *Burr* claiming under him, if with notice, might also be bound. But it appears clearly that this license was revoked before the mill or

(a) Vin. Ab. tit. "Nuisance," H. & J.

(b) Raikes v. Townsend, 2 Smith Rep. 9; The Earl of Lonsdale v. Nelson, 2 B. & C. 302.

(c) 2 B. & Adol. 97.

(d) The North Union Railway Company v. The Bolton and Preston Railway Company, 3 Rail. Ca. 3[illegible].

(a) Stamps v. The Birmingham, Wolverhampton and Stone Valley Railway Company, 6 Railway Cases 128.

dam was built. It was purely voluntary. It is not suggested that any consideration was given for it, and the *Cunninghams* say that they expected that some compensation would have been made for it, and some agreement concluded about it; but nothing of this sort ever occurred. It does not appear whether the land had been purchased when the revocation took place. *John Cunningham's* evidence and his wife's are at variance upon this point. If it appeared that the land had then been purchased, it might be contended that *John Cunningham* was bound: but for this purpose it must clearly appear that he knew when he granted the license, or before *Graham* purchased his land, that the land was intended to be purchased, and so permitted *Graham* to act upon his promise and place himself in a situation in which he would not otherwise have placed himself. This does not appear. Further inquiry may perhaps be proper under these circumstances. For the present, this matter must be laid out of the case.

The bill, as already observed, seeks to restrain the defendant from backing the water of the river upon the plaintiff's saw-mill so as to impede its operation; in other words, to prevent the infraction of a legal right; in which the court acts only *in subsidium* of the legal right, which ought, therefore, in the first instance to be established at law. The plaintiff did in the year 1851 bring an action against one *McIntosh*, who was then the tenant of *Burr*, and recovered a verdict and about £60 damages. This was while the plaintiff's mill was building, and the injury, to which the damages were addressed, appears to have arisen from the plaintiff's inability, owing to the obstruction, to complete his mill. It is contended by the learned counsel for the plaintiff, that *Burr* was bound by this verdict. The authorities cited did not support this proposition in its full extent. But, without entering into this question, we may observe that the circumstances are so altered since that trial, that the right which at present exists, if any, was not in question on that occasion. It is then said, however, that the defendant is precluded from insisting on a trial at law by a submission in his answer, and by his agreement to refer the matter to Mr. *Dennis*. I very much question whether the defendant intended by these acts to waive any right that he had, and whether to consider them as producing that effect, is not to press them beyond the limits of justice and right. However, I think the defendant was not unwilling to refer the question entirely to this court without requiring the intervention of a jury. It is absurd, however, to suppose that any thing was referred to Mr. *Dennis* but the solution of certain questions of fact on scientific principles. He was not to stand in the place of a jury, and to determine the whole question of nuisance or no nuisance. This duty a jury performs under the direction of the judge, who expounds the law on the subject to them. Even if the parties or either of them had so intended, the court would not have delegated its authority to any private individual; and nothing which has occurred will prevent the court, should it seem necessary, from ordering a trial at law for the purpose of establishing the right. It cannot be supposed that this court will be induced by the submission of parties to grant its injunction for the protection of an alleged legal right, when it is unable to ascertain whether any such right exists at all. It would be then placed in the ridiculous position of protecting by its injunction a supposed legal right, which perhaps, upon subsequent investigation before a court of law, might appear to have no existence. But, whatever the parties intended, or this court has directed, Mr. *Dennis*, remaining within what I consider the due bounds of his authority, has determined nothing, having merely reported certain facts to the court ascertained through the application of scientific principles, and, when asked, expressed his opinion upon one or two points, upon which his opinion was desired by the court. One opinion expressed by him is, that the plaintiff has at all events upon his land sufficient water power without committing any wrong to any one to drive the machinery proper for a woollen factory or other light machinery of that nature; and it has been contended by the plaintiff that, supposing him to have no saw-mill privilege whatever, he is nevertheless entitled to the remedy which he seeks, because he has sufficient power for a different purpose. The plaintiff suggests this proposition—namely, that a riparian owner having no mill whatever upon his land, the water only being backed upon his land a few inches so as to do him no sensible injury, has nevertheless a right to the preventive interference of the court to the damage and perhaps the ruin of the proprietor below him, merely because he may choose perhaps one day to erect a woollen factory upon his land, the injunction not being necessary for the preservation of his privilege until he should think fit to make use of it, because that could be effected by an action brought once in twenty years. From this proposition I wholly dissent. Nothing can justify the interference by injunction—having the effect perhaps of rendering useless the labor and expenditure of years, and of stopping a trade or manufacture—but the most absolute necessity. The plaintiff, upon whose land the water is only raised a few inches, doing him no sensible injury, asks the court to stop the trade and business of the man below him, perhaps to his ruin, merely because he may some day erect a mill. The answer of the court to this application, in my judgment, ought to be, that when he had erected his mill, or was prevented from doing so by the acts of the defendant, it would be time to protect him: that so long as he abstained from making use of the water himself he should not prevent his neighbour below him from using it, provided it did him no damage; that, if it were necessary to interfere in the way proposed for the preservation of his right until he wished to use it, the court would not withhold its assistance; but this was not the case, because an action at law once in twenty years would effectually preserve his right, while it permitted the proprietor below to use the water which he did not require. To grant an injunction to such a person seems to me contrary to every principle upon which the court exercises this branch of its jurisdiction. Wanting that absolute necessity, which alone can justify it, such an exercise of power seems to be arbitrary and oppressive. The application involves a deceit also, for it is in fact an attempt to protect a saw-mill, not entitled to protection, under color of protecting a woollen factory, which has no existence. It is not pretended that the plaintiff has ever built or attempted to build a woollen or other factory, or to convert his saw-mill to that use. His bill is solely for the protection of his saw-mill.

Supposing then no mill on the plaintiff's land, and that the only injury he sustains from the defendant's proceedings is, that the water is backed or raised upon his land ten inches, doing it no appreciable damage, will such a case call for the interference of this court by injunction? I think not. It may be conceded that the plaintiff could maintain an action for this tort, because he may desire some day to erect a woollen factory on his property, to which the raising of the water would be injurious, and the defendant might otherwise through twenty years' enjoyment acquire the right so to raise the water. (*a*)

But the sole object of this litigation would be the preservation of the right, for which an action once in twenty years is sufficient. Actions brought more frequently would be unnecessary and unreasonable; and if a party were so litigious as to bring them, he could expect no assistance from this court, which would leave him to his legal remedy. The injunction being unnecessary for any proper purpose, would be oppressive and unjust. I disclaim the notion that this court would guard this right by injunction so as to enable the party to extort money from the man below him; in other words, that this court would countenance any one in saying to his neighbour below him, "I do not want to make use of the water myself, and your raising the water on my land does me

(*a*) See Wood *v.* Waud, 3 Exch. Rep.

no real injury; nevertheless, I will make you pay for the privilege." The case of *The Rochdale Canal Company* v. *King*, cited by the plaintiff's counsel, was very different. There the canal company had built their canal at their own expense, under two acts of parliament, which jealously protected their right to the water, permitting the use of it to the mill owners for one purpose only. These acts, and all the provisions they contained for protecting the rights of the company and limiting the use of the water by other persons, formed a contract between the company and the public, and any breach of these provisions, any use or abstraction of the water for other purposes than those specified, was a violation of this contract; besides, if one mill owner had a right to extract the water for one purpose, he and all other mill owners could abstract it for that or any other purpose to the irreparable damage of the company, who, if they were willing to part with the water for any purpose, had a perfect right under such circumstances to demand some compensation for its use. On this principle *Lord Cranworth* would have thought it right to grant the injunction in the case cited, expressly however distinguishing it from the case of nuisance, which this is, and in which he lays it down, that when the injury is inappreciably minute, the party is entitled to what the assertion of the legal right will give him, and to nothing more. If therefore we are to suppose that the plaintiff has no mill on his property, and that the only effect of the defendant's dam is to raise the water ten inches on the bank where his land is, which for aught that appears, may be attended with no sensible damage to his property, I do not think him entitled to an injunction, although he may be able to maintain an action for the injury, such as it is. That it does not follow that because a party would recover at law that he is entitled to an injunction in equity, is laid down in many cases, amongst which I may instance—*Attorney General* v. *Nichol*, *Wynstanley* v. *Lee*, and *Soltau* v. *DeHeld*. I do not mean to dispute the proposition that the court has jurisdiction to restrain continued injury in the nature of tort. It restrains repeated trespass after several recoveries at law, although capable of being compensated in damages; and the same doctrine must extend to injuries in the nature of tort. The principle is to prevent multiplicity of actions; but for this purpose not only must the injury be substantial and such that the party would be justified in reason in bringing repeated actions for the purpose of redressing it, but it would seem that even in such cases the exercise of this jurisdiction is discretionary, and the court is bound to weigh the inconvenience to either party of granting or withholding the relief sought. If the injury be merely nominal, and such that the party would be warranted in reason only in bringing an action once in twenty years for the preservation of his right, as in the case of raising water a few inches on the bank of a river without injuring the land, the court certainly would refuse to interfere. A party cannot apply to the court on the principle of preventing a multiplicity of suits when he himself is the author of the mischief of which he complains, and has of course the remedy in his own hands by simply refraining from bringing a number of actions, when he would be justified in reason only in bringing one action in a long period of time for the preservation of his right. In short, where the only reasonable purpose of the litigation is the preservation of the right, for which an action once in twenty years will suffice, it is not a case which admits of the application of the principle of preventing a multiplicity of suits, the party being the author of his own mischief and having the remedy in his own hands. The doctrine however does not seem to stop here. It would appear from the language of the court in *Attorney General* v. *Nichol, and Soltau* v. *DeHeld*, that although the injury is substantial, and it would not be unreasonable for the party aggrieved to bring an action from time to time in order to redress it, the question still remains, whether it is of that grave character which would induce the court to interfere for its prevention, to the great detriment of the party committing it. Where the injury is merely wanton, no doubt the court would interfere in such a case. But neither the heightening of the wall in the *Attorney General* v. *Nichol*, nor the use of the bells in *Soltau* v. *DeHeld*, nor the back-flowage of water in our own case, are mere wanton injuries. The first and last were done in the prosecution of the party's trade or business, the other in the exercise of religious worship. In the two cited cases, if it had appeared that the injuries complained of were not destructive of daily comfort and convenience, I doubt whether the court would have interfered on the principle of preventing multiplicity of actions where the detriment to the other party would have been severe. But, however this may be, I apprehend that it cannot be said with any certainty that if Mr. *Graham* had no mill on his property the back-flowage on his land would be productive of any material injury.

We then come to the question whether the court is to interfere by injunction to protect the business carried on at the plaintiff's saw-mill. Upon this point I apprehend it is to be quite clear, that before the court can be called into action for the protection of one party, and to the detriment—perhaps ruin—of another, the party seeking its aid must shew that he has some substantial interest to protect. Suppose a party had built a mill, which he could not by any contrivance make to work at all; would the court interfere at his request to compel the proprietor below him to demolish his works? I apprehend not: and the same principle must apply where it appears satisfactorily that his mill will not pay expenses, or more than pay expenses, or yield enough to make it worth any reasonable man's while to work it. The court deals only with reasonable people, and will not countenance a person acting from vexation or caprice. Another remark should be made here. It appears that when this suit was commenced *Cunningham* owned Lot 33, and it is stated that after the commencement of the suit the defendant purchased it from him. Although at the time of the commencement of the suit *Graham* penned the water of the stream back upon Lot 33 to the extent of thirty inches or more, it cannot be said that he thereby did any wrong to any one, because *Cunningham* did not complain of it. Nor can it be said that *Burr* was wrong in purchasing Lot 33 from *Cunningham* after the commencement of the suit, and withdrawing the consent to the raising of the water on it, in order, if possible, to protect his works below the plaintiff's mill. The situation of the parties is very similar. *Burr* backed the water upon Lot 31, *Burgess* not complaining of it. Afterwards *Graham* purchased part of this lot, built a mill upon it, and is entitled, if he have a valuable right to protect, to compel *Burr* to lower his dam so as not to injure that right. On the other hand, *Graham* backed the water greatly upon Lot 33, *Cunningham* not objecting. *Burr* then buys the lot from *Cunningham*, and as, in imitation of *Graham*, he could build a mill upon it and compel *Graham* to demolish his works, so he can avail himself of his ownership of it to protect his own works below the plaintiff's. Nor is it material that this right was acquired after the commencement of proceedings. It was acquired without fraud or wrong, and defendants often acquire after the commencement of suits the means of resisting them, although the circumstance of their being subsequently acquired may affect the liability to costs. Now I am of opinion that if *Graham* can acquire a water privilege only by committing a wrong upon *Burr*, he has in fact no privilege or right at all. The court cannot recognize a right founded on a wrong, or sanction such wrong by protecting such supposed right, which, if it could be supposed to exist, would be nothing more or less than a right to commit a wrong—a manifest impossibility, and the proposition of which involves a contradiction in terms. It is true that while *Cunningham* acquiesced, it was no wrong, and *Graham* had a right founded on the gratuitous permission of another. It may be true also, that even if *Cunningham* had resented and objected to this proceeding as a wrong, *Burr* would not have been permitted to complain of it, as it was no wrong to him. But the moment

he becomes the owner of the lot above, he is the party aggrieved, and can complain of the wrong, and can object to *Graham's* supposed right as based upon wrong and having therefore no existence. It may be conceded that the wrong done to the owner of Lot 33 is not such as this court would interfere to prevent. The court might refuse at the instance of *Burr* to compel *Graham* to demolish his works for the protection of Lot 33 from injury, not considering the injury of that nature which would warrant its interference by the exercise of its preventive jurisdiction. But it is one thing to interfere against a party and another to interfere in his favor. The court often refuses to interfere either in favor of or against a party. To call the court into action in favor of a party, he must have right without any admixture of wrong: to induce the court to interfere against a party, the wrong complained of must be substantial and real, and perhaps, in the sense in which this court uses the term, irreparable or destructive of comfort and convenience.

The court might refuse to aid *Burr* against any riparian proprietor below him, who at the same time owned the lot above him, on account of the injury done by his water power to that lot, but it does not therefore follow that it is to interfere against him at the instance of a party having no better right than himself. Now I cannot concur in granting an injunction to Mr. *Graham* in this suit and upon this bill, without being convinced that he has a valuable mill privilege on his land, proper for the purposes of a saw-mill. If we are to decide this question without reference to a court of law, the evidence does not enable us to do so, even including that of Mr. *Dennis*. It may be tolerably clear that *Graham* has no right to back the stream upon Lot 33 to the extent he has done; and if the right to do this is essential to the constitution of his mill privilege, it may be clear that he has none whatever. As to whether he has any privilege, supposing the water reduced to its proper or natural level at Lot 33, it is, to say the least of it, extremely doubtful. Mr. *Dennis*, I think, decidedly negatives the existence of any such privilege to any—the smallest extent. It is true that his earlier evidence seemed to leave this matter in some degree of obscurity; but in his last examination when the question was put once and again to him pointedly, and his attention must have been drawn to the precise point, he uses this language: "If the water in the plaintiff's pond were so drawn down as not to back water on Lot 33, he could not work his saw-mill—he would not have sufficient water power even with any alterations he might make in the construction of his mill, or by lowering his head race to work a saw-mill, but only some light machinery such as a carding machine or something of that kind;" and after saying that if the mill could work in dead water it might be lowered ten inches, he said, in answer to a question from the court, "even then I do not think there would be sufficient power to drive a saw-mill if the water was so lowered as not to back on Lot 33." I should, I think, have little difficulty in deciding upon Mr *Dennis's* testimony, that with the water reduced to its natural level at Lot 33, the plaintiff would not have any privilege at all. It would not be a question of *majus* or *minus*, into which perhaps the court would not enter, provided the right appeared to be substantial, but it would appear that the mill must be wholly inoperative. The witness *Barons*, however, who is the tenant of the plaintiff, expresses the opinion that, with the water at its natural level on Lot 33, there would still be sufficient water power at the plaintiff's mill. Without examining the weight to be attributed to this speculative opinion in opposition to the professional testimony of Mr. *Dennis*, it is sufficient to observe that the right under such circumstances, is, to say the least of it, too doubtful to warrant an injunction issuing in support of it. As to whether the plaintiff has the right to back the water upon Lot 33 to any extent less than he has been in the habit of doing, or if he has, whether by so doing he would obtain any water privilege at his mill, which it would become this court to protect by the exercise of its preventive authority, are points left wholly in the dark by the evidence. *Barons* indeed seems to say that with the water raised ten or twelve inches on Lot 33 he had six or seven feet head of water at the plaintiff's mill. Mr. *Dennis*, on the other hand, says that on lowering the plaintiff's pond twenty inches (which must have left about ten inches upon Lot 33) the plaintiff's head-race was perfectly dry. It seems to me impossible to reconcile these two statements. Whether, therefore, the plaintiff has any right to back the water upon Lot 33 to any extent less than he has hitherto done, or if he has, whether it would afford him a water power, which it would be proper for this court to exert its extraordinary jurisdiction to protect, is wholly uncertain, and can be only ascertained by a trial at law, or a further investigation before this court.

The result is—1st. That I would not grant Mr. *Graham* an injunction on the ground of his possession of a site for a factory until he shew that he has erected one or has been prevented from so doing by the defendant's proceedings: in other words, I would not act on the contingency or possibility of his making that use of the water some day, and thus enable him to obtain protection for a saw-mill not entitled to it, under pretence of protecting a factory not in existence. 2nd. That I would not grant Mr. *Graham* an injunction to protect his land, irrespective of any mill, from the injury arising from the back-flowage of the water, because I am wholly uninformed whether that injury is more than nominal, and because in such a case I think an injunction would be improper: and 3rd. That I cannot concur in granting an injunction to Mr. *Graham* to protect his saw-mill, because I would not grant such an injunction to the serious detriment of the defendant without being sure that the plaintiff has a valuable privilege to protect, and because in the present state of the evidence it is wholly uncertain whether he has any such privilege. I would not, however, debar him from further inquiry, should he think it advisable, either by action at law or further investigation before this court.

These are the views I have formed upon this case, and although I can have little confidence in their correctness, since they differ from those of the Chancellor and my brother *Spragge*, still, as they are the best that I have been able to form after a very careful consideration of the case, I consider it my duty to express them.

SPRAGGE, V. C.—The point for the consideration of this court I consider to be, whether the dam erected by the defendant on Lot 31 in the 9th concession does so raise the water on Lot 31 in the 10th concession—the plaintiff's lot—above its natural level, and thereby injuriously affect the plaintiff's rights to the use of the water as it flows through his lot, as to entitle him to relief in this court. The defendant has, I conceive, by his answer, as well as at the hearing of the cause, so put himself upon the judgment of this court, desiring the decision of the court without proceedings at law, that if in the opinion of this court the plaintiff's rights are so injuriously affected by the defendant's dam, it is proper to decree a perpetual injunction.

There is no difference of opinion in the court as to the fact that the waters of the River Humber are raised on the plaintiff's lot above their natural level to the extent of about ten inches, and that this is produced by the backing of water caused by the defendant's dam; the consequence is, that the fall of water on the plaintiff's lot is less by about ten inches than it would be but for the plaintiff's dam.

It is not shewn that any part of the plaintiff's land is overflowed by the penning back of the water, or that any right of the plaintiff is infringed thereby; unless he have available water power on his lot, which he cannot enjoy so beneficially to himself, by reason of the penning back of the water. If he have such available water power, then one mode in which as a riparian proprietor he is entitled to the use of the water as it flows past him may be injuriously affected.

The water power on the plaintiff's lot and on the defendant's is about the same, there being only a difference of about an inch in the fall of water on the two lots. The defendant has for some years—much less however than twenty—had a factory and mill upon his lot, the latter more recently, and penned back the water upon what is now the plaintiff's lot, but no *easement* is shewn, nor anything to affect whatever rights the plaintiff may possess as an ordinary riparian proprietor. In 1850 the plaintiff put up his mill, and for the purpose of forming his mill-pond erected a dam, which pens back the waters of the river beyond the upper boundaries of his own lot and overflows a small portion of Lot 33, in which the defendant in this suit claims an interest. On this lot also there is some fall of water—the river flowing through it as well as through the other two lots—but considerably less than on either of them.

In the opinion of Mr. *Dennis*, the surveyor, there is not sufficient water power on any one of the three lots to work a saw mill to advantage. On lots 31 respectively he is of opinion that a saw-mill may be worked, but not as he conceives profitably. He considers the water power on each of these two lots more suitable for a factory or other works requiring less water power than a saw-mill. The plaintiff's position then is, that he has upon his land a saw-mill, and that only, which in the opinion of Mr. *Dennis* can be worked, but not profitably; and the question is, whether he is entitled to be protected, and I think that he is.

If the plaintiff had from sheer folly, or to injure the defendant, built a mill on a stream where there was no possibility of working it, then I think that the defendant might reasonably object that his dam had nothing to do with the plaintiff's mill not working, and so that he ought not to be restrained; otherwise, a right would exist in every owner of land on a mill-stream to object to the waters of the stream being at all raised when they flow through his land, and that although it flooded no land, diverted no water, and in no way injured such proprietor. There would in such case, perhaps, be no mode of use of the waters of the stream injuriously affected. I do not assume, however, that a proprietor of land through which a stream flows would have no right to prevent the continuance of a dam or other erection whereby water was so penned back, as to make that dead water which before was a running stream flowing through his land. It is obvious that in such a case much more than an imaginary injury might be sustained.

In this case the plaintiff has placed his mill where in his own judgment, and probably in the judgment of the millwright who put it up, there is what is termed a *mill privilege*– sufficient water power to drive a mill, but in the judgment of Mr. *Dennis*, not sufficient to work it profitably.

Now when it comes to so nice a point that a mill can be worked, but in the judgment of one not profitably, while even in the judgment of that one there is sufficient power for the working of a factory, can it be said that another proprietor on the same stream is at liberty so to use the waters of the stream as to prevent his working his mill at all? If the water power be such that he can work his mill, is it not a matter for his own judgment and discretion whether he will work it, even if it be not profitable; and is it not for him to judge what would be a profitable working of the mill? Mr. *Dennis* does not say that the mill cannot be worked in the ordinary state of the water—that it requires a freshet or any unusual quantity of water to work the mill; but only that in his judgment it would not be profitable. Now what would be unprofitable with lumber at a low price might be very profitable upon an advance in the price of lumber; and besides, persons may differ very much as to what would be a profitable working of a mill. Such an objection too, it strikes me, cannot reasonably be made by one who has *practically* admitted the sufficiency of the water power; for upon the defendant's own land, with a fall of water almost identically the same, he has both a factory and saw mill.

But further, I do not consider it established that the plaintiff has not upon his land sufficient water power to work a saw-mill profitably. Whether he has or not, was not the question raised between the parties, nor was it the point upon which Mr. *Denhis* was deputed, with the consent of parties, to examine and report. Mr. *Dennis* is not a millwright, and declares himself ignorant of the effect and working of a modern kind of water-wheel in use in the plaintiff's mill, and however competent he may be as a surveyor; and I believe him thoroughly competent in his own profession, I think it would be too much to take his opinion as decisive against the plaintiff upon a point upon which he may not possess all the requisite knowledge to decide, because not lying within the proper sphere of his own profession. He may probably be *right*, but I think it is not such evidence as would justify this court in deciding that the plaintiff's water power is not sufficient for the profitable working of his mill.

But, taking him to be quite right in his opinion—viz., that a mill may be worked, but in his judgment *not* profitably—I think the defendant should be restrained from keeping up a dam that so materially interferes with his working it as almost to prevent its working at all.

I have not referred to the circumstance of the plaintiff's dam penning back the water so as to overflow a small portion of Lot 33, because it is not proved that the defendant has any interest in that lot.

Declare, that the plaintiff is entitled to enjoy his mill-site on the north-east part of Lot number 31 in the 10th concession of Vaughan, free and clear of all injury thereto or infringement thereon by the penning back of the waters of the River Humber thereon by the defendant or the owners or occupiers for the time being of Lot number 31 in the 9th concession of Vaughan. Order and decree the same accordingly.

Order, that the said defendant and the owners and occupiers for the time being of the said Lot 31 in the 9th concession, together with their workmen, servants and agents, be restrained by the perpetual injunction of this court from permitting the water of the said River Humber to continue at its present height, or at any such height, on the said Lot number 31 in the 9th concession, as thereby to pen back the water of the said River on the plaintiff's land on the said Lot 31 in the 10th concession, to a height above its usual and natural flow, or at the highest to any height nearer than ten inches below a certain mark made by *J. Dennis*, Esquire, at the bridge on the road allowance between the said Lots 31 in the 9th and 10th concessions, and from preventing or retarding the escape of the water from the tail-race of the plaintiff's present or any future mill on a level not lower than the natural flow of the River, on his said land on the said Lot 31 in the 10th concession, or hindering or retarding the flow of the said water through, across and from his said land on the said Lot 31 in the 10th concession, at its usual, natural and ordinary speed and level.

Defendant to pay plaintiff's costs.

MUNICIPAL CASES.

(Digested from U. C. Reports.)

From 12 Victoria, chap. 81, inclusive.

(*Continued from page* 173.)

XLV. *Police Magistrates—Remedy for Recovery of Salaries —By-Law not requisite.*

Held, That the Statute 12 Vic. ch. 81 makes it not only the duty of a Town Council to pay their Police Magistrate, but creates a debt, the payment of which the Magistrate may enforce in an action of *debt*,—not as founded upon a contract express or implied, but on the statute and the rights which it confers.

Held, also, That under the statute, the action may be maintained without the aid of a by-law of the Municipality to confer it.

Quære: Is *debt* the only remedy?

Wilkes v. The Town Council of Brantford. 3 C. P. Rep. 470.

XLVI. *Sale of Spirituous Liquors in Taverns. By-Law to limit the number of Taverns to one, held unreasonable. By-Law under 16 Vic. ch. 184 requires the assent of a majority of the Electors. 13 & 14 Vic. ch. 65, sec. 4; 16 Vic. ch. 184, sec. 4.*

The Municipality of the Township of Darlington passed a by-law enacting:—

1. That the number of taverns which should receive license to sell wines and spirituous liquors in the municipality should not exceed one.

II. That the sum to be paid by any person who should obtain a license to keep such tavern should be £10 annually, above the duty imposed by the Imperial or Provincial Statute for such license.

IV. That the person receiving such license should be subject to the following regulations, amongst others:

2. That no innkeeper shall sell or permit the drinking of any intoxicating liquors on the Sabbath Day, except in case of sickness, or to travellers.

4. That no innkeeper shall sell intoxicating drink to any apprentice or minor, without the permission of his legal protector; nor shall he sell to any habitual drunkard, after being forbidden so to do by any relative or friend of such drunkard.

6. That no innkeeper shall be allowed to sell, give, loan, barter, or dispose of in any way, any intoxicating liquors after the hour of ten o'clock at night, or before five in the morning, travellers excepted.

By a subsequent by-law the fee to be paid for the license was increased to £25.

It appeared by the affidavits, that a by-law to prohibit absolutely the sale of spirituous liquors, &c., had been submitted to the electors, but not passed, as a sufficient number did not attend the meeting; that this by-law had not been *so submitted; and that the township of Darlington contained* a population of six thousand.

Held, That the first enactment was bad, as amounting in effect to a total prohibition, and being therefore an attempt to evade the provisions of 16 Vic. ch. 184, sec. 4, by which no such by-law can be passed without the consent of a majority of the electors:

That the second enactment was also bad, being inseparably connected with the first.

That the second, fourth, and sixth regulations, were beyond the jurisdiction of the municipality to impose.

Held, also, That the second by-law was bad, as the fee imposed exceeded £10, and no reference had been made to the electors.

In re. Barclay and The Municipality of the Township of Darlington. 12 U. C. B. R. Rep. 86.

XLVII. *By-Law to prohibit absolutely the sale of Intoxicating Liquors, &c.—Approval of Electors.* 16 Vic. ch. 184, sec. 4.

By-Laws for prohibiting the sale of spirituous liquors, &c., which, under 16 Vic. ch. 184, sec. 4, require to be submitted to the electors, must be adopted and approved of by a majority of all the qualified municipal electors of the municipality, not merely by a majority of those who may attend at the meeting called to consider such by-law. Where the by-law which provided for calling such meeting assumed the approval of the majority of the voters present would be sufficient:—

Held, That it was nevertheless proper to move against the then proposed by-law, after it had been passed on such approval, and not against that which laid down the improper course of proceeding.

In re. McAvoy & The Municipality of Sarnia. 12 U. C. B. R. Rep. 39, and 1 U. C. L. J. 106.

XLVIII. *By-Law—Tavern Licenses—Sale of Spirituous Liquors—Imprisonment on failure to pay fine.* 13 & 14 Vic. c. 65; 16 Vic. ch. 184.

The Municipality of Otonabee passed a by-law on the 25th of March, 1854, enacting:

1. That there should be a license issued for one inn only where spirituous liquors should be sold, and that such inn should be in Peterborough East.

2. That persons applying for a license to keep such inn should produce a certificate from four municipal electors, residing in the locality where such house was to be kept, of his honesty and good moral character, and a certificate from the township treasurer that he had deposited a bond with such treasurer, made in favor of the reeve and his successors, approved by the councillors of the ward in which such tavern *should be situated, binding him in £50, with two sufficient* sureties in £25 each, to abide by all the by-laws of the township council for the regulation of such houses.

4. That all tavern-keepers, obtaining licenses under this by-law, should shut up their bar and bar-room at 10 p.m., and keep it closed on Sunday, and should not give or sell liquors to any person in a state of intoxication.

6. That persons wilfully neglecting, refusing or failing to comply with the provisions of the preceding clauses of this by-law, or selling by retail without license, should be liable to a fine of £5, or *failing to pay the same*, to twenty days' imprisonment.

9. That there shou'd be one shop license, and no more, granted within the said municipality, and that such license should be granted to one of the storekeepers in the village of Keene.

The reeve of the township swore that the by-law was passed because 244 out of the 489 electors had expressed themselves in favor of limiting as much as possible the sale of spirituous liquors: and that, at the last election, three out of the five were returned on the understanding that they would support such a measure.

Held, That these facts could not affect the question: that the first and ninth sections of the by-law, and so much of the sixth as related to the imprisonment of offenders fined on failure to pay, must be quashed; and that the second and fourth sections were good.

In the matter of Greystock and The Municipality of Otonabee. 12 U. C. B. R. Rep. 458, and 1 U. C. L. J. 46.

XLIX. *Township of North Dumfries—Exemption from Debt for Guelph and Dundas Road.* 14 & 15 Vic. ch. 5, sec. 8.

By the 14 & 15 Vic. ch. 5, the county of Waterloo is made to consist of certain townships, including North Dumfries, which before formed part of the county of Halton. The 8th section provides that the townships named, *in which North Dumfries is not included*, shall be responsible for their share of the debt for building the Guelph and Dundas road. This debt had been incurred by the former district of Wellington, which embraced all the townships mentioned in sec. 8 except Dumfries.

Held, That the Municipal Council of Waterloo could not impose a rate on Dumfries to pay such debt, the omission of that township in the 14 & 15 Vic. shewing clearly that it was not intended to be liable.

In the matter of The Municipality of the Township of North Dumfries and The Municipal Council of the County of Waterloo. 12 U. C. B. R. Rep. 507.

L. *Mandamus to Clerk to furnish copy of By-Law.*

A mandamus to a clerk of a municipality to furnish a copy of a by-law was refused, where it did not appear that the demand was accompanied by an offer of his fee. 12 Vic. c. 81, s. 155.

In re. Township Clerk of Euphrasia. 12 U. C. B. R. Rep. 622, and 1 U. C. L. J. 128.

LI. *By-Law—Intendment in favor of—Township levying money for County purposes.*

A township by-law was quashed as to so much of it as related to the raising a sum of money to defray the demands of the County Council on the township, and as an equivalent to the government school grant, &c., it not appearing on the face of it that it was directed to the purpose of meeting a deficiency, nor even that there was any, if that would have authorized the by-law.

Semble, however, that a township council has not power to pass a by-law imposing a rate in aid of any county rate. It does not appear necessary that a township by-law should set forth the estimates on which it is founded; and the court will intend that proper estimates have been made in the absence of evidence that they are wanting: nor that the by-law should state that the rates are calculated at so much in the pound on the actual value; and in the absence of any thing to the contrary, the court will intend that the council has followed the direction of the statute.

Dickinson Fletcher *v.* Municipality of the Township of Euphrasia; White *v.* The Municipality of Collingwood. 13 U. C. B. R. Rep. 129, and 1 U. C. L. J. 123, 125.

LII. *By-Laws—Rules for construction of—Certainty.* 12 Vic. c. 81, s. 177; 14 & 15 Vict. ch. 109, sec. 4.

In construing a by-law the court will not intend that the municipality are trying to evade compliance with a statute, but will give every reasonable help of construction to bring the by-law within it.

They will also look at the whole by-law to ascertain its meaning, and construe one part with another or other parts, so as if possible to give effect to the whole.

Where a by-law recited that the amount of the whole ratable property of the township, according to the last assessment returns, was £114,756, and that it would require the annual rate of 2½d. c'y. in the pound as a special rate, for payment, &c., and then enacted that a special rate of 2½d. c'y should be levied to pay the principal and interest of the loan to be raised under the by-law, and that the proceeds of such special rate should be applied solely to the payment, &c., until the same be fully paid and satisfied:—

Held, That the recital as to the amount of ratable property and the assessment returns was sufficient, and that it sufficiently appeared that the rate was to be levied in each year.

In one part of the by-law the reeve was empowered to issue debentures for such sums as should be from time to time required for the purposes mentioned, but not to exceed in the whole £10,000; in subsequent clauses a special rate was imposed to pay "the said sum of £10,000," and the application of "the said sum of £10,000," was pointed out: and the debentures were directed to be made payable "within twenty years of the time that this by-law shall come into operation":—

Held, That the amount of the loan, and the time when the debentures were to be made payable, was stated with sufficient certainty.

In re. Cameron and The Municipality of East Nissouri. 13 U. C. B. R. Rep. 190, and 1 U. C. L. J. 169.

LIII. *By-Law—Rate of Interest.* 16 Vic. ch. 80.

Municipal Corporations cannot by by-law raise money at a rate of interest exceeding six per cent, they not falling within the exception of sec. 4.

Wilson and the Municipal Council of the County of Elgin. 13 U. C. B. R. Rep. 218, and 1 U. C. L. J. 165.

TO CORRESPONDENTS.

H. S.—Accept our apologies for the delay in publishing your favour, the Communication was mislaid. We will at all times be happy to hear from you.

O. K.—Many thanks for your letter and papers enclosed. You will see we have made a commencement in this number. Other matters you refer to, we will take up at an early day, probably in the next number. The September number has been forwarded. Could you furnish the names of the Bailiffs also?

T. M.—We have already explained the cause of the delay. We hope to complete Volume I by the first week of January. The numbers of Volume II we will have ready for delivery in the early part of each month.

B. A.—*Grimley v. Aykroid* 1 Ex. 479 1 Cox. & Mac 79 s. c. is the leading case relative to splitting demands on a Tradesman's account.

ONE &c.—We think you are wrong. The case of *Woolcock v. Pritchard*, 17 L. T., Q.B. 16 is in point, in that case it was held, that where the Landlord gave the Bailiff a notice claiming arrears of Rent, the Bailiff rightly distrained implements of trade, &c, in order to satisfy the Rent. Before deciding compare sections 96 and 107 of the English Act 9 & 10 Vic. c. 95, with the like provision in our Division Courts Act.

THE LAW JOURNAL.

OCTOBER, 1855.

OUR NEXT VOLUME.

ALTHOUGH many gentlemen favourable to the publication of a Law Periodical have gratuitously furnished us with "matter," and also materials for practical articles, and although we have been always willing to pay a reasonable sum for essays of practical utility on subjects coming within the scope of the *Law Journal*, we have experienced difficulty at times in producing the liberal amount of original matter which we aimed at laying before our readers; not that we have been deficient in this particular or have failed in carrying out the promises made in our Prospectus—but the difficulty alluded to has in a great measure been the cause of our delaying the issues beyond the appointed periods.

Having traced out for ourselves a widely extended field of usefulness, we have endeavoured to occupy it to the largest extent that could reasonably be expected, and have had the satisfaction of receiving the testimony of very many friends and supporters to the value and utility of the *Law Journal*. We have now established a circulation, and overcome the—perhaps not unreasonable—distrust incident to a new undertaking, the first of the kind in Upper Canada,—a Law Periodical intended not only for the Profession but for suitors, officers of local courts, local authorities and municipal bodies. Under these circumstances its conductors are anxious to give additional value to the *Law Journal* by enlisting the services of competent persons as *regular* contributors to its pages: at the same time they

will continue to receive from those already engaged, and in no wise propose relaxing their own exertions.

With this extended view, the sum of three hundred pounds has been devoted to procure suitable Treatises and Essays from writers in Upper Canada for the *Law Journal*, commencing next year:—a sum, taking our limited circulation into consideration, fully equally to what is paid by any Law Periodical at home.

At *present* we offer the sum of one hundred pounds, cy., as under: in addition we will at any time pay fairly for accepted original matter from writers of competent ability on the subjects they propose to treat of; and here we may add that we will be glad to have suggestions as to subjects most likely to be useful to our readers.

First it may be observed that the time has arrived when something more is required than mere isolated commentaries on the Law and Practice of the Division Courts. Clerks especially, who are the main agents in working the whole machinery of practice, (for professional men will not, or at all events do not, usually superintend the steps preliminary to the hearing) need full information on every point: but to Judges, Officers and Suitors, as well as to the Profession, a treatise embracing the entire subject would, we are assured, be alike valuable and acceptable.

The English decisions on analogous Statutes, the cases decided in our own Superior Courts on the D. C. Statutes, and those which have appeared or can be procured from the County Judges, if collected and arranged by a competent and experienced person, will furnish ample material for such a treatise.

The pecuniary inducements to publish the ordinary way would scarcely be sufficient to compensate for a formidable work of this kind, as on its completeness would its utility and value mainly depend.

As a further inducement, therefore, we will pay the sum of sixty pounds to any competent person who will produce, adapted for publication in monthly parts in the *Law Journal*,—*A Treatise on the Law, and Practice of Division Courts*, of the character above designated: after such work published by us, the copyright to belong to the writer.

Further: we will pay the sum of twenty pounds for *A Manual* (in monthly parts) *on the Office and Duties of Division Court Bailiffs*—the matter to be treated of in as plain and familiar a way as the subject will admit; the treatise also to embrace the Officer's duties, in relation to attachments, service of process, and his conduct in Court: also, his duties in respect to Warrants, Executions, and Interpleader;—copyright as before to belong to the author.

Further: we will pay the sum of twenty pounds for *A Treatise* (in monthly parts) *on the Power, Duties and Responsibilities of Township Municipalities*,—to embrace the mode of Election and Return—the way in which Election Returns may be questioned, and the grounds on which Returns are set aside, altered, or amended—the mode of conducting business, with Forms and plain practical directions for the guidance of those corporations in the exercise of their important duties;—copyright as before to belong to the author: in all the subjects, cases to be referred to.

If several persons propose writing on the same subject, we reserve the right to select.

Any gentleman meeting any of these offers, who is known to us or to any Superior or County Judge (who will speak as to his ability) need not, unless he wishes, give any portion of the work until the offer be accepted. Those gentlemen of whom we have no knowledge, will be good enough to favour us with an outline view of the method in which it is proposed to treat the subject, and some portion of the first division.

Payment will be made as the work progresses, in such proportion as may be agreed on: or we will pay the whole in three months, on a guarantee being given for the completion of the work.

Communications to be addressed to the "Editors of the *Law Journal*, Barrie, U. C."

DIVISION COURTS DIRECTORY.

By the Division Courts Act of last Session, cases may be entered and tried in the Division in which the cause of action arose, notwithstanding the defendants reside in a different County or in different Counties, in Upper Canada, from that in which the cause of action arose. In order to provide for service of the necessary process under such circumstances, the Bailiff of each Division Court in U. C. is required to serve and execute Summonses, Writs, and Orders, issued from any Division Court in which an action is commenced, although not the Court of which he is Bailiff.

For example: a party resident in the County of Ontario purchases and receives goods from a Merchant in Toronto, or a party living in the County of Middlesex sends an order to a Manufacturer in the City of Hamilton for goods, which are delivered to his Agent there: it is not necessary for the Merchant or Manufacturer to institute a suit where his debtor resides, but he may bring it in the place where the cause of action arose—in Toronto or in Hamilton—and thus the great expense and inconvenience of sending a Clerk away from home to prove the claim is saved.

Every County in U.C. is separated into Divisions,

at the will of the Local Authorities, and after no uniform plan—each Division constituting a Court. When a suitor in one County wishes to take proceedings against a resident in another, it is necessary to ascertain in what Court Division the debtor's residence is situated. How is the suitor to learn it? He may know the Township, Lot and Concession, or the Town or Village, in which the debtor lives, but he does not know to what Court Division it belongs. He may expect the Clerk of his own Division, who is to issue the Summons to the Clerk of the Division where the debtor resides, to be informed on the point; but, how is the Clerk to learn from the Lot, Concession and Township, or the name of the Town or Village alone—what is the Court or who is the Clerk, to whom the Summons is to be sent? He has in truth no other or better way of information than the suitor.

It was an omission in the Act of last Session that no means was provided for making these Divisions known, for the value of the clause permitting suits to be brought where the cause of action arose, is dependent on this knowledge. The Law is a dead letter without it.

It is plain, therefore, that to Officers and Suitors a complete Directory to the several Division Courts in Upper Canada, showing the limits and extent of each, and the names and Post-office address of the Officers, is essential to the working of this branch of the Division Courts Jurisdiction. We are willing to undertake the troublesome but useful task of supplying this necessity through the columns of the *Law Journal*, commencing in this number with the Counties of Huron, Bruce & Waterloo. When all the Counties are gone through, we intend publishing the whole list entire in Pamphlet form,—adding other information if deemed necessary, and appending, *if furnished to us gratis*, a list of Professional men, with their addresses, practicing in each Court.

The expenditure of money, time and labour incident to the production of such a Directory we assume, knowing its essential importance to all having business with the Courts; and we respectfully request the County Judges to examine the lists as published, and to point out any error or defect they may observe.

DEFECTIVE LEGISLATION—THE CHIEF JUSTICE'S ACT.

The most eminent English Lawyers, the *Law Times* asserts, are obnoxious to the charge of defective and blundering legislation. It appears that numerous defects and difficulties have been discovered in the "*Larceny Summary Jurisdiction Act*," and that there is a blunder in the "*Bill of Exchange Act*," which threatens practically to suspend its operation altogether.

We extract the following from the article referred to:—

"The truth must be told. The Lawyers have very little to boast of in their legislation. We have been accustomed to laugh at blunders in Acts of Parliament concocted by country gentlemen, merchants, and amateur law makers, and to conclude that if only Lawyers were allowed to construct laws, as well as to interpret them, they would not offer so many gaps for the cunning to creep through. Unfortunately during the last session of Parliament the Lawyers were intrusted with the settlement of two statutes of singular brevity, but of great importance. Neither of them fills four pages. Both were sent to Select Committees composed almost entirely of Lawyers, the most experienced the House could supply; they were scrutinised clause by clause; the combined wisdom of the Committee was directed to perfecting them. The parents of both of them were Lawyers. The Lord Chancellor was the author of one; Mr. Keating, Q.C., of the other; both being substituted for Bills having the same object, introduced by Lord Brougham. They did not pass without investigation by the Law Lords in the Upper House. Nevertheless, strange to say, both of them proved defective beyond the common measure of legislative floundering."

After all we Colonists do not err so much in the way of legislation: occasionally an Act is found so defective as to "provoke the public, and perplex the lawyers," but those Acts which have been prepared by our first-rate lawyers, and passed as prepared, are not open to such objections.

It does indeed sometimes happen, we admit, that Bills are passed through the House too rapidly for careful examination, and require afterwards to be amended or explained; but who can say of the many Acts which own the Chief Judge of Upper Canada as their author, that any one has required to be "doctored," either by Parliament or by the Courts to cure its blunders? On the contrary, the most important Laws have required the least amendment—the least needed judicial construction to explain them. We may cite the Act of U.C., 4 Wm. 4 ch. 1, (a *sixty clause* Statute) commonly known as the "Chief Justice's Act," as eminently illustrating the correctness of our assertion.

LAW REFORM—OBSOLETE STATUTES.

There is nothing so easy to talk about as Law Reform; but it is quite another matter to lay down practical suggestions for improvement in the law—specific descriptions of what should be done, and how it ought to be done. The Hon. Locke King has addressed several letters to the *Times* on Law Reform, which are rather severely handled in a late number of that Journal.

"Nothing," says the article we refer to, "could we discover, only windy declamation against defects which nobody denies. Nothing is so easy as to find out faults; the difficulty is, to devise such means of amendment as shall cure them, without making ten times more mischief than is cured. That is the objection to codification, which Mr. King so much desires. A code would be a good thing, but how are we to codify so as to exclude a conflict upon the construction of almost every word in the code? Would not the litigation it

would make for a century to come be a hundredfold greater than the litigation it would prevent? A whole column of the *Times* is devoted by Mr. Locke King to a denunciation of obsolete statutes. We agree with him in this. Everybody will agree with him. All sensible men would rejoice to see every obsolete law expunged from the statute book. Mr. King is an M.P.; he has the power to carry out his own project. Let him bring in a Bill to repeal all obsolete laws, and we promise him the hearty support of the Lawyers, whom he wrongly assumes to be so hostile to all improvements of the law. Why does not Mr. Locke King, a legislator, legislate, instead of writing letters to the *Times*, complaining that others do not legislate? Action is better than talk. Shall we whisper to Mr. King himself *why* he does not bring in a Bill to repeal the obsolete laws, instead of declaiming against them? Simply because *he cannot determine what laws are obsolete;* and the same difficulty that impedes him is the impediment in the path of others.

"This is a specimen of the *un*practical character of so many of our Law Reformers. They preach against the evil, instead of providing the remedy. Had we despotic power, we would prohibit any person from finding fault with anything unless at the same time he shows how the fault might be removed, or the thing better done. Such a decree would relieve the country of nine-tenths of its talk and three-fourths of its printing. It would reduce Parliamentary debates to two or three columns, and leading articles in newspapers to *nil*"

Having been requested to publish in this number the Mill case of *Graham* v. *Burr* decided in the Court of Chancery, we have done so to the exclusion of other matter. The decision is an important one, and as the majority of the Profession have not access to the Chancery Reports, they will no doubt appreciate our endeavour to serve their interests.

DIVISION COURTS.

(Reports in relation to)

(County of Essex.—A. Chewitt, Judge.)

IN RE. WILLIAM CHADWICK.

Attachment—Affidavit.

In 13 several cases of attachment against William Chadwick, summons served on domicile, a third party, Oscar F. Cargill,(*a*) claimed the property. Bailiff issued interpleader summons, served personally to try the validity of sale to Cargill. At the trial, 30th May, *Stuart* for claimant objected to jurat of affidavits—some by illiterate persons—not certified as explained—no places where sworn—no addition, 46 Rule. But upheld under discretion in that Rule and 45th, addition not necessary, 3 U. C. R. 248. Objected, also, that in all the affidavits, after the words—"*hath absconded,*" &c., the affidavits say—"and hath left," instead of "*leaving*" personal property, &c., held sufficient, being the same meaning, if not the very same words. (See *U. C. Law Journal*, 96, Covington cases on *qu.* as to *equivalent* words. This is an *instance shewing* that if *words equivalent* fully could not be used, injury might be done, though not in a part of the affidavit so very *important* as in these Covington cases.) Also objected, that affidavits state in one or other of them, the words—"for timber and beef," "for lumber," "for boarding," "for labour," "for black-smithing," "for pork and oats," "for store goods," "for hay and board at his request," "for paying a debt to James Williams," without adding—sold and delivered—done—found and provided—paid and expended at his request (request not always necessary, 1 Chit. 339) in same case, and one affidavit for £3 12s, not stating nature of debt *at all*. This last not coming up to the requirements of 64 sec., i.e., according to the purport of the Form in the Act, Schedule D., which says, here state the *cause of action briefly*, held bad, the others held good enough under 45 Rule, *as not interfering with the just and real adjudication of the cases*. (But better to follow the safe Forms and instructions in *U. C. Law Journal*, p. 21.)

Also objected, that several of the affidavits stated three of the *causes* mentioned for attachment in the Form and Statute, i.e., "*hath absconded,*" leaving, &c., or, "*that he was about to* abscond from this Province, *or* leave Essex," with intent to defraud plaintiff, (decided in 11 U. C. R. 416, not to be warranted by the Statute, though so given in the old Form D); or, *that he is concealed* in Essex, to avoid process, with intent to defraud, &c., being in the *alternative*.

Held, that the first cause for attachment in the affidavits, i.e., hath absconded, &c., was sufficient under the 45 Rule, and was sound under the case 10 U. C. R. 416; and that if the other *alternatives*, or statements, were not true, or defective, they did not affect what was good (1 Prac. R. 158); and as to their inconsistence or untruth, the defendant, if injured, might move to deprive plaintiff of all costs, for want of probable cause of attachment, or *indict*. See 3 U. C. R. 248. *In* the alternative is good being *distinct* causes of *action*. If *and* had been used instead of *or*, and the several causes of *attachment* were *inconsistent* or *repugnant*, the affidavit might have been bad, *not otherwise*. That there is some ground for using the Form in the *alternative* as the form of warrant given under the Act (none is given in the Forms), Schedule E states, That bailiff is to take and keep the effects of C. D., an *absconding, removing,* OR *concealed* debtor, (not saying—"*as the case may be,*") *or* a sufficient *portion thereof;* and the Form settled in Q. Bench, Meighan v. Pinder, 2 O. S. 292, is in the alternative under the Statute, i.e., attachment, &c., of C. B., "*an absconding or concealed debtor.*"

Also objected, that bailiff should return all *effects* taken at that time, on each attachment, instead of a *sufficient* portion thereof, to secure, &c., (*Law Journal*, 22) appeared relieved on each, while the latter, I think, is the right way. Also objected, that in affidavit and attachment in one case, and in the appraisal(*b*) of several of the cases, defendant is called *Shad*wick instead of *Chad*wick. This may not be quite *idem-sonans*, though so very near it *among ignorant* country people and unskilful J. P.'s, that it is ordered to be amended in the subsequent proceedings, under 37 Rule, and the affidavit held sufficient under the 45 Rule for reasons before stated as to other defects. It may be added, that almost all the affidavits were drawn by a J. P. little *accustomed* to legal niceties or technical terms.

In another case, McMullen *v.* Chadwick, on an award payable to Elliott & Simms, the words (*or order*) happened to be inserted. The action was brought in name of McMullen, instead of E. & S.; award was assigned by *indorsement* formally to McMullen. Affidavit stated that debt was due to McMullen, but also sufficiently showed the arbitration award and assignment, and that *technically* it was *originally* due to E. & S.

Stuart consented that proceedings should be amended, if

(*a*) *Since decided* to be *void* as against *creditors*. The sale not being accompanied by an *immediate* delivery followed by an actual and continued change of possession of the goods sold; nor, instead thereof, was the *paper writing* which purported to be a *conveyance* of the goods by bill of sale (being more like an account of sales, headed—A. B. bought of C. D.—then giving an account of the articles sold, like a common account rendered, and concluding with—Received payment in full by C. D., witnessed), filed in County Court, with affidavit, according to Statute: and besides the absence of filing in County Court, or *immediate* delivery, the whole transaction bore, nearly on every part of it, the badges of fraud as against creditors, though it might have been sufficient as between themselves.

(*b*) Omissions or defects in these formal Acts, as required to be added or indorsed by an officer, is no ground to set aside proceedings under writs. I. P. R. 205; McNider v. Martin.

the Court thought they could be amended. Under this consent, it was considered the affidavit might stand, as it sufficiently showed a debt due E. & S. on award, and that all subsequent proceedings be amended, he being called, in entitling the cause in each paper, McMullen, assignee of E. & S; so that the proper plaintiff's name was inserted in the paper, being substantially correct, leading no party astray—not interfering with merits, &c. 36 & 45 Rule; in 1 P. R. 263. In affidavit in replevin, *something* like this affidavit was allowed to be sufficient, as really showing a party to be *servant* or *agent* to another, though not much in point; but there could be no doubt of the indebtedness of defendant to the plaintiffs E. & S., by the award, or that McMullen, though beneficially interested, had a right to act and use the name of E. & S., and as their agent, the affidavit being technically correct in other parts, and substantially correct as to the part in question.

NOTICES OF NEW LAW BOOKS.

ENGLISH REPORTS IN LAW AND EQUITY, *Edited by Edmund H. Bennett and Chauncey Smith, Counsellors-at-Law. Volume* 30.—Little, Brown & Company. Boston: 1855.

Messrs. Little & Brown have favoured us with Volume 30 of their reprint of English Reports in the Law and Equity Courts. The present volume contains Decisions in the House of Lords and Common Law Courts during the years 1854-55. The last case is that of *Cuthbert* v. *Cumming*, decided in the Exchequer Chamber on 14th June, 1855. As noticed in a previous number, Messrs. Little & Brown will, at the expiration of this year, issue three volumes of Law Reports and one of Chancery. They have also in press a Digest, which will materially facilitate reference to the numerous volumes of their series.

INTRODUCTION TO AMERICAN LAW, *designed as a "First Book for Students," by Timothy Walker, L.L.D., late Professor of Law in the Cincinnati College. Third Edition, enlarged and amended.*—Little, Brown & Co. Boston: 1855; p.p. 758.

The author of this work, Dr. Walker, the pupil and friend of the late Chief Justice Story (to whom the work is inscribed), having felt from experience that few "facilities had been provided for studying the elementary principles of American Jurisprudence," and that a course of legal study in the United States should be commenced, "with a systemated outline of American, instead of English Law," has published in collective form, a series of lectures delivered by him with that object to the students of his class in the Cincinnati College.

The work consists of seven divisions, each containing several distinct lectures. 1. Preliminary Consideration, Principles of Political Organization, Historical Summary, &c., such as Study of the Law. 2nd. Constitutional Law—embracing Legislative, Executive, and Judicial Departments, &c. 3rd. The Law of Persons—comprising Corporations, Partnerships, Husband and Wife, Parent and Child, and the like. 4th. The Law of Property, real and personal. 5th. The Law of Crimes. 6th. The Law of Procedure. 7th. International Law.

Dr. Walker thus alludes to the "technicalities" of the Law:—

"First, the language of the law is the subject of much complaint. No doubt it is obnoxious to the charge of unnecessary technicality. But it shares this reproach in common with every science of ancient date. There has always been a disposition in the votaries of learning towards exclusiveness. They have sought to create a monopoly of their acquisition, by employing a language not generally understood nor easily acquired: and when a phraseology, however barbarous or inelegant, has been consecrated by time, it is very difficult to change it. The old law language was, in fact, a jargon compounded of three distinct languages. From the date of the Norman Conquest to 1063, legal proceedings were conducted, recorded, and reported in Norman French, itself a mixture of French and Saxon. A statute of that year required them to be conducted in English, and recorded in Latin; but for some time after they continued to be reported in French. With the exception of a few years during the Protectorate of Cromwell, the records continued to be in Latin until 1730; when an Act of Parliament required them to be in English. Yet two years after, it was found necessary to enact that the technical terms of the law might still *remain in their original language, whether French, Latin or Saxon; and so* they have continued to this day. Some of them are, indeed, incapable of a convenient translation. But the number is very small, consisting chiefly of the names of legal proceedings; and it may be safely affirmed that one can become a profound Lawyer, without a general acquaintance either with French or Latin. These will serve for embellishment, but our own mother tongue is all that is indispensable. It is time that this should be generally understood; and that efforts should be made on all hands, to simplify the language of the law so as to make it level to the comprehension of all. The same overpowering reasons which opened the Scriptures to the laity in their vernacular tongue, should operate to make human laws intelligible to every inquirer. There would then be no plausibility in the objection, that it takes so long to learn terms, that little time is left for principles. And in conformity to these views, I shall avoid foreign terms as much as possible. Indeed, it ought to be a maxim with every man, not only in reference to the law, but to every kind of knowledge, never to use a foreign word when a native one will express the idea as well."

The work appears to us admirably adapted for the purposes for which it is intended; whilst necessarily, from its size, confined to the investigation of general principles of law, yet it is written with much clearness and perspicuity, in which the author possesses an unusual facility. The forms throughout the book, and references to both English and American authorities, are valuable in elucidation. We think the Canadian Law Student will derive both benefit and pleasure from its perusal.

FIRE ASSURANCE.—IMPORTANT TO SOLICITORS.

We direct the particular attention of our readers to the following notice of the City Article of the *Times* on Friday. It involves most important consequences, of which Solicitors should cautiously advise their clients when effecting fire assurances, and which they should also bear in mind in mortgages, where buildings, &c., are required to be insured against fire. It seems that the assurance will not cover the whole value unless the whole value is assured. If the assurance is for less than the value, it will only cover a proportionate amount of the whole. Thus an insurance for £500 is not, in fact, an insurance to the extent of £500, but only an insurance to the amount of so much of the £500 as the £500 bears to the whole value of the property insured.

The late loss by fire at Messrs. Scott Russell and Co.'s shipbuilding yard, has just been finally determined, after a protracted investigation by the several insurance offices interested, for £25,000, the policies being subject to the conditions of average. These conditions are of great importance, but are not always sufficiently understood. Their effect is that, in the event of partial loss, the uninsured sum of the total value covered by the policies bears its relative proportion to the sum insured. Thus, if the total value of the property should amount, at the time of a fire, to £200,000, while only

£150,000 is insured, and a loss of £100,000 should arise, the sum to be paid by the insurance offices would be three-fourths of the loss, or £75,000 only. The following are conditions of average referred to:—

"ENGLISH.—It is hereby declared and agreed that, in case the property belonging to the insured, in all the buildings, places or limits herein described, shall, at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then the company shall pay or make good to the assured such a proportion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid at the time when such fire or fires shall first happen.

"But it is at the same time declared and agreed that, if the within-mentioned assured shall, at the time of any fire, be insured in this or any other office on any specific parcel of goods, or on goods in any specific building or buildings, place or places, included in the terms of this insurance, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specified insurance or insurances, which said excess is declared to be under the protection of the policy, and subject to average as aforesaid."

"FRENCH.—If at the time of a fire the value of the objects covered by the policy is found to exceed the sum total of the insurance, the assured is considered as having remained his own insurer for that excess, and he is to bear in that character his proportion of the loss."

[The matter in the above, which we have taken from the *Law Times*, is seriously interesting to Policy holders. We have not at present the means for obtaining specific information for our readers, but think it probable that the objectionable condition referred to is not contained in Policies issued by our own companies, though it may be found in those from England and foreign companies.

This, however, is only a supposition of ours. We would recommend those interested to examine their Policies, and judge for themselves, and if such a condition is contained, to make application to expunge it; and should the office refuse, then to drop the Policy, and insure in some other office that had not this condition.—*Ed. L. J.*]

CORRESPONDENCE.

To the Editor of the "Law Journal."

SIR,

Many writs of *certiorari* to Division Courts have been framed under sect. 85 of 13 & 14 Vict. cap. 53, and the practice has uniformly been to issue such writs on a Judge's fiat, obtained on an *ex-parte* application, following the English practice under the Imperial Act 9 & 10 Vict. cap. 95, sec 90, which is nearly in the same words as the clause referred to of the Canadian Stat.), as laid down in the case of *Symonds v. Drinsdale*, 2 Exchq. 533. If the fiat is granted on an affidavit, which the defendant objects to as insufficient, his course, it would seem, is to move to quash the writ. *Parker v. Bristol & Exeter Railroad Company*, 6 Exchq. 184.

Yours obediently,

S.

[The existence of the practice does not establish its correctness, nor will the opinion we advanced be shaken till the point is raised and decided on *argument*. We cannot lose sight of the point that the Division Courts are *not Courts of Record*, and that therefore the writ of *certiorari* does not go to them *as of course:* and we can see good grounds, as a general rule, for the Judge requiring some notice to the opposite party before exercising the Judicial act of granting leave to issue a *certiorari*.—*Ed. L. J.*]

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent of the several Division Courts in every County of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.*

UNITED COUNTIES OF HURON AND BRUCE.

Judge of the County and Division Courts—JOHN STRACHAN, Goderich.

First Division Court—Clerk, W. A. S. Williams, Goderich; *Bailiff*†; *Boundaries*—That portion of the Town hip of Goderich to the north of the Cut line and the Huron road, until the same meets the road allowance between the 13th & 14th concessions, then south along the said concession to the river Bayfield, then along the said River to the London road in a north-east direction, together with the township of Colborne.

Second Division Court—Clerk, Louis Meyer, Harpurhey P.O.; *Boundaries*—The townships of Hullett, McKillop, Tuckersmith, Morris, Grey, Turnberry and Howick.

Third Division Court—Clerk, Christopher R. Barker, Penetangore P.O.; *Boundaries*—The townships of Arran, Brant, Bruce, Carrick, Culross, Elderslie, Greenock, Huron, Kincardine, Kinloss, (with the exception of the first four south concessions of the said township of Kinloss) and Saugeen.

Fourth Division Court—Clerk, George Carter, McGillivray P. O.; *Boundaries*—The townships of Biddulph and McGillivray.

Fifth Division Court—Clerk, Thomas Trivitt, Devon P. O.; *Boundaries*—The townships of Stephen, Usborne, and that portion of the township of Hay to the east of the 6th and 7th concessions of the said township of Hay.

Sixth Division Court—Clerk, John Clark, Wawanosh P.O.; *Boundaries*—The townships of Ashfield and Wawanosh, and the first four south concessions of the township of Kinloss.

Seventh Division Court—Clerk, David H. Ritchie, Bayfield P.O.; *Boundaries*—The township of Stanley and that portion of the township of Goderich to the south of the Cut line and the Huron road, until the same joins the road between the 13th and 14th concessions of the township of Goderich, thence along the said concession road until the same joins the river Bayfield, thence along the said river to lake Huron, together with all that portion of the township of Hay to the west of the 6th and 7th concessions of the said township of Hay.

COUNTY OF WATERLOO.

Judge of the County of Waterloo—WILLIAM MILLER, Galt.

First Division Court—Clerk, John Davidson, town of Berlin; *Bailiff*;† *Boundaries*—All that portion of the township of Waterloo lying north of the block-line on the west side of the Grand River, and that part of the upper block of said township lying on the east side of the Grand River north of lots numbers 115, 109, 104, 86 and 95 to the Guelph township line.

Second Division Court—Clerk, Otto Klotz, Preston; *Boundaries*—All that portion of the township of Waterloo lying south of the block-line on the west side of the Grand River, and that part lying on the east side of the Grand River south of the northern boundary of lots 115, 109, 104, 86 and 95, to the Guelph township line, including the village of Preston.

Third Division Court—Clerk, Henry McCrum, Galt; *Boundaries*—All that part of the township of North Dumfries lying east of lot number nineteen in the seventh concession, and running a course with the eastern boundary of the said lot in a northerly direction up to the twelfth concession, thence along the eastern boundary of lot number twenty-three in said twelfth concession to the township line, including the village of Galt.

Fourth Division Court—Clerk, George Colcleugh, Ayr P.O.; *Boundaries*—All that part of the township of North Dumfries, lying west of lot number eighteen in the seventh concession, thence along the western limits of said lot number eighteen, the same course thereof in a northerly direction to the twelfth concession, thence along the western limit of lot number twenty-two to the township line.

Fifth Division Court—Clerk, John Allchin, New Hamburg P. O.; *Boundaries*—The township of Wilmot.

Sixth Division Court—Clerk, Michael P. Empey, Hawksville P.O.; *Boundaries*—The township of Wellesley.

Seventh Division Court—Clerk, James Merrilees, Conestoga P.O.; *Boundaries*—The township of Woolwich.

* *Vide* observations *ante*, page 196, on the utility and necessity for this Directory.

† We have not yet received a List of the *Bailiffs* for these Counties.