Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☑ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☑ Continuous pagination/ Pagination continue
- ☐ Includes index(es)/ Comprend un (des) index

  Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☐ Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
								✓			

DIARY FOR AUGUST.

5. SUNDAY..... *9th Sunday after Trinity.*
11. Saturday..... Articles, &c., to be left with Secretary of Law Society
12 SUNDAY..... *10th Sunday after Trinity.*
15. Wednesday .. Last day for service of Writ for County Court.
19. SUNDAY .... *11th Sunday after Trinity.*
20. Monday ..... Last day for notice of Ex. Chancery, Toronto.
21. Tuesday..... Long Vacation ends
25. Saturday..... Last day for declar for County Court.
26. SUNDAY ..... *12th Sunday after Trinity.*
27. Monday. ..... TRINITY TERM begins.
31. Friday;..... Paper Day, Q. B.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

AUGUST, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number—1. The name of the Subscriber. 2. The amount in arrear. 3. The current year to the end of which the computation is made.

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The "60" has reference to the year, and not to the amount represented as due.*

THE LAW OF REGISTERED JUDGMENTS IN UPPER CANADA.

There are few branches of our law of real property so important, and, perhaps, so troublesome, as that which relates to the lien upon property created by registered judgments. The statutory enactments are by no means perfectly clear; and the consolidation of the various conflicting provisions in the Consolidated Statutes for Upper Canada, has only brought into greater relief their numerous inconsistencies.

In a former article upon this subject (vol. 5, p. 193), we treated of the lien of registered judgments, and under what circumstances it was, and was not, binding upon lands, and in the present article we propose to fulfil the promise then made, of referring to the interests in real estate which may be bound by such registered judgments.

By the Consolidated Statutes for Upper Canada (cap. 89, sec. 49—same as 13 & 14 Vic. cap. 63, sec. 2), it is provided that judgments, when registered, shall affect and bind all lands to which the debtor was or afterwards became seized, possessed, or entitled, for *any estate or interest* whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which he had or afterwards obtained any *disposing power*; and these provisions are amplified by the Consolidated Statute for Upper Canada (cap. 90, secs. 5 & 11), which provides that a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, shall be bound by judgments, and be liable to seizure and sale under execution the same as lands.

The words here used—"*any estate or interest in land*"—are certainly comprehensive enough to include all kinds of estates which can possibly exist at law or in equity. We shall therefore describe those estates which are more generally known, and then refer to those which the latter statute more particularly describes, on all of which judgments attach.

1. An *estate in fee simple* in land is the largest estate which can be held under our laws. It is the kind of estate most common in this Province, and possesses the advantage of descending not merely to the heirs of the body, but to collateral relatives, according to the canons of descent. Its most valuable quality, however, consists in the unfettered right of alienation which its owner enjoys. A sale of such an estate under a judgment is a complete alienation.

2. An *estate tail* may be considered as the next largest estate. It is an estate given a man and the heirs of his body generally, in a regular order of descent; and it will descend to his lawful posterity, without restriction; or to certain heirs of his body, as heirs male, heirs female, or heirs by a particular wife. Judgments registered against these estates are binding on the lands of the tenant in tail as "against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or any other interest in or out of said lands."

3. An *estate for life or years*, may be an estate to hold during life, and no longer, or a husband's tenancy by the curtesy of England, in his deceased wife's estate; or an estate for a limited number of years, or for the life of another. As the tenant for life or years of such estates has only a disposing power over whatever estate he pos-

sesses in the lands, a judgment can bind no more than this disposing power can control; and a sale of such an estate, under such a judgment, would only confer upon the purchaser the remainder of whatever estate the debtor had in the lands at the time of the sale.

The preceding may be termed estates in possession, such estates being those of which the tenant is in actual receipt of the profits.

4. An *estate in reversion* may be defined to be that interest in an estate which remains in a tenant in fee simple or fee tail, who has parted with his estate for a term of years, or for the life of another, and in virtue of which he will have the full estate on the expiration of the term of years, or death of the tenant for life. The estate which he has granted is called, during its continuance, the *particular* estate, being only a part or *particula* of the estate in fee or tail; and that which is undisposed of and remains in the grantor, is the *estate in reversion.*

5. An *estate in remainder* is an estate arising out of an estate in reversion. If the tenant in fee should, after granting a *particular estate*, as above explained, also dispose of his *reversion* to another party, that which he disposes of is called a remainder. Thus: if a grant be made by A, the tenant in fee simple, to B for life, and, after his decease, then to C and his heirs, the whole fee simple is disposed of, and C's interest is an estate in remainder, expectant on the death of B. A remainder, therefore, always has its origin in *express grant*, and springs from the acts of the parties; a reversion merely *arises* incidentally, in consequence of the grant of a particular estate, and is created simply by the operation of law.

A further term is used by the statute—*estates in expectancy*, or estates where the right to receive the profits is postponed to some future time—of which there are two sorts, estates in remainder and estates in reversion, (2 Cruise's Dig. 202.) and which we have above described.

We shall now refer to the estates described in secs. 5 & 11 of cap. 90 of the Consolidated Statutes of Upper Canada.

6. A *contingent remainder* is that remnant of an estate which is limited to take effect on an event or condition which may never happen or be performed till after the determination of the preceding particular estate; in which case, such remainder can never take effect. Sir William Blackstone has clearly defined "contingent or executory remainders" (whereby no present interest passes) to be, "where the estate in remainder is limited to take effect either to a dubious and uncertain *person*, or upon a dubious and uncertain *event.*" (2 Bl. Com. 169.)

7. An *executory interest* is a future estate, which arises when its time comes, of its own inherent strength, and depends upon no prior estate, from which to take effect. By the old law, a feoffment or any other conveyance of a freehold made to-day to A, to hold from to-morrow, would be absolutely void, as involving a contradiction; for when the seisin is parted with, it must vest in some person immediately. There is no half-way place for estates to rest in, like that supposed to be occupied by Mahomet's coffin. But by means of *springing and shifting uses*, created under the Statute of Uses, the seisin of an estate shifts from one to another, until it vests in the party for whom it is intended. Thus: an estate may be conveyed to A and his heirs, to the use of the grantor and his heirs, until to-morrow, and then to the use of B and his heirs, and the courts would enforce the use in favor of B. A very common instance of such a shifting use occurs in an ordinary marriage settlement. A, the settlor, conveys, by the settlement executed a day or two before the marriage, to the trustees, to the use of A the settlor and his heirs, until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof, to the use of B the husband, for his wife. Here the moment the marriage takes place, the seisin shifts away from A to B, without any further conveyance.

8. The other estates mentioned in the statute are, a "future interest," and a "possibility coupled with an interest." Of the former, a *vested remainder* may be given as an example, which is an estate in which the person entitled has an immediate, fixed right of future possession and enjoyment of the profits. A *possibility coupled with an interest*, is an estate which must depend upon a contingent event, which will be recognized by law; for Lord Coke says, "The law will never adjudge a grant good, by reason of a possibility or expectation of a thing which is against law." (3 Rep. 51 b.) As an example of such possibilities the following is given: If a lease be made to A. for life, remainder to the right heirs of J. S., this is good; but if at the time of the limitation of the remainder there be no such person as J. S., but during the lifetime of the tenant for life, J. S. be born and die, his heir shall at no time take, because the possibility on which the remainder is to take effect is too remote. This latter is called a possibility upon a possibility, which, as Lord Coke says, is never admitted by intendment of law. (2 Cruise's Dig. 231.)

These observations may be considered too elementary; but it must be recollected that these provisions of the statutes are seldom acted upon, and that as it is probable more attention will be given to the subject hereafter, it is a pardonable fault to be clear and explicit in treating of the provisions of a law which deals so minutely with interests in real estate.

It is not necessary to refer to authorities affecting the first class of estates declared by the statute to be bound by

judgments, as in regard to them the law is quite clear.

But in regard to entailed estates, it is clear that under the statute first referred to (cap. 89), the issue in tail and remainder-men will, where there is no protector, be bound by judgments entered up against the tenant in tail, inasmuch as he has, in the words of the section, a *disposing power*, which he may, without the assent of any other person, exercise for his own benefit, and also as such judgments are binding against the issue of his body, and all other persons whom he may, without the assent of any other person, cut off and debar from any remainder, &c. And where there is a protector, as the tenant in tail can create a base fee without his consent, the judgment can bind the land to that extent.

In *Moffat* v. *Grover* (4 U. C. C. P. 402), it was held that the interest of a husband in the freehold estate of his wife may be sold under a *fi. fa.* lands, as such might be extended on an *elegit*, and may therefore be sold under such *fi. fa.* by 5 Geo. II. cap. 7.

In *Doe dem. Cameron* v. *Robinson* (7 U.C. Q.B. 335), the interest of a reversioner was held liable to sale under a *fi. fa.* lands during the lifetime of the tenant for life.

Some of the advantages of these provisions are, that in cases of joint tenancy, the creditor need not be deprived of the benefit of his judgment by reason of the death of the debtor in the lifetime of the co-tenant (notwithstanding the *jus accrescendi*); but will be entitled to the same remedies against the share which has survived, as he would have had in the lifetime of the debtor.

So if a joint judgment be entered up against the joint donees of a general power of appointment, it would seem that, the joint power being considered a disposing power, would be bound.

In *McLean* v. *Fisher* (14 U. C. Q. B., 617), the testator, after giving certain lands to three of his children, devised all the residue to his wife for life; and after her death to be equally divided among all his then surviving children (except the three). A patent was afterwards issued to the executors to hold under the will. While the wife was alive, and therefore before the division to the surviving children, a *fi fa* lands issued against one of these children, and under it the sheriff seized and sold his interest in the property. The Court held, that the sheriff's deed was inoperative, as the defendant in the writ had no estate, or interest in the land which could be sold under execution. It was decided in this case, that while the Trustees held the legal estate, the residuary devisee (judgment debtor) had not such an equitable estate in the land which could be subject to execution as a trust interest liable to execution under the Statute of Frauds (29 Car. II. cap. 3, sec. 10). The judgment debtor could take no interest unless he survived his mother. Yet this case seems rather adverse to the effect of the term used in the statute of "a possibility coupled with an interest."

In *Keyland* v. *Belfast Corporation* (6 Ir. Ch. 161), the Lord Chancellor, in remarking upon the attempt of a judgment creditor to enforce his lien against the trust estate of his debtor, said: "It is one thing to establish the liability of a trustee; another, and a very different one, to determine that such liability is to be enforced against the trust property. In a court of law such property may be seized under a judgment against the person whom the law recognizes as the legal owner, but not in equity."

In *Arnold* v. *Gravesend* (2 Jur. N. S. 703), it was held that the word "person" includes a body corporate, and the words "for his own benefit" mean not as trustee; and in that case, property acquired by the new corporation, after succeeding to the old corporation, was held liable to be taken in execution for debts contracted by the old;—and thus in effect overruling *Arnold* v. *Ridge* (17 Jur. 896).

The other cases referring to trust estates are *Whitworth* v. *Gaugain* (1 Phil. 730), *Gore* v. *Bowser* (1 Jur. N. S. 392), *Pallister* v. *Gravesend* (25 L. J. Ch. 776), and *Kinnerley* v. *Jarvis* (25 L. J. Ch. 543).

It is clear that the object and scope of the statutes is to afford relief to the creditor to the extent of the debtor's interest, whether actual, beneficial, or attainable by the execution of a power, or otherwise; and therefore the enactments must extend to all cases where the debtor has a general uncontrolled power of appointment, not limited to particular objects or to specific purposes.

Hereafter we may continue the subject of this article by referring to the lien of Crown debts as they affect real estate, under the old statutes of England and our own Act respecting the registration of deeds and instruments creating debts to the Crown (Con. Stat. U. C. cap. 5).

PRIVILEGES OF ADVOCATES.

A case of some importance to the profession has recently been determined in England (we refer to *Mackay* v. *Ford*), which will be found transferred to our columns from the pages of the *Law Times*. It desides that an action will not lie against an attorney for words spoken by him as an advocate, in a matter before magistrates, when the language used by him is strictly relevant to the question before them. We confess we have always understood the law to be so, and would have been much astonished to find it differently determined.

LAW AND EQUITY BILL.

MEMORIAL OF THE COMMON LAW COMMISSIONERS RESPECTING THIS BILL.

In reply to the following letter of the Lord Chancellor, enclosing the "observations" of the equity judges on the Law and Equity Bill, a communication from the Common Law Commissioners has been presented to Parliament by her Majesty.

House of Lords, 24th April, 1860.

My lord,—I have the honour to submit to you a copy of a memorial from the Master of the Rolls and the three Vice-Chancellors upon a Bill framed with a view to carry into effect the last report of the Common Law Commission presided over by your lordship. I respectfully beg that this memorial may be considered by your lordship and the other commissioners, and that you would have the goodness to inform me how far you concur in its reasoning.

I ought to add, that as this memorial was laid before the House of Lords, I propose (with your permission) to lay before the House of Lords any observations you may be pleased to offer in answer to it.—I have, &c., CAMPBELL, C.

The Right Hon. the Lord Chief Justice Cockburn,
&c. &c. &c.

The Common Law Commissioners' communication is as follows:—

18th May, 1860.

My lord,—Our attention having been called by your lordship to the objections urged in the memorial of the equity judges against the Bill introduced into the Legislature on the recommendations contained in our last report, with a view to our offering such answer as our acquaintance with the subject might suggest, we beg to submit the following observations in reply.

We must begin by premising that the scope and effect of the alterations proposed in the jurisdiction of the common law courts has been greatly misconceived, while the objectors appear to have lost sight of the extent to which equitable jurisdiction has already been conferred on these courts, as well as of the great improvements which have been introduced in modern times into their procedure.

In the sweeping criticisms with which our recommendations have been assailed the proposal to confer further equitable jurisdiction on the courts of common law has been treated as a scheme of innovation and demolition, now first propounded, and the incompetency of the common law judges and the inadequacy of their procedure to deal with equitable rights has been taken for granted and unhesitatingly asserted, as though equitable jurisdiction had never before been conferred upon or exercised by the legal tribunals of the country.

We shall have no difficulty in showing that, with a single, and that a very unimportant, exception, in no instance is it proposed to enlarge the equitable jurisdiction of the common law courts, except where this jurisdiction already to some extent exists, and where the competency of these courts and of their procedure to administer it has already been established by practical experience.

It may not be inexpedient to pause for a moment to take a brief survey of what has already been done in this respect.

The rigid simplicity of the ancient common law and its strict and inflexible procedure having proved inadequate to meet the exigencies of a state of society becoming every day more complicated and refined, and the Legislature omitting to intervene to bring the law into harmony with the more liberal principles of rational and enlightened justice, courts of equity stepped in to supply the place of legislation, by the application of a rude yet not wholly inefficacious remedy—partly in eking out the defectiveness of the common law procedure, partly in mitigating the rigour of the law where an adherence to its letter would have worked injustice—not, indeed, by attempting directly to control the action of the legal tribunals, an attempt which would at once have been resisted, but by coercing the suitors by means of personal duress to forego their legal rights, and to submit to have justice done between them on equitable principles.

Experience, however, soon made men sensible that the benefits of this equitable jurisdiction were greatly diminished by the drawbacks of double tribunals and a twofold litigation, attended with a vast increase of expense. Hence, from time to time, during the last century and a half, according as particular inconveniences successively forced themselves on the attention of the Legislature, portions of the jurisdiction at first exercised only by the courts of equity have been transferred by statute to the courts of common law.

The power to relieve against the penalty of bonds conditioned on a defeasance, to relieve up to the time of trial against actions of ejectment on forfeiture for non-payment of rent, to relieve mortgagors in actions on mortgage bonds or actions of ejectment, on payment of the principal and interest, and the important process of interpleader, are examples of this transfer of jurisdiction.

To these instances of encroachment on the domain of courts of equity must be added the transfer, in our own time, of the whole of that extensive and important jurisdiction which was known under the name of "auxiliary equity." The powers included under this head being wanting in the original procedure of the common law, courts of equity, as has already been observed, took upon themselves to make good the deficiency. Better this, no doubt, than that such powers should nowhere be found for the protection of right; yet so great the evil that a Court in which a suit was pending should not have the means of doing justice between the litigants; so great the hardship of being compelled to resort to a second Court to supply the defects in the procedure of the first; so serious the harassment, and, above all, the expense of the double proceeding that the remedy was often more grievous than the absence of redress; and parties, especially of the poorer sort, more particularly where the matter in dispute was not of large amount, preferred to submit to injustice rather than have recourse to a remedy oftentimes far worse than the mischief to be cured. When, therefore, the Common Law Commissioners recommended the transfer of these powers to the courts of law, Parliament at once saw the propriety of the suggestion, and gave effect to it by legislative enactment. Yet the same argument might have been urged then which is resorted to now. The powers which it was proposed to confer on the common law courts were powers which the courts of equity for many generations had exclusively exercised, according to principles and rules with which, so far as their practical application was concerned, the common law judges could not be expected to be familiar. Yet these powers have now been extensively exercised by the common law courts to the infinite advantage of the suitors. The judges have had no difficulty in familiarizing themselves with the principles and rules established by the practice of equity in this department; and the machinery of the common law has proved itself abundantly adequate to the exigency of the occasion.

It may safely be asserted that, owing to the increased facility and diminished cost of the present mode of proceeding, for every instance in which the resort was had to a court of equity under the old system, hundreds of instances now occur in which the corresponding powers of the common law courts are called into action, and are found fully effective for the purpose.

The innovation introduced by the Legislature into the established jurisdiction of the different branches of our judicature did not however, end here; and assuredly a further and a great change was imperatively called for.

The existence of two conflicting systems of law, recognizing inconsistent and incompatible rights, the one called common law, the other equity, administered by two distinct sets of tribunals, each refusing to give effect to rights which would be

enforced by the other, is not only an anomaly in jurisprudence but has been found to be attended with practical inconvenience and mischief of the most serious character. That a plaintiff, who has brought his action in a court of law, the only court to which he could resort, should be liable to have his action suspended, or the fruits of the judgment he may have obtained withheld, while he is compelled to follow his opponent to a different tribunal on an allegation of equity; or, still worse, that a defendant, sued in a court of law, and having a valid defence on equitable grounds, though none at law, should be under the necessity, instead of at once setting up such equitable defence as an answer to the action, to resort to another court, and there initiate a new and costly proceeding, at an expense in many instances immeasurably disproportioned to the value of the matter of the dispute, was a judicial grievance and abuse which neither time nor authority could sanction, and which, as soon as the work of legal reform was undertaken in a large and earnest spirit, neither prejudice nor interest could defend so far as to resist some modification of the evil.

When, therefore, in our second report, we had gone the length of recommending that jurisdiction should be given to the courts of law to entertain considerations of equity when arising incidentally in an action at law, the legislature although it did not see fit to give full effect to our suggestions in respect of equitable jurisdiction, yet took the very important step of enacting that equitable defences might henceforth be pleaded in an action.

Here, again, it may be observed that almost all the arguments which are now urged against the extension of jurisdiction at present proposed, would have been equally applicable to the change then introduced. The best answer to them is, we think, to be found in the practical experience of the working of this equitable jurisdiction, which has been exercised by the common law courts for now six years. It is from our experience of the usefulness of this jurisdiction, so far as it extends, from our persuasion that its only defectness arises from its not being sufficiently extensive, as well as from our conviction that, if the jurisdiction were enlarged, the courts of common law possess ample machinery for working it out, that we have been led to urge the expediency of extending the sphere of equitable defences in actions at law.

It will be convenient to divide the subject of the equitable jurisdiction proposed to be conferred by the Bill into two branches: 1. where the jurisdiction proposed to be enlarged or conferred arises on an action pending; 2. where it is to be exercised independently of an action.

EQUITABLE DEFENCES.

In the first branch equitable defences occupy the most prominent place. Equitable defences being now admissible in an action, a class of cases has arisen in which, although the defendants were desirous of pleading equitable pleas, a practical difficulty presented itself from the equity being conditional on something to be done *in futuro*, or on a contingency. Such a plea a court of law could, in the exercise of its discretion, allow to be pleaded; inasmuch as the plea once found for the defendant would be a bar in all time to come to the plaintiff's right, while the Court would have no power to compel the performance of the condition on which the equity arose. Now, it is plain that, if this difficulty can be removed, the same reason exists for permitting an equitable plea of this nature to be made available in an action as exists where the equity is unconditional and complete.

If the condition had been performed, we have the sanction of the Legislature for saying that the equitable plea should be allowed. If the performance of the condition can be ensured there can be no conceivable reason why the defendant, who is willing to perform the condition in order to obtain the benefit of the equity which would so result to him, should be driven to a court of equity to establish his defence. Of course, this is said on the assumption that a court of common law would be able, from the competency of its judges and its officers, to ensure the due and effectual performance of the condition. To doubt of this would be, as it seems to us, to doubt of their competency to administer the law at all; and we cannot bring ourselves to suppose that any serious resistance can be offered to the proposed amendment on this ground. It seems to us to follow from what has been said, that conditional equity be made available as a defence in an action at law, just as unconditional equity already is. Whether this should be done by an application for relief to the court in which the action is pending (as proposed by the Bill) or by allowing such an equitable defence to be pleaded, and giving the Court power, if the plea should be found for the defendant, to enforce the performance of the condition, on the application of the plaintiff, may be open to consideration.

INTERPLEADER.

The next instance in which it is proposed to give jurisdiction in respect of equitable matter is the case of interpleader. It is of everyday occurrence that, money or goods being in the hands of persons not claiming beneficial interest therein, or goods being seized by sheriff's in executing the process of the courts, adverse claims are set up whereby persons thus circumstanced are placed in an embarassing position and are exposed to be harassed by actions, and subjected to eventual loss. It is plain that persons so circumstanced ought, in justice, to be relieved, on actions being brought against them, by the parties claiming the beneficial interest being put to fight out their claims. Formerly this relief could only be obtained by interpleader bill in equity, a proceeding, which, as the statute of 1 & 2 Will. IV. c. 58, recites, was "attended with expense and delay."

By this statute interpleader jurisdiction was given to the courts of law. But this jurisdiction does not attach where the *jus tertii* set up is founded on equitable right. This jurisdiction it is now proposed to give. It cannot be contested that an innocent party, thus placed between two fires, ought equally to be relieved in the case of equitable as of legal claims. The expense and delay to the party against whom the adverse claim is set up by the institution of fresh proceedings in equity is, of course, equally great. The action is already in the Court of Common Law, and the reasons against the double litigation apply as strongly as this as in other instances. The object ought obviously to be to place the case on such a footing that the action shall become one between the parties really interested. Now, if the action were between the real parties, as, for instance, between an execution creditor (on a seizure of goods by the sheriff) and a party setting up an adverse claim, instead of between the claimant and the sheriff, an equitable right of the claimant would be available to him against the plaintiff under an equitable plea without recourse to a court of equity. But if, in an ordinary action of trover between A. and B., any equitable rights of the defendant as an answer to the action would be cognisable by the Court, it seems difficult to understand why, when it is sought to bring A. and B. into their proper position as litigants, at the instance of a party entitled to interpleader relief, the equitable nature of B.'s interest, which would be cognisable by the Court if A. and B. were once before it as plaintiff and defendant, should be a reason from withholding from the Court the power of granting such relief, and for putting the parties concerned to the vexation and expense of a fresh suit before another tribunal. In addition to which, another and a very cogent reason for extending the process of interpleader to such cases is to be found in the fact that the setting up of adverse claims by third parties generally arises on the seizure of goods by sheriffs in execution on process from the common law courts. To these officers courts of equity, as was pointed out in our late report, have refused relief by interpleader, while on the other hand they are liable to hostile proceedings if they omit to to take possession of property according to the exigency of the writ of execution.

FORFEITURE.

Next, as to the proposal to extend the jurisdiction first conferred on the common law courts by the Act 4 Geo. 2, c. 28, in an action of ejectment brought on a forfeiture for non-payment of rent. By that statute the equitable power, previously exercised by courts of equity alone, of relieving the tenant on payment of the rent due, was given to the court in which the action is brought up to the time of trial. Relief may be obtained in equity for a further period of six months after execution; but to obtain the latter relief fresh proceedings in equity must be taken. The simpler course would surely be to allow the Court in which the action has been brought to afford relief to the same extent as a court of equity can afford it. The record is in the former court; the facts are before it; the application may be by motion on affidavit: the expense of a second suit in a different court, with a fresh statement of facts and perhaps fresh proofs will be avoided. Nor can any possible ground be suggested, as far as we are aware, why the Court which is thought competent by the Legislature to give relief up to the time of trial should not be equally so after trial.

In like manner we cannot but think that the power conferred on a court of equity by the 22 & 23 Vic. c. 35, s. 4, to relieve against a forfeiture on a covenant to insure, where no loss has occurred, and the breach has been committed by accident or mistake, or otherwise without gross fraud or negligence—and a policy is, in fact, in existence, such as the covenant requires—might advantageously be extended to courts of common law, at all events when an action has been brought on the forfeiture. It must, we apprehend, be at once conceded that the questions involved are peculiarly within the province of the common law court; and there seems to be no conceivable reason why a second suit should be necessary to afford the defendant protection.

OMISSION TO PLEAD EQUITY.

We pass on to the important question, whether a party to an action who has once had the opportunity of pleading equitable matter, and who has not availed himself of it, shall be concluded by the omission—as he would have done by the omission to plead matter available at law if his case had rested on legal grounds—so as to preclude him from afterwards resorting to a court of equity to defeat the action.

The affirmative of this proposition appears to us to follow of necessity the moment equitable matter is permitted to be introduced at all into the action of law. The argument that a plaintiff who has necessarily commenced his suit in a court of law ought not, at the option of the other party, to be dragged before some other tribunal applies equally at whatsoever stage of the suit this anomaly arises, Indeed, the later the stage of the proceedings the greater and more grievous the hardship; inasmuch as, if the equitable right should eventually prevail over the legal, all the expense of the action which may perhaps have involved a trial at Nisi Prius, and may have proceeded even to judgment and execution, will have been entirely thrown away. Added to which, it seems repugnant to justice that a party shall be thus permitted to fight out his cause with his adversary on one stage, and having there taken his chance of success, shall be at liberty, when defeated, to renew the conflict on a different ground, which, if rightly taken at first, would have prevented the prolongation of the original contest; while if the equitable ground be wrongly taken at such later stage, the effect is necessarily to delay the party who has succeeded in the contest at law from reaping the benefit of the decision in his favour.

It is unnecessary to dwell on the various grounds on which the salutary rule is based, that in judicial proceedings litigant parties must put forward their respective cases, whether of attack or defence at the proper stages of the suit, or be concluded by their omissions; as well as that judgment once pronounced in the last instance shall be final and conclusive. They may be summed up in a word; without this rule litigation would be interminable, nor could rights ever be definitely ascertained or securely established. It is obvious that this principle applies equally to the case of equitable as of legal defences; and it seems to us to follow that, if matter or equity is allowed to be pleaded in actions at law, and a court of common law is to have jurisdiction in respect of such matter at all, it should be obligatory on the party relying on equitable grounds to put them forward at the fitting time, just as it would be to bring forward matter of law; and that a party omitting to take his stand on equitable grounds which it was competent to him to bring forward in the action ought not to be allowed afterwards to harass his opponent by a renewal of the litigation by proceedings in a court of equity.

NEW TRIAL.

It it obvious that much of the foregoing reasoning applies to the bill in equity for a new trial, by which, after trial and judgment in a court of law, on the discovery of new matter, though amounting only to a defence of law, relief may be applied for in a court of equity after the expiration of the time within which a new trial could be applied for in the court in which the action has been brought. It seems to us plain that this is an inconsistency which ought to be removed. If the time limited in the court in which the action has been brought and the trial had, is too short, that time should be extended. But it seems a startling anomaly that when the Court in which the action has been properly brought has pronounced its final judgment, a second court, not having any appellate jurisdiction over the first, may take the cause in hand, try the whole matter over again, deprive the victorious suitor of the judgment he has obtained, and decide in favour of the opposite party.

The only rejection to our recommendation is this respect, so far as we are aware, has been the denial of the existence of such a process. This, however, is a mistake. The proceeding has, as was stated in our third report, fallen into disuse, but there is nothing to prevent its being revived. The weapon may have been laid aside and may have grown rusty, but there is nothing to prevent its being again brought forth and made an instrument of mischief. The forensic combatant will not have to search far or deep to find it. In two text books of the profession, namely, "Mitford on equity pleading" (p. 131) and "Story on Equity" (secs. 887, 888), the bill of new trial is treated of as an existing part of equity procedure, and its terms and conditions prescribed with considerable detail. The jurisdiction is treated as an existing one, nor is it suggested that, if again invoked, it must not be exercised. On reference to these authorities it will be seen that where a bill of review in respect of a suit in equity may be brought, the bill of new trial upon judgment in an action at law may be resorted to. Acting upon such authorities we deem it our duty to direct attention to this conflict of jurisdiction, and to suggest the expediency of cutting off the possibility of its practical recurrence.

(To be continued.)

THE FUSION OF LAW AND EQUITY.

(From the Solicitor's Journal.)

We print elsewhere an able and ingenious defence of the Law and Equity Bill, which was read by Mr. Walker Marshall, at the last meeting of the Juridical Society. Although our opinion of the Chancellor's abortive measure is not in the least shaken by the clever argument contained in this paper, we are glad upon this, as upon all other subjects, to make the *Solicitors Journal* the medium for the freest possible discussion of every topic of professional interest. Mr. Marshall has adopted the well known device of advocacy which consists in accumulating arguments in support of a part of his case, which no one disputes, and quietly passing over the real difficulty, without anything more than a bare assertion in its suprort,

Nine-tenths of the paper is devoted to proving that the whole law of England, which, as he rightly says, comprises what is technically called equity, as well as what is technically called law, might have been just as well administered by one court as by two. Apart from the difficulties which arise from the circumstance that equity has in point of fact grown up in a different region from law, has been infused with a different spirit, and administered by means of a totally different procedure, no one in his senses can contend that the fusion of law and equity is not a desirable thing. We are prepared to go a step further and say, that it is not only desirable, but if attempted in the right way, without precipitation, quite practicable to effect this great reform, even at this day. Our charge against Lord Campbell's Bill was, not that it tended to fuse the two branches of English law into one, but that on the contrary, it was certain to destroy the larger and more comprehensive system, in the attempt to transfer it suddenly from courts where it has grown up towards perfection, and has developed a suitable practice, to other courts, by which it has always been regarded with more or less of narrow jealousy, and whose technical forms are utterly incapable of giving free play to equitable principles. If the Bill had not been virtually rejected already, it might have succeeded in destroying the jurisdiction of the courts where equity is really administered; but it could not have infused the spirit of equity in a moment into the rigid system of the common law, or have made room for equity jurisprudence in a procedure which would soon have cramped it to death.

Starting from the ground which is common to Mr. Marshall and ourselves, that the fusion of law and equity is one of the grandest objects which a law reformer could propose to himself, let us consider in what way the desired result can be most safely brought about. The real state of things is this. The law of England is made up of those principles which the common law courts enforce without coming into collision with the Court of Chancery, and of the doctrines which equity has added thereto. There is a class of subjects on which the legal tribunals would decide one way and the equitable courts another; but those instances fall under the second head, because in such cases of so called collision the law of England really is that which the courts of equity declare. For instance a court of law would say that a trustee of land is entitled to eject his *cestui que trust*, and that after the day of default is passed, a mortgagor has no interest in the mortgaged property. But the strictest of common lawyers would scarcely assert—certainly Mr. Marshall would not, if we understood him rightly—that it is any part of the law of England that a trustee may defraud his *cestui que trust*, or a mortgagee resist the right of his mortgagor to redeem. There is this further to be observed, that technical equity, by virtue of its maxim, *æquitas sequitur legem*, acknowledges the whole law of England, though it does not actively enforce so much of it as is adequately administered in other courts. Technical law, on the other hand, refuses to recognise more than a part of the jurisprudence of the country. If it were determined to fuse the two systems into one, there are but three ways in which it could be done. You might annihilate the Court of Chancery and direct the courts of law for the future to administer equity; or you might abolish the courts of law and require the Court of Chancery to enforce legal as well as equitable rights; lastly, you might give to each court a concurrent jurisdiction over law and equity, and before taking any further step, allow them time to accommodate their practice to their new duties until it was seen on which foundation a single court of universal jurisdiction could best be built up.

Of these three methods of bringing about the desired reform, the first two appear to us to be excluded by very obvious considerations. It is impossible, or at any rate—and that is enough for our argument—it is not proved to be possible, to transfer the traditions and spirit of either department of law into the courts which have been hitherto almost exclusively occupied with the other. In so serious a matter as this it would be the height of rashness to impair the machinery either of legal or equitable courts, until experience had shown that the tribunal to which the jurisdiction was proposed to be transferred was thoroughly imbued with the principles which it would have to apply. There is another condition almost more essential, and that is, that the forms and procedure of the favoured court should be put into a shape which would not impede the efficient performance of its new duties. *A priori*, one would imagine that courts of equity, which in their daily business take account of legal rights as the foundation on which equity is built, would be more capable of administering the whole law of England, than the tribunals which, until lately, utterly ignored the principles of equity, and even now exercise, under recent statutes, a limited and not very successful jurisdiction of this kind. This, so far as it goes, would tend to show that it would be less hazardous to transfer legal jurisdiction to the Court of Chancery, than to hand over the functions of equity judges to the Courts of Westminister. But we are not advocates of either of these plans, which seem to us to be full of danger. The diverse nature of legal and equitable procedure appears quite conclusive upon this head. Equity once had, and still retains in theory, a system of pleading as artificial as that which culminated under the influence of Lord Wensleydale. But, side by side with this scheme of eliciting issues by alternate allegations, the Court of Chancery introduced the method of pleading at large, combined with the obligation of answering on oath; and so superior has this process been found for the investigation of equitable matters, that where some simple defence, like the Statute of Limitations, forms the essence of the contest, a plea is scarcely ever resorted to; and the looser but more convenient system of bill and answer is almost universally adopted. If the immediate question were the converse of Lord Campbell's project—viz., the the transfer of law to courts of equity—it might be a fair subject of discussion whether pleading at large, as practised in Chancery, would not work better even in the settlement of legal disputes than the ingenious but over subtle device of special pleading. The difficulty commonly suggested is, that without strict logical pleading it would be impossible to pick out the issues for a jury to try. But in point of fact, we know that the result of the pleadings is almost always to present a large number of false issues—the mere creation of the pleader—besides the one or two material issues on which the contest really turns. These same issues, moreover, are as often as not a compound of fact and law and cannot but be so by reason of the rule that facts are to be pleaded according to their legal effect The practical result, therefore, that the jury learn the question which they are to try, not from the opening of the pleadings by the junior counsel, which they never understand, but from the statement at large of the leading counsel, and the summing up of the judge, who really performs the function which in theory belongs to the pleadings, of separating matters of fact from matters of law, and defining the precise points which the jury have to decide. It is by no means clear that a judge could do this quite as well with a bill and answer before him, as he can do it now with the aid or the embarrassment, as the case may be, of a set of complicated pleas, replications, rebutters, and the rest. But we are not concerned to prove that pleading at large might in all cases be substituted with advantage for the common law system. It is enough to say that strict pleading cannot, by possibility, adapt itself to equitable suits. The difficulties as to parties alone, would be quite insurmountable. Even at an earlier stage the procedure would break down. The theory of the common law was to label and ticket all the possible wrongs which a man could suffer, and furnish an appropriate writ for each. Narrow decisions, in early times, made this scheme worse in practice than even in theory; but even if all judges had been as liberal as Lord Mansfield, they would have failed to build up an exhaustive jurisprudence on such a foundation.

There are rights and wrongs which cannot be catalogued in this way beforehand; and no court which does not allow a plaintiff to state his own case in his own way, untrammelled by technical rules, can never effectually exercise an equitable jurisdiction. These considerations seem quite to exclude from the catagory of rational reforms attempts to transfer equity to courts of law without a radical change in their practice and procedure. At the same time the difficulty of engrafting trial by jury upon the forms of chancery pleading, which has not yet, at any rate, been surmounted, is an equally cogent reason for not taking away the jurisdiction of the common law courts, and handing it over to the Court of Chancery.

The only remaining method of bringing about the fusion which Mr. Marshall advocates is to enlarge the concurrent jurisdiction of both courts. The great advantage of this plan would be, that common law courts would get no equitable suits until they had moulded their practice and their principles into a shape which would enable them to deal with such matters as successfully as the Court of Chancery now does. So, on the other hand, no purely legal questions would penetrate into Chancery until equity judges and equity procedure had proved themselves capable of administering relief as well as courts of law. If courts of law were empowered in all cases to grant injunctions, and courts of equity to enforce payment of tradesmen's bills, a man who wished to restrain equitable waste would probably prefer an equitable court, and a butcher who was anxious to get a settlement of his account, would be likely to select a legal tribunal. All would go on as before until it became manifestly for the benefit of suitors to carry any particular class of litigation to a different forum. It is possible that both legal and equitable courts, on being endowed with a universal concurrent jurisdiction, would modify their procedure so as to make it as widely applicable as might be. If they did so, the ultimate result would be the growth of a form of procedure fitted to deal with questions of every kind, and therefore suited to a single court of universal jurisdiction. But such a practice cannot be called into existence by guess work; still less can it be assumed that the existing methods of the common law supply all that is to be desired in this respect. Of course, it may be said, that if you were merely to give a concurrent jurisdiction on all matters to both courts, each might, perhaps, go on in its old ways, and the desired fusion would never be attained. But even in this event no harm would be done, which is more than could be said of a project to force an imperfect and distorted growth of equity in courts of law by the summary process of destroying the existing jurisdiction, and driving suitors, whether willing or unwilling, into a court where they would not otherwise have sought redress. The man who has an equitable title to relief ought not to be deprived of his resort to a court of equity, any more than a contest of a purely legal character ought to be forcibly transferred to the Court of Chancery. But it is such a transfer as this that Lord Campbell proposes to effect. He would give to a court of law the right to issue an injunction to prevent a court of equity from entertaining an equitable question.

There is no sort of analogy between such injunctions and those which are now granted to restrain legal proceedings. In effect, a court of equity in staying an action requires the defendant at law to admit the legal right. So far from hindering the legal remedy of the plaintiff at law, or taking upon itself to adjudicate upon it, the basis of its interference is the concession of all the legal rights which are claimed at law. But a court of law in staying an equitable suit under Lord Campbell's Bill, instead of making it a *sine quâ non* that the defendant in equity should concede the equitable question, would say, "True it is that you, the plaintiff in equity, may have right on your side; but we insist on your giving up the proceedings by which you have sought to enforce the right, in order that the questisn of equity may be decided in a legal court." If the court of law should ultimately prove the better tribunal for affording equitable relief, no harm would be done. But the only way to test this is to open the doors of both courts as wide as possible, and allow persons who seek equitable relief to go where redress can be most conveniently and effectually obtained. Mr. Marshall tacitly assumes that the administration of equity in courts of law would be as good as or better than it is at present; and his argument goes the full length of advocating the abolition of all the judicial functions of the Court of Chancery. An opponent who chose to assume that legal rights could be as effectually enforced in Chancery as at law, might argue in the same spirit that it was desirable to have but one tribunal, and that the cognisance of all legal questions ought therefore to be transferred to courts of equity, with power to restrain the courts of law from entertaining them. We are satisfied that neither of these assumptions would be justified by the event, and that a gradual modification of legal or equitable procedure under the influence of enlarged concurrent powers, can only supply the material out of which a single court of universal jurisdiction can be constructed, without endangering the vital principles either of law or equity, and possibly of both.

ENGLISH CASES.

COURT OF EXCHEQUER.

MACKAY v. FORD.

Slander—Attorney's speech before magistrates, when pertinent to the questions before them, privileged.

An action for defamation will not lie against an attorney for words spoken by him as an advocate in a matter before magistrates when the language used is strictly relevant to the question before them.

Action for slanderous words. The declaration alleged special damage. Plea, the general issue. The plaintiff had been employed by a Mr. Jones to sell at the Albion vaults, wines, &c., upon commission for Jones, according to certain terms specified in a written agreement; Jones to allow Mackay the use of the vaults and fixtures, &c., and to supply him with good maketable goods, Mackay to be allowed as commission all he could make after paying for the goods supplied, and 4*l.* weekly for the privilege of selling there, &c., the same to so continue until one should give to the other twelve calendar months' notice in writing of his wish to determine the agreement. Jones subsequently made an assignment of his property for the benefit of his creditors, and the assignees sold the premises to one Eaton, who sent two men to take possession. The plaintiff resisted and they then proceeded to eject him by force. He then summoned them before the magistrates at Chester for an assault. The defendant, an attorney, appeared there for the defendants, and in the course of his observations to the justices upon the matter, said: "I am going to take an objection in this case. This is a case in which I apprehend the bench has no jurisdiction. Mr. Mackay claims certain rights and privileges under this agreement produced, but I think we have sufficient reason to terminate the connection therein referred to between Jones and Mackay. Mr. Jones has been plundered by this man to a frightful extent." The magistrates ultimately dismissed the complaint. This action was brought for slander against the defendant in consequence of his using those words. The cause was tried at Chester before R. Gurney, Esq. A witness deposed that he was present before the justices, and heard the defendant use the expressions referred to, and in consequence refused to take the plaintiff into his service. Defendant objected that the words he used on that occasion were privileged, and the judge reserved leave for the defendant to move to enter a verdict for him or a nonsuit, but summed up the facts to the jury, who found a verdict for the plaintiff for 20*l.* A rule *nisi* having been obtained pursuant to leave reserved, on that the verdict was against the evidence, or for misdirection.

Welsby and *McIntyre* showed cause.—It will not be disputed that words, although defamatory and slanderous, spoken by an advocate in a court of justice, are privileged if they are strictly relevant to the matter before the tribunal; that appears to be the law now clearly understood: (see 1 Stark. on Libel, 283; *Hodgson* v. *Scarlett*, 1 B. & Ald. 232, and note; *Revis* v. *Smith*, 18 C. B. 126.

But the question here is, whether the words spoken by the defendant were then relevant to the matter about to be inquired into before the justices—whether Mackay had or had not plundered Jones to a frightful or any less alarming extent, was not then a subject of investigation or inquiry before the justices, but whether the then defendants summoned for the assault had put the plaintiff out of possession under a *bonâ fide* claim of right—a fact which, if established, would have been sufficient to terminate the magistrate's jurisdiction. *Henderson* v. *Broomhead*, 4 H. & N. 569, is not applicable to this case.

Gifford and *Hutton*, contra, in support of the rule, not called upon.

POLLOCK, C.B.—This is an action against the defendant, who is an attorney, for words spoken by him in a court of justice, where he was attending as an advocate for one of the parties. It seems that the plaintiff in this case entered into an agreement with one Jones to act as his servant in the sale of wines, &c. The agreement provided that the contract might be put an end to by either party giving the other twelve months notice in writing of that intention. There is no doubt, in point of law, I think, that such an agreement could be put an end to by Jones at any moment, if it turned out that the plaintiff had not behaved honestly towards him in the conduct of the business with which he was intrusted. A person would not be bound to give twelve months' notice to his servant and submit to be robbed by him during a whole year, under circumstances like these. On the contrary he may have a right to turn the offending party out at once. Jones assigned effects for the benefit of his creditors. His assignees sold the business to a person named Eaton, and the plaintiff, on being required to go out, refused; Eaton's men then turned him out. The question before the magistrates was, had they a right to do so? and that very much depended on whether the charge of dishonesty, which his employer made against him, was proved. The defendants on that occasion treated the contract as at an end on account of the plaintiff's alleged dishonesty, and so instructed their advocate, and he was not responsible for that. The plaintiff declining to go out, the men employed by the assignees proceeded forcibly to turn him out; it does not appear that they used any excessive force for that purpose; the complaint before the magistrates was for the assault in being turned out of the premises. The parties charged with the assault employed the defendant to conduct the case before the justices, who on that occasion said he had an objection to take to their jurisdiction. Properly speaking, perhaps, it was not an objection to the justices hearing the case, but an objection to their coming to a conclusion against his clients. The magistrates were bound to hear the charge, and if it turned out that the act complained of was done in the exercise of a right, and the defendants did not exercise too much violence in its assertion, they ought not to have said, "We have no jurisdiction;" but that, "having ascertained what the question is, we see what was done by the defendants was done in the exercise of a supposed right; and no more having been done by them than the exercise of such a right called for, we dismiss the complaint." In the course of that proceeding, in order to show that the plaintiff was properly dismissed, the present defendant said that the plaintiff plundered his employer. The question is, was that relevant to the question before the magistrates? I think it was; for it went directly to the question, was the agreement at an end, so as to justify the defendants turning the plaintiff out? And the judge at the trial having reserved the point, I am of opinion that the rule should be made absolute to enter a nonsuit.

BRAMWELL, B.—I am of the same opinion, and think the judge at the trial did right to reserve the point. The defendant acting as an attorney for certain defendants in an assault case, was before the bench of magistrates and in substance said: "I am going to take an objection to your jurisdiction, because the assault complained of was committed under a claim of right." He also said that the way his clients obtained that right was because the plaintiff plundered his master to a frightful extent. The plaintiff's counsel in the present case contend that if the defendant had said the then defendants had a *bonâ fide* claim to turn him out, it would have been sufficient to oust the jurisdiction of the justices, and therefore the defendant need not have said anything about the plaintiff having plundered his master. I think that is not so. In one sense it might not have been necessary for him to have said so, but in another sense it was because the magistrates might have said, "We don't take your view of the law; we think you had no *bonâ fide* claim to turn him out, unless the defendant had dismissed him from his service." Would not the defendant then once had a right to say what he did? and if he had a right to say that in answer, he had a right to say it in anticipation. Suppose an action by a servant against his master for words spoken when giving him a character. If the counsel for the master were to argue that the words were privileged, and spoken *bonâ fide*, he might also say that they were true. Surely that would not be irrelevant, because it would go to show that the words were spoken *bonâ fide*. So here, although it may not have been essential that there should have been a lawful cause of dismissal between Jones and the plaintiff, it was justifiable for the attorney to say what he did, and urge that his clients could not have had a *bonâ fide* right to do as they did unless the man had done sufficient to justify dismissing him.

CHANNELL, B.—I am also of opinion that this rule should be made absolute. At the trial, when the plaintiff's case had closed, the counsel for the defendant objected that the action was not maintainable, because the words complained of were spoken by in the course of a judicial proceeding, and were relevant to the then subject-matter of inquiry; the point was thereupon reserved. The words were spoken by the defendant when he appeared before certain magistrates as an attorney and advocate in defence of persons then charged with an assault, and probably received his instructions from Jones, under whom those persons indirectly probably acted. The plaintiff had entered into a contract with Jones, by which he had become as it were Jones' servant. The assault complained of to the plaintiff was in removing him from the premises which he held under Jones. By that contract it was a question therefore whether the plaintiff had a right to be there when he was so removed, which depended partly on whether the agreement with Jones had been terminated. The plaintiff might have so conducted himself as would enable Jones to put an end to the agreement without the twelve month's notice. The defendant before the justices took the objection, that the then defendants were acting under the authority of those who had a right to turn the plaintiff out of possession. Was that irrelevant to the question before the magistrates? Were the words used by the defendant irrevalant? I own I do not think they were.

Rule absolute to enter a nonsuit.

DIVISION COURTS.

OFFICERS AND SUITORS.

SEIZURE UNDER EXECUTION IN THE DIVISION COURTS.

An Act of last session, entitled, "An Act to exempt certain articles from seizure in satisfaction of debts," (printed on page 125 of this volume,) will effect almost a revolution in the "small debt" business of the country. Those who have been in the habit of trusting out their property will be driven, in self defence, to limit their credits; and persons of small means, who would formerly be trusted on the strength of their being in possession of property at least sufficient to guarantee a creditor for a debt of forty or fifty dollars, must now give some additional security, or pay far beyond the market value of goods purchased, for the creditor's additional risk. However benevolent the intention of the law, we are decidedly of opinion that its working will not serve the class of persons for whose benefit it was designed.

It may be argued—it will do away with the credit system to a great extent! We doubt that. In the new and poor settlements, the people begin on little or nothing; they trust for the most part to their coming crops, and must in

the *mean* time have the means of support. Their first yoke of oxen, cows, sheep, implements of husbandry, are almost in every case purchased on credit; and the notes given in payment *had* something of a market value. They passed from hand to hand, and in new settlements served instead of money in the hundred and one little transactions between farmer and farmer. But these notes, if taken now, are not likely to do so, when the law is such as effectually to disable a creditor from enforcing payment.

Let any one calculate the value of the exemptions, and if we do not mistake they will on the whole exceed $300 in value. And how many settlers in the back woods will have goods and chattels to that amount? We venture to say, not one in every twenty. But perhaps some experienced clerk or bailiff would make an accurate estimate in detail, and send it to us for publication in our next number.

New settlers must procure necessaries for themselves and families, and must have the means of stocking and working their farms; and if men are found willing to supply them on credit, it is obvious a large advance will be asked on the cash value of the article, to cover the extra risk.

On the whole we regret, *on the poor man's account*, the change in the law; for unless we are greatly mistaken, it will have the effect of making him pay for his supplies at least one shilling in the dollar more than he now pays.

But our business is more particularly with the law as it is, and the mode in which it is to be administered.

The 151st section of the Division Court Act contained the provision exempting certain articles from seizure, namely, the wearing apparel and bedding of the party and his family, and the tools and implements of his trade to the value of $20. This exemption is repealed by the act of last session (*ante* page 125), and a general provision made for United Canada.

The 151st section of the Division Court Act (as altered by section 2 of the act referred to) now stands thus:

"Every bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take *any of the goods and chattels* of such person (*excepting those which are by law exempt from seizure*), and may also seize or take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, belonging to such person."

This is the only alteration made in the Division Court Act, and the provisions of the 150th and 152nd sections remain untouched.

Now for a few practical suggestions and remarks. There will doubtless be a revision of the rules and forms at an early day, to make them square with recent changes and alterations in the law; but in the mean time clerks issuing executions should take care to alter the forms so as to adapt them to the law as altered. For example, take Form 20, "Execution against goods of defendant." The necessary alteration might be made by striking out the words "*wheresoever the same may be found (except the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of £5)*," and inserting in lieu thereof the following words: "*being within the said county (except those which are by law exempt from seizure)*."

From this example, clerks will easily perceive the mode in which a like alteration would be made in other forms of execution; and officers getting blanks printed, would of course have the *necessary change made by the printer.*

The bailiff's duty, when acting under execution, will be to leave untouched the articles now exempt by law from seizure, unless in cases provided for by section 5 of the Exemption Act (page 125), which we hereafter notice.

We shall take the subsections of section 4 in order, making a few practical notes on each.

Section 4 is as follows:

"The following chattels are hereby declared *exempt* from seizure under *any* writ out of any court whatever in this Province, *namely*:

1. "*The beds, bedding and bedsteads in ordinary use of the debtor and his family.*" This, we take it, may cover two or more beds, and as many bedsteads, according to the number of the debtor's family; and we should say two at least, if the debtor has children, large or small. That at all events would be the safer view for a bailiff to act upon. The words, in their ordinary acceptation, would cover not only the clothes, &c., in actual use, but those required for a change.

2. "*The necessary and ordinary wearing apparel of the* debtor and his family." Why not at once have said "the wearing apparel," without using the words "necessary and ordinary?" It is useless for the Legislature to make these nice distinctions, which are so difficult to carry out, and which are not in point of fact carried out in actual practice. Of course one can imagine a man having a dozen or so of extra kid gloves for "ball practice," as many fancy waistcoats, and no end of fashionable *et ceterus;* and his wife having all sorts of extravagant things in dress, certainly not *necessary*, and not in *ordinary* use; and possibly, in such cases, a bailiff might be justified in seizing. But a bailiff is not, we think, to be expected to enter into any nice questions as to what is "*necessary and ordinary* wearing apparel;" and the best general rule we can suggest to a bailiff is, to keep his hands off wearing apparel of all kinds used by the debtor or his family. People take as different views respecting what is *necessary*, as they do respecting what is becoming; and indeed it would be hard to say what particular kind of wearing apparel is not within the meaning of this subsection.

(*To be continued.*)

INCREASED HEARING FEES.

The return called for by the Hon. Mr. Patton, and printed by order of the *Legislative Council*, showing, by counties, the number of cases in which increased hearing fees were charged, the amount of such fees, and the total amount of monies for which suits were entered, calls for remark; and we cannot but think that Mr. Patton has "done the state some service," in drawing the attention of the Government and the public to the very strange and altogether unaccountable way in which the fees were heaped up in some counties.

In April, 1859, the address passed, praying His Excellency to furnish this information; yet we find, after the lapse of a year, the Hon. Mr. Vankoughnet apologizing in the House for the delay in furnishing it. "There was no

way," said the honorable gentleman, "of forcing the returns to be made. The delay in not presenting those already made, arose from waiting for full returns." And from five counties no returns were sent in.

One naturally asks, why this omission to furnish the information sought? Information, which, in a well kept office, could be put into the form of a return in three or four hours, not produced after a year's delay! To say the least of it, the delay was not particularly respectful to the powers that be.

The printed return before us embraces all the counties in Upper Canada, except the five in default, and is for a period of eighteen months.

We subjoin a table, showing in condensed form the information it gives.

COUNTIES.	Number of cases in which increased Hearing fees were charged	Amount of such Hearing fees.	Total amount for which Suits were entered during 18 months.
		$ c.	$ c.
Brant	1081	609 10	233,618 97
Carleton	72	69 35	93,072 30
Elgin	39	78 00	162,210 87
Essex	0	0 00	62,720 91
Frontenac, Lennox & Adding'n	67	62 00	226,806 21
Grey	403	578 80	147 836 28
Halton	158	162 40	129,658 76
Kent	0	0 00	113,566 86
Lanark and Renfrew	43	52 40	108,118 76
Leeds and Grenville	32	58 50	169,053 40
Lincoln	2	4 00	124,581 40
Lambton	174	275 75	85,116 92
Middlesex	30	52 00	300,222 60
Northumberland and Durham	0	0 00	434,699 95
Norfolk	0	0 00	138,820 72
Oxford	3	6 00	245,094 28
Prince Edward	0	0 00	80,178 30
Peterboro' and Victoria	0	0 00	171,630 30
Perth	102	156 80	183,239 03
Prescott and Russell	54	101 60	38,626 70
Simcoe	61	68 54	317,420 60
Stormont, Dundas & Glengary	45	33 75	169,958 99
Waterloo	724	756 90	251,521 96
Welland	193	163 30	116,129 30
Wellington	405	162 40	301,231 07
Wentworth	204	391 25	337,798 46

The four counties in which the largest number of suits were entered for the eighteen months (for amounts over $300,000 in each), are Northumberland and Durham, Simcoe, Wentworth, and Middlesex. In the first-named (Northumberland and Durham), no increased hearing fees appear to have been charged. In the others as follows: in Simcoe the amount was $68, in Wentworth $391, and in Middlesex $52; in all, $401; while in Grey alone the hearing fees charged amounted to no less a sum than $578.

On no ground of sound administration can this immense disparity be accounted for.

In Brant and Waterloo the charges are also very high; but Grey actually out-Herods Herod. Let us contrast the figures.

	Aggregate amount of monies sued for.	Aggregate of increased hearing fees.
Simcoe, Wentworth, Middlesex,	$955,440 00	$401 00
Grey alone!	147,836 00	578 00
Grey, Brant and Waterloo.....	632,975 00	1,943 00

Whatever may be said of Brant and Waterloo as to the character of the cases, Grey can urge nothing, for it is one of the most recently settled counties in Upper Canada, and the business transactions there can be neither very large in their respective amounts, nor complicated in character.

But in five counties *no* increased hearing fees were charged. This appears to us to be an error on the opposite side. In counties such as Northumberland, Essex and Kent, we must conclude that during a period of eighteen months, many cases have arisen, of such importance, and occupying such a length of time in the hearing, as to warrant a charge of $2 to the fee fund; and if so, fees ought to have been imposed.

It is most desirable there should be something approaching uniformity of action in taxing this Hearing Fee—some regulating principle kept in view. It is clear that the Legislature did not intend the increase to be governed by the amount of the claim, from the language in the table of fees. The time occupied in the investigation would be the more reasonable ground to act on. Suppose a "horse case" occupying some three or four hours, a case of "assault and battery" with five or six witnesses on each side, or any other case involving a long and difficult investigation, and you have a fit subject for an increased Hearing Fee. The $2, be itobserved, is not in addition to the items mentioned in the five fold gradation, nor does it follow that the fee, if increased, must be the exact amount of $2; it may be under that amount; but the whole fee on hearing cannot *exceed* $2 in any case.

We have felt it a duty to lay the matter before our readers. It is manifestly unjust and contrary to the intention of the law that an increased Hearing Fee should be the *rule*, it forms the *exception*, and the power to impose it ought to be carefully and judiciously exercised.

New Rules and Forms.

In reference to the enquiries, by more than one correspondent, touching the issue of a new set of rules and forms for the Division Courts, we have endeavoured to find out whether such is contemplated, but have not been able to learn whether it is the intention of the Board of Judges to take any immediate steps in the matter. The forms particularly require a complete revision. Additional rules and forms are necessary. They are now in a very unsatisfactory state, and require to be used with much caution. The present rules, however, are in force, but must be modified for use. The 70th section of the Division Court Act provides that they shall, as far "as applicable, remain in force until otherwise ordered." We notice the subject again as desired, but those who feel "the unsatisfactory condition of the present rules and forms, and the extra caution necessary in using them," should represent the matter in the proper quarter.

SUBPŒNAS FROM THE SUPERIOR COURTS.

The mode of securing the attendance of witnesses in the Division Courts, who reside out of the county, is supposed to be attended with difficulty. Whereas nothing can be more simple. It is very often the case that unwilling witnesses, though living close to a place where a court is held, refuse to attend an ordinary Division Court subpœna, knowing that they cannot be punished for default because living out of the bounds of the county. The 100th section of the Division Court Act meets a difficulty of this kind, and enables parties to obtain compulsory process from the Superior Courts. It has been suggested to us that it is only a few days before the sitting of the Court, in many cases, when it is discovered that a witness will not attend unless compelled to do so, and then that it is too late to go to the county town for a Superior Court subpœna.

The difficulty might, it seems to us, be obviated in this way. Let clerks obtain from the Deputy Clerk of the Crown, at the county town, some blank subpœnas, and keep one or two always on hand, to be used by parties as occasion may require. One of these blanks any clerk can readily fill in for the plaintiff or defendant, and he would be entitled to claim from the party asking for it the fee paid for the subpœna. Or if there be any professional man resident in the neighbourhood, he will generally have blank subpœnas by him. In serving a subpœna from the Superior Court, we would recommend a verbatim copy to be made and personally served on the witness.

The 100th section enacts, that "the witness shall obey such subpœna," *provided the allowance for his expenses according to the scale settled in the Superior Courts be tendered* to him at the time of service. Many of our readers for whom this article is intended may not know what that scale is, and we accordingly subjoin it.

It is not to be understood from what we have said that a clerk is *bound* to obtain a Superior Court subpœna for a party. He is not compelled to do so, but for public convenience ought to feel himself called on to assist suitors in the way suggested.

ALLOWANCE TO WITNESSES.

To Witnesses residing within three miles of the Court House, per diem	$0 75
To Witnesses residing over three miles from the Court House	1 00
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem	4 00
Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill and judgment, per diem	4 00

If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each case only. The travelling expenses of witnesses over ten miles shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way.

THE LAW AND PRACTICE OF THE DIVISION COURTS.

Sufficient time has now elapsed to bring the law of these Courts to the test of administration; and having worked under rules for over six years, we think the period has arrived when a work "On the Law and Practice of the Upper Canada Division Courts" may with advantage be produced. Will any of our readers undertake the task of producing such a work? Or will the County Judges lend us some assistance with it? A work of the kind would require to pass under the hands of some one practically conversant with the law as administered in the Division Courts, and would of course occupy considerable time in preparing. But if it appeared (a portion each month) in this journal, the work would be light enough, and would besides by that means be subjected to the notice and criticisms of the profession and of Judges and Officers of the Courts, so that errors and omissions could be corrected and supplied in publishing the work when completed—*for the copy-right could be reserved.* If assured of the cordial aid of all interested, there would be a strong motive to undertake it. But we would rather offer inducements to another to assume the task, and we should be happy to hear what the feeling is, and to be favored with the opinions of the Judges.

OFFICERS PURCHASING GOODS SEIZED.

From facts to which our attention has been drawn, we have reason to believe that an alteration advisedly made, if not in the law at least in the language of a provision of the Division Courts Act, is not properly understood.

Nothing can be clearer now than that every one who holds the office of a Clerk or Bailiff of a Division Court is prohibited from purchasing directly or indirectly *any* property at *any* sale under execution by *any* Bailiff of a Division Court, and a purchase made in violation of this provision may be treated as a nullity, beside subjecting the offender to summary removal from office. In the 13 & 14 Vic. c. 53, s. 51, the word "*clerk*" was not contained. But the acting Commissioner, in submitting his final consolidation, made some alterations, which he explained in a note, as follows: "The word 'Clerk,' though not in the statute, has been inserted before 'Bailiff,' as within the spirit if not the letter of the law as an 'officer.' The words 'any Division Court Bailiff' are substituted for 'such Bailiff,' as being within the mischief."

The provision as consolidated stands as section 157 in the Division Courts Act, and the suggestion contained in the note was adopted by the Legislature, and is now law.

CONFESSION AND AMENDS.

We have to apologize to those of our readers who are principally interested in matters relating to the Division Courts for the rather limited supply of matter under that head, in our last number. The omission was unavoidably caused by an unusual press of business coming at the time when such matter is usually supplied. We have endeavoured, however, in the present number, to make up somewhat for former deficiencies.

CORRESPONDENCE.

To the Editors of the Law Journal.

JUNE 30th, 1860.

GENTLEMEN,—You would confer a favor on me by answering the following questions:

When a judgment is given, does the time granted for payment commence from the court day, or the time of service? Has the bailiff a right to fees on an execution when he cannot make a seizure, either from want of effects or other causes; it seems hard that he should travel ten or fifteen miles, and for no fault of his, be at a loss of time, &c.?

When does the 23rd Vic. chap. 25, come into force? You do not say anything about the time when in the *Journal* for June: or are we (as clerks) to know by instinct that such a Statute has been passed. You were good enough to say in one of your *Journals*, that the Division Court Clerks were not behind any class of men in the Province for intelligence, &c.; the government cannot think so, or if so, it seems to me a very *small affair* not to supply us with the Statutes—our fees are not so exorbitant that we can afford to purchase them, and they are supplied to Magistrates, some of whom cannot read them; and I suppose you are well aware that Clerks, particularly in the country, are looked up to for law advice in all small matters at court. I was in great hopes that you would have strongly advocated our being supplied with the "Consolidated Statutes," as even now they are out of the reach of most of us.

I shall not make any apology for troubling you, as you kindly give us every encouragement to do so.

A DIVISION CLERK.

1. [The time given for payment commences to run from the day on which judgment is given.

2. For an answer to his second query, we refer our correspondent to page 61 of volume 5 of this journal, where he will find the case treated in various aspects.

3. The Act "to exempt certain articles from seizure in satisfaction of debts," was assented to on the 19th of May, and consequently came into force on that day—no time being named in the body of the Act. Our correspondent will find an article on the subject of its provisions, under the head of "Divisions Courts" in this number.

Division Court Clerks, our correspondent we suppose, amongst the number, have lately been supplied with the Acts containing the Division Court Law taken from the revised Statutes. We suggested the advisability of this being done considering it a matter of great importance that Clerks should have every facility afforded them for being posted up in their duties. We could have no objections to seeing clerks supplied with copies of the Statutes which we have no doubt they could make as good use of as many of those who now get them do; but as the law has not yet recognized them as amongst its expounders, they must, we suppose, be satisfied with being furnished with that portion of it which it most behoves them to know.—EDS. L. J.

To the Editors of the Law Journal.

DEAR SIRS,—I enclose report of a Division Court case decided by our County Court Judge, the other day. The point is one on which I am aware many officers differ in their practice, and you may perhaps think it of sufficient importance to be published in your very useful journal.

I am, dear Sir, yours, &c.

Dundas, July 16, 1860. F. OSLER.

[Our best thanks are due to our correspondent for the report of the judgment published below. The point is an important one to be known to most if not all of our readers. We will be always happy to hear from him; our personal knowledge of his ability as a student, added to the high estimation in which we know him to be now held as a practising lawyer, affording us a sufficient guarantee that his communications will not fail to contain matter of interest to our readers.—EDS. L. J.]

WESTON v. THOMAS (SHERIFF).

Division Court execution—When returnable—Fi. fa. from Superior Court—Priority—141st sec. D. C. Act.

An execution from the Division Court cannot be executed after the expiration of 30 days from its date.

The facts of the case were as follows:

On the 18th May, 1859, a warrant against the goods of C. (which were then covered by a *fi. fa.* in the Sheriff's office) was placed with the D. C. Bailiff. The Sheriff levied and sold under his *fi. fa.*, but part of the goods were redeemed, and on 14th November the *fi fa.* was returned. The warrant in the meantime remained with the D. C Bailiff, without being renewed, and on the 18th November the Sheriff received another *fi. fa.* against the defendant, under which he levied. On the day of sale, the D. C. Bailiff showed his warrant and claimed priority, and on the refusal of the Sheriff to pay over the proceeds of the sale this action was brought. The plaintiff contended that the warrant had not expired, because the Bailiff had been unable to make any levy until the 14th November.

C. L. P. Act, 256; Harr. Do. 333 and note; Ch. Arch. 1247; were cited for defendant.

LOGIE, J.—This case turns upon the construction of section 141 of the Division Courts Act (similar to sec. 56 of 13 & 14 Vic. ch. 53); and the question to determine is whether or not an execution issued out of a Division Court has any force or effect after the expiration of 30 days from its date. I think that the effect of the 141st sec., the 148th sec., and the form of execution framed by the Judges under the authority of the Act, is to make the writ returnable at the expiration of the 30 days, in the same way as a writ of *fi. fa.* issued out of one of the Superior Courts was returnable on a day in Term, before the recent alteration in the law. It is quite certain no levy could be made upon a *fi. fa.* after the return day. In Todd's Practice, page 1148, it is stated that "the utmost length of time the law allows for executing a writ, is the day whereon it is returnable." Nothing was done under this writ until after the return day; and not being in force when the Sheriff made the levy under the second writ, in his hands, it could not take priority over the second writ.

Judgment for the defendant.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

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

(Present, ROBINSON, C. J., DRAPER, C. J. C. P., MCLEAN, J., BURNS, J., SPRAGGE, V. C., RICHARDS, J., and HAGARTY, J.)

WATSON v. MUNRO.

Deed or Mortgage—Trustee—Issue at Law.

9th July, 1860.

Appeal from the Court of Chancery. The reports of this case will be found in 5 Grant 662, and 6 Grant 385.

The transaction out of which this suit arose, occurred in October, 1840. The defendant, Munro, had then brought an action against the plaintiff, Watson, to recover a debt of £35 17s. 11d., and that action was stayed by the plaintiff assigning to the defendant certain property on Yonge Street, in the city of Toronto. This property the plaintiff had, during the previous year, contracted to purchase from the Hon. Peter McGill for £150, but had only paid half a year's interest on the purchase money. He had, however, erected upon it a frame two-story dwelling house, and otherwise improved the property to about the value of £100, and had by a conveyance absolute in form, assigned the premises to

the defendant for the amount of the debt and £25. The plaintiff continued for about two years to receive the rents, which the defendant answered by stating that it was part of their agreement that the plaintiff should retain possession for a certian period; that shortly after the agreement he went to England, and the plaintiff in his absence still kept possession; and that on his return to to this province in June, 1841, the defendant took proceedings in ejectment, and evicted the plaintiff. The plaintiff filed his bill to redeem the premises in December, 1855.

The cause came on for hearing on the 30th September, 1856, before the Vice Chancellors, and the Court, although inclining to dismiss the bill, directed an issue as to the question of mortgage or no mortgage. The trial took place in Toronto, before the late Sir J. B Macaulay, and a verdict was rendered in favour of the plaintiff, but the learned judge certified that he was not satisfied with the verdict, and that his impression from the evidence was unfavourable to the plaintiff. By arrangement between the parties the case came before the Court on a petition for a re-hearing, upon motion for a new trial and for further directions. The Court, although in favour of the plaintiff upon the finding of the jury and the evidence, granted a new trial on the application of the defendant, in consequence of the judge's certificate. But a material witness having died, the new trial did no take place, and accordingly a decree was made in favor of the plaintiff, from which the defendant appealed; and it was

Held per Cur., that the conveyance was absolute, and that the plaintiff was not entitled to redeem.

Held, (by ROBINSON, C. J.) that this was not a proper case to refer to a jury: that such references in cases of this kind, would have the effect of weakening the protection provided by the Statutes of fruds.

Per Cur.—Decree reversed and bill dismissed with costs.

CHANDLER v. FORD.

Trustee and Cestui que Trust—Breach of Trust—Account.

Appeal from the Court of Chancery. The case is reported in 6 Grant 607. The case while in the Court below, had been heard before the Vice Chancellors, but they having been unable to concur in a judgment, directed it to be re-argued before the Chancellor, when a decree was made in favor of the plaintiff. The facts of the case were as follows: *Lands* were held by Ford as trustee for Chandler, who assigned by a memorandum absolute in form, for a nominal consideration of 5s., but in reality by way of security to one Codd, the instrument declaring the trust. Subsequently the agent of Codd wrote to Ford, stating that the Chandler had assigned the instrument to Codd, and calling upon him to convey the property to Codd. Ford, without calling for the assignment, executed a conveyance and sent it by post, and shortly afterwards Codd sold to a purchaser without notice. Upon a bill filed by Chandler against Ford and Codd, the Court of Chancery held that Ford should have called for the assignment of his *cestui que trust*, and that under the circumstances he had committed a breach of trust; that he was bound to make good the trust estate, and an account was directed. Codd was directed to re-emburse Ford for any sum he might be compelled to pay under the decree. On appeal it was

Held, that from the evidence, Chandler was more at fault in the transaction than Ford, and was entitled to no equitable relief, and that as to Ford, the decree should be reversed and the bill dismissed with costs.

BOYS v. SMITH (Sheriff).

Chattel Mortgage—Replevin—Sheriff in possession under Absconding Debtor's Act refusing to replevy, or mortgage.

Appeal from the Court of Common Pleas. The case is reported in 9 U. C. C. P. 27. The facts of the case were as follows: The plaintiff being the owner of certain goods, sold them to one P. S., taking as security a mortgage of all the goods, merchandize, and chattels at present situated, lying, and being in the brick store on lot No 1, on the north side of Dunlop Street in the town of Barrie, for £336 with interest payable in three, six, and nine months, and it was stipulated that in case of default for principal or interest, the plaintiff might take possession of and sell the goods or keep them at his own option. The affidavit describes the bargnee as "of the Town of Barrie in said County, gentleman." The mortgagor remained in possession and made large purchases from other parties, and then absconded. The Sheriff then received a writ of attachment against his goods at the suit of R. M & Co., and under it seized all the goods in the store as belonging to the absconding debtor. The plaintiff, while the Sheriff was in possession, and there being two instalments of principal and interest due on the mortgage, issued a writ of replevin, but the Sheriff refused to execute it, whereupon the Court

Held, that the plaintiff was entitled to recover, and that the Sheriff was liable for not executing the writ.

That the affidavit was sufficient (*Moyer* v. *Davidson*, 7 U C. C. P. 521 and *Brodie* v. *Ruttan*, 16 U. C. Q B. 207).

From this judgment the Sheriff appealed, and

Per Cur.—Appeal dismissed with costs.

COMMON PLEAS

Reported by E C JONES, Esq., *Barrister at-Law.*

CARROLL v. CORPORATION OF PLYMPTON.

Contract—Injury done in performance of—Agency.

To sustain an action for damages occasioned in the performance of a contract it must be shewn that the contractor is the authorised agent of the parties sought to be charged, or at all events that they subsequently ratified or adopted the work as their own.

The declaration contained two counts. 1st —That plaintiff was lawfully possessed of a close in the township of Plympton, No. 1, front concession, and a close in the township of Sarnia, being No. 1, front concession, on which was a large quantity of timber, cordwood, cedar posts, &c.; that there was a public allowance for road between plaintiff's said lots, and the timber in the said road allowance had been cut down and was lying on the road; that defendants, well knowing the premises by their servants and agents, entered on the road allowance with fire to burn off the timber thereon, and it was their duty to manage the said fire in a careful and proper manner to prevent any injury to the plaintiff.

Breach.—That by reason of the negligence and want of proper caution by defendants certain dry timber then and there being set on fire, and the fire extended to plaintiff's closes and burned the said timber, cordwood, &c., and destroyed cedar timber growing on plaintiff's closes. The second count was nearly similar.

Pleas to both counts.—1st. Not guilty. 2nd. That the closes were not plaintiff's. 3rd. That the timber, cordwood, &c., were not plaintiff's.

The case was tried at Sarnia in April last, before *Richards J.* One George Bell swore that he took a contract from the corporation; that Mr. Whiting, who was the defendant's treasurer, put up the logging and burning of the town line (of which the allowance for road mentioned in the declaration formed part) and he (Bell) bid it in at $8 per acre, and he told two men who were working for him that if they would do the job they might have the profit. He first put fire into it himself. The reeve of the township stated that the councillors of the townships were usually authorised to expend money which was appropriated by the council for roads within their respective wards; that money was appropriated to clear the town line; that it was sometimes left to the councillors to select commissioners, and sometimes they were selected by the corporation. The commissioners certify to the work being done, and they superintended it and give orders on the towship treasurer, and countersigned the order; but the jobs were all given out by auction. Mr. Whiting, the township treasurer, proved that the work was first let to Bell, and as three weeks after nothing had been done but what the fire had done, he re let the job of clearing out the town line between Plympton and Sarnia, between No. 1 on each side. When he went to re-let it he found the fire had been burning some weeks, and he then let it to Bowden, who was paid for doing it Mr. Whiting stated that he had no authority from any one but the trustee, (*qy.* commissioner,) who requested him to let out the work. Another witness stated

that he was present when Whiting let it to Bell; that Bell put fire into it that evening, but it did not take, the weather being unfavorable, and this delayed it for two or three weeks, and Bell handed it over to the two Bowdens. The plaintiff further gave proof that they set fire in the road allowance which spread on to his property, and he gave evidence of the damage he had sustained.

At the close of the plaintiff's case a nonsuit was moved for on the ground that the damage was not brought home to any act of the defendants, or of those for whom they were responsible; that the work was let out by contract, and that the contractor and not the defendants are liable.

The learned judge was strongly inclined to this view, but allowed the case to go on, subject to the opinion of the court if plaintiff obtained a verdict. The defendants then went into evidence to rebut the assertion that the fire was caused by the Bowdens, and also to negative damages to the plaintiff as the general result of the fire. The learned judge left it to the jury on the question of negligence of the parties clearing the road being the cause of the damage to the plaintiff, and that in fact there was negligence in setting fire to the timber in the road, which was the act complained of, assuming, for the purposes of the trial, that the defendants were liable for the acts of those who claimed the road. The jury found for the plaintiff with £100 damages.

In Easter Term *Richards*, Q C, obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit or a verdict for defendant on leave reserved, or for a new trial on the law and evidence; that nothing was shewn to have been done by defendants to render them liable; no evidence of any corporate act by their by-law or other sufficient act to authorise the opening of this road; that if any one was liable for the damage complained of it was the contractor; that no negligence either in making or taking care of the fire was in fact shewn.

Cameron, Q C.—The verdict of the jury determines the questions of fact, viz., that the fire caused the damage the plaintiff has sustained, and that there was negligence in making or managing that fire. Then as to the defendant's liability, the law makes it their duty to take charge of highways, and therefore they must be taken to be the parties by whom work on the highways is directed to be done, and in that view are to be looked upon as having done it. He referred to *Farrell* v. *The Town Council of London*, 12 U. C. Q. B. 373.

Richards, Q C., contra, cited *Steel* v. *S. E. Railway Company*, 16 C. B. 550; *Overton* v. *Freeman* 11 C. B. 867; *Reedie* v. *London & N. W. Railway Company*, 4 Exch 244; *Knight* v. *Fox*, 5 Exch. 721; *Peachy* v. *Rowland*, 13 C. B, 182.

DRAPER, C. J.—It seems to have been conceded for the purposes of bringing the question before the court, that Bell stood in the position of a contractor, to perform the work of clearing this road allowance, which the defendants desired should be done, and either that he gave up his contract to others and they undertook it and were paid for performing it, or that Bell the contractor having neglected it, a new letting took place to other parties the same as Bell gave up to, and on this new letting, though on the same terms as Bell had undertaken it, the work was performed. If it had been denied that the work was done by parties who contracted to do it, and to be paid a certain price by defendants for doing it, that question should have been submitted to the jury. But when the objection was taken at the trial the plaintiff's counsel did not appear to have denied that the parties actually doing the work were doing it as contractors; but it was then insisted, as it was by Mr. Cameron in his argument, that under that state of facts the defendants are liable.

In *Knight* v. *Fox* Alderson, B., says, "The real question and the only one, is, whether the negligent act by which the injury was occasioned to the plaintiff was the act of C. as the defendants' servant." In other words, whether the negligent act is to be treated as having been done by the person who actually did it, as the servant of the person sought to be charged. This remark is quoted with approbation by Maule, J., in *Overton* v. *Freeman*, and that case and others cited by Mr Richards as well as many older authorities, shew that where the work is done by any party under a contract that negatives the contractor being the servant of the party for whom the work is undertaken and performed.

According to *Steel* v. *The South Eastern Railway Company*, it makes no difference whether the contract be by parol or otherwise. If the evidence did not shew the letting of the work at a fixed price per acre to be performed for the defendants and paid for by them, and which letting, if not previously authorised by them, they subsequently ratified and adopted, it did not connect the defendants with the act complained of as negligent, and then the action fails, and if the work was done upon a contract it equally fails.

In either point of view the rule for entering a nonsuit should be made absolute.

Rule absolute.

WILSON v. THOMPSON.

School act—Special meeting—A resolution passed by—May alter one passed at a general meeting.

Held, that power is given to assemble a special meeting of the freeholders and householders of any school section for the purpose of maintaining a common school within their section.

Held, also, that any resolution passed at the general annual meeting may be rescinded by a special meeting properly convened for that purpose.

REPLEVIN for a cow, value £10.

Pleas—1st. *Non cepit*. 2nd. *Non detinet*. 3rd. Goods not the property of the plaintiff. 4th. That plaintiff, on the 1st December, 1857, was a freeholder and a householder resident within school section No 4, in Warwick, and so continued up to the 21st of December, 1858, and was liable to be assessed for school purposes during that period, and being duly assessed, was liable to pay certain money as a rate therefor, to wit, £3; and said sum was remaining unpaid, the trustees of the said school section No. 4, afterwards, on the 19th of October, 1858, issued their warrant under their hands and seals, and thereby required one James Thompson to collect the school rate from the individuals named in the rate bill annexed to said warrant the sums set opposite their names, and to pay the amount over to the secretary and treasurer of the section within thirty days, and in default of payment by any person so rated then to levy the amount by distress and sale of the goods and chattels of the person or persons making default; that plaintiff was rated on said roll, for, to wit, £3, and having made default in the payment of said sum after demand, and after the expiration of 14 days from such demand, said James Thompson, within 60 days from date of warrant, and within said school section seized and took the goods and chattels in the declaration mentioned, and sold the same as a distress for the rate so due by the plaintiff, said cow having been first duly advertised according to law, at which sale defendant bought said cow, which is the alleged taking and detaining complained of.

Replication.—1st joins issue on 1st, 2nd, and 3rd pleas. 2nd, as to the fourth plea, that the rate therein named as rated and assessed against plaintiff was not lawfully rated or imposed, nor was the same lawfully attempted to be levied of plaintiff's goods, and said seizure and sale as well as said rate were illegal and void, and of no lawful authority or affect.

The case was tried at the last assizes for the County of Lambton before *Richards*, J., when a verdict was taken for the plaintiff subject to the opinion of the court upon evidence, of which the following is the part material to this decision.

Tilton Howard sworn.—I am deputy sheriff. I executed the writ of replevin. I took under it a cow; it was then in defendant's possession; he said he had bought the cow at auction.

Mark Hagle.—I owned the cow once. I sold it to the plaintiff the latter part of last summer. I was present when one James Thompson was about to sell this cow. Plaintiff forbid him doing so. The notice (a notice signed by the witness himself) produced was read, and defendant was present when it was read and heard it read. The notice was signed by me. I was a school trustee. He bought the cow for $8. I sold her for $20. I took a warrant after the replevin from one Joseph Macpherson and gave it to Mr. Adams.

For the defendant it was admitted that at the Annual school meeting in January, it was decided that the school should be supported by a rate bill of 1s. 3d. a month payable in advance. Mr. *Becher* contended for plaintiff that this admission put the case on such a ground that plaintiff cannot but fail on this suit.

James Thompson.—We applied to the people; they said the times were so hard they would have to take their children out of school, as they could not pay the 1s. 3d. a month, and they wished that the resolution of the annual meeting should be re-considered. On getting a letter from Dr. Ryerson on the 2nd of February, 1858, three copies of the notice produced were put up, one on the school house door, and the other two in two of the most public places in the township.* The reason why Somer's name was inserted was, there was a dispute whether Somer's or Hagle was the third trustee. We have since accepted Hagle as the trustee. A meeting was held on the 10th of February (proceedings put in of the meeting). On the 19th of October last we made out the rate bill and annexed the warrant to it. It had the proper seal of the corporation of the school section to it. Plaintiff was rated in the bill for the amount therein. I seized the two cows and sold them both. I think it was Mr. Hay put up the notices. I saw the notices up after they were posted. Hagle did not have notice of the meeting of the trustees at the time of the second meeting of the trustees for re-considering the rate bill. I was secretary and treasurer. John Thompson and Timothy Hay have my bonds. I did not ask Hagle to go to the meeting, because I did not consider him a legal trustee then. Afterwards we took him as a trustee. We had a trustee meeting at Timothy Hay's house on the 2nd of February The notices were drawn up, and that is the way the meeting was called. Hagle and old McPherson came in at the close of the meeting, and Hagle objected to the proceedings. We were more than half an hour at the meeting. We waited for nearly an hour before we got through. Myself and Timothy Hay made out the rate rolls. We called a meeting, giving Hagle notice, about eleven days before this, 8th or 9th October, to come and make out the estimate, he did not attend. We gave him notice also to attend and make out the rate bill and sign the warrant; he did not attend. The corporation had a seal; got it at Toronto the beginning of 1858. There were thirty-one resident freeholders and householders in the section. All paid the taxes willingly but Hagle. Two McPhersons and three others, six altogether, attended at the meeting.

Timothy Hay. I am one of the trustees of No. 4, in Warwick. I put up two of the notices and saw the third put up; one on the school house, the other places, two of the most public. Before the rate bill was made up I saw Hagle and wished him to come up and make up the estimate and a rate bill. He said he would not come. Afterwards, when I was returning, he said I had taken advantage of his being away to court. It was a dispute whether Hagle was elected to fill a vacancy or for a full period. Hagle refused to give up the papers to see if he had been elected or not. We accepted the other, and afterwards agreed that Hagle should come in.

The case was argued by *Richards*, Q. C., for plaintiff, and *Wilson*, Q. C., for defendant.

DRAPER, C. J.—The points made for the plaintiff at the argument were:

1st. That the trustees of the school section had no power to act except in accordance with the resolution of the annual school meeting when a majority of the freeholders, and householders then present decided that the salary of the teacher and expenses connected with the operation of the school should be defrayed by a rate bill of 1s. 3d. per month upon each child attending the school, payable in advance, for this decision could not be revoked or changed during the year for which it was made.

2nd. That the proceedings of the trustees, admitting they had power to call a special meeting of the inhabitant freeholders and householders for the purpose of reconsidering, and if they saw fit changing, the mode of providing for the school expenses, were irregular and void for want of notice or reference to, or the concurrence of Mark Hagle, the third trustee.

3rd. That the trustees could not call a special meeting, since that power by the 16 Vic., ch. 185, sec. 14, was conferred on the local superintendent.

It was urged in support of the first objection, that the statute gave no authority to any one to change or vary anything which had been determined on at the regular annual school meeting, and it was conceded on the other side that the statutes gave no such power. But it is equally certain that there is nothing in the statute to prohibit it.

If there was no provision or authority for convening the freeholders and householders of a school section except at the annual meeting, or if such power was only conferred for certain limited and defined purposes, which clearly excluded the dealing with what had been decided at the annual meeting, the plaintiff's case would be unanswerable, but the contrary is the fact. Among the powers given to the trustees by sec. 12 of the school act of 1850 is the following: 12thly. To appoint the place of each annual school meeting, and to cause notices to be posted in at least three public places of such section at least six days before the time of holding such meeting; *to call* and give like notices of any special meeting of the freeholders or householders of such section for the filling up of any vacancy in the trustee corporation occasioned by death, removal, or any other cause whatever, or for the selection of a new school site, *or for any other school purpose as they may think proper.*"

But it may be firstly said, that while this language is large enough to give the trustees power to call a special meeting for any such school purpose; it does not necessarily follow that the special meeting has authority to revoke the proceedings of the regular annual meeting in this or any other particular.

In reply it may be first noticed that it is the plain intent of the school acts to refer every question which affects expenditure to the consideration and control of those by whom the means are to be furnished. There must always be a local assessment equal to the sum apportioned out of the government grant, and it is a duty particularly devolving on the freeholders and householders of each school section to decide how this is to be done. (a) The trustees are to carry this decision into effect, and the direction to them to do so is in the 12th section, 17thly, thus set forth, "to provide for the salaries of teachers and all other expenses of the school in such manner as may be desired by a majority of the freeholders of such section at the annual school meeting, *or a special meeting called for that purpose.*"

Although the 9th section provides for the calling of a meeting in lieu of the annual meeting of the freeholders and householders, where, from some oversight or neglect, no such annual meeting has been held, it does not, nor does any other section that I am aware of, provide for the calling of a special meeting to do any of the things specially required to be done, but which may have been omitted from some cause or other, at an annual meeting duly convened or held; in this case either the business must be transacted at a special meeting called for the particular purpose, or not at all, and the school year be allowed to pass without it. I have no doubt in my own mind that any omission to do what should have been done at the annual meeting can be thus supplied.

The question then is reduced to this, whether any resolution improvidently made at an annual school meeting is irrevocable, even though it be plainly demonstrated that its effects will deprive the section of the benefits of the school act for the current year; I cannot bring myself to this conclusion. With regard to the election of school trustees, it is a different thing, but the unqualified admission, that having once elected, they cannot at a special meeting displace those who have been chosen does not affect this question. I assume that the resolution passed at the annual school section meeting in January, as to the monthly payment by each scholar, was found by the freeholders and householders to be practically injurious to the schools, keeping away pupils and thus reducing the means of defraying the necessary expenses, and of maintaining the school at all. In the absence of any prohibitory enactment, it is my opinion the freeholders and householders duly convened at a special school meeting might rescind the former resolution and substitute another mode—one authorised by law—to obtain their end of having a common school maintained in their section, and therefore, that this objection fails.

* The opinion given was, that a special meeting could re consider the proceedings of the annual meeting

(a) The raising of a sum by assessment equal to the government grant is vested in counties in the County Council, and in cities, towns and villages, in their Municipal Corporations. These two sums are then divided among the school sections, and whatever sum in addition to these two is required for the salary of the teacher is provided by the Trustees, as directed by their constituents, in the section referred to.

I think my brother Richards gave a complete answer to the second objection at the trial. John K. Somers was in the office of trustee, acting as such, whether duly appointed or not. There is nothing before us to show, admitting that we could collaterally try the question, whether Somers was not, or that Hagle was third trustee; and if that was the ground relied upon to sustain the replication, the plaintiff should have given much more distinct evidence for the purpose.

I scarcely thought Mr. Richards attached any weight to the third objection. The 14th section of the 16th Vic., ch. 185, does (proviso 5) give the local superintendent "authority to appoint the time and place of a special school section meeting, at any time and for any lawful purpose, should he deem it expedient to do so," but this does not affect or take away the authority previously given to the school trustees.

I think the defendant is entitled to the *postea*. It is to be regretted that either a litigious spirit or the ill-considered and perhaps even mischievous promptings of other parties should have induced the plaintiff to raise this question for the sake of a sum less than two dollars, sacrificing his property worth ten times the amount, according to the evidence, as well as incurring the costs of a very unnecessary lawsuit.

Postea to defendant.

Pim v. The Municipal Council of Ontario.*

Assumpsit—Action of against a Corporation—Contract under seal.

An action cannot be sustained against a corporation for work and labour unless supported by contract under the seal of the Company.

Assumpsit for work and labour and materials.

Pleas.—Non assumpsit and payment. It appeared that by agreement, dated the 23rd of October, 1852, James Wallace covenanted with the Provisional Municipal Council of the County of Ontario, sealed with the seal of such council, to erect a gaol and court house in the said county, to be finished on or before the 15th of September, 1853, according to a certain plan and specification, and to the satisfaction of their architect, the price to be £5795, by monthly instalments of seventy five per cent. on the work done and materials on the ground, the remaining twenty-five per cent. being retained till the fulfilment of the contract. In default at the time £5 weekly penalty to be paid by Wallace. If the work should not be duly proceeded with the council to be at liberty, upon three days' notice in writing to Wallace, to employ others to finish the same, and deduct the costs from his allowance; the contract not to be assignable; all the materials delivered on the ground to become the property of the council, &c.

That Wallace proceeded with the work, and executed a large portion of it, but did not complete it by the day named, after which it was taken out of his hands by the architect acting under the authority of the building committee of the council, and plaintiff was employed by such architect so acting to finish it, to be paid by estimate as he proceeded, without any written or sealed contract, or any specific price being agreed upon; that the plaintiff did proceed and completed the work, finding materials, workmen, &c., to the satisfaction of the architect; that he was from time to time paid sums of money on account, twenty-five per cent. on the periodical estimates being retained, and in the end leaving a balance of £1051 12s. 6d., due him, for which this action was brought, and for which the jury found a verdict in his favour. The architect of the defendants certified to the correctness of this balance as due the plaintiff. A building committee, of which the Warden was chairman, was appointed by the council by a by-law No. 2, of the 25th June, 1852, and their report of the 11th November, 1853, that the work had been taken out of the contractor's hands for default, and its completion entrusted to others to be employed by the architect, was approved and adopted by the council.

Leave was reserved at the trial to defendants to move to enter a nonsuit on the ground that the defendants not having contracted with the plaintiff under seal, were not liable in law, and that £6,000 only being authorized by by-law on the works, the committee exceeded that sum independent of the balance claimed by the plaintiff in this action, and therefore defendants are not liable therefor.

A rule *nisi* was obtained accordingly by *McMichael*, and cause shewn thereto by *Freeland*.

Macaulay, C. J.—If any thing, this is perhaps a stronger case in favour of the action than Marshall v. The School Trustees of Kitley (1 U. C. C. P. 373,) decided in this court last term, but I cannot satisfactorily distinguish it in principle. My own view of it is, that the plaintiff should recover on the evidence, but my learned brothers adhering to the views expressed by them in the former case, the result must be the same, and the rule *nisi* for a nonsuit be made absolute.

Per cur.—Rule absolute.

IN THE COURT OF ERROR AND APPEAL.

Pim, Appelant, v. The Municipal Council of Ontario, Respondent.

The foregoing judgment having been appealed from, the decision was reversed and the rule discharged.

For the facts of the case, see the preceding judgment.

The case was argued in appeal by Freeland for appellant, and McMichael for respondent.

The Chancellor.—The present state of the law upon the subject is a reproach to the administration of justice in England. It may be that the evil calls for legislative interference, but if the legislature will neither declare the law nor alter it, courts of justice are bound to place their decisions upon some principle intelligible to the public and sufficient for their guidance.

It is said, I believe, in the case now under appeal, that the decisions in the English court harmonise and negative the right of the present plaintiff to relief. But the cases which have arisen since the decision in the court below show that the judgments in the English courts are in direct conflict, and are so treated by the learned judges by whom they were pronounced. In Smart v. The Guardians of the Poor of the West Ham Union (L. Times, 277), *Parke*, B., says, "The case which has been cited and relied upon for the plaintiff is a case with which I cannot agree. It would in effect overrule several previous decisions of this court; and *Alderson*, B., adds, "I quite agree with the observation of my brother *Parke*, in reference to the judgment in Clark v. The Guardians of The Cuckfield Union (16 Jur. 686), as it is directly in opposition to several cases decided by the court upon similar questions. To these cases we should adhere until they are overruled by a court of error." While in the case alluded to, Mr. Justice *Wightman* admits his inability to reconcile his own judgment with the cases in the Exchequer; and in Henderson v. The Australian Steam Navigation Company (25 L. Times, 231), which is, I believe, the latest case upon the subject, Mr. Justice *Crompton* says with becoming candour, "At the same time I cannot distinguish this from Diggle v. The Blackwall Railway Company (5 Ex. 442, reported also 14 Jur. 937), Homersham v. The Wolverhampton Waterworks Company (6 Ex. 137). I cannot disguise from myself that we are deciding the case in opposition to these authorities, which have, however, I believe, excited some surprise" See also, and contrast Clark v. The Cuckfield Union, (16 Jur. 686,) and Sanders v. St. Neots Union (8 Q. B. 810), with Diggle v. The Blackwall Railway Company (14 Jur. 937) and Lamprell v. The Guardians of The Poor of The Billericay Union (3 Ex. 283), and other cases in the Exchequer.

It cannot be doubted, therefore, that the authorities in the English courts conflict, and it is certainly difficult, moreover, to extract from them any satisfactory principle for our guidance. But the cases have been so often collected, and so fully commented upon of late days, and are so familiar to every one conversant with the subject, that it would be mere pedantry to enter upon a detailed review of them here. I shall content myself, therefore, with a short statement of the principle upon which, in my humble opinion the judgment of the court below ought to be reversed.

---

* This judgment was omitted at the time of its being delivered on account of its similarity to the case of Marshall v. the School Trustees Kitley, but is now published as establishing the law, the decision being reversed in appeal. See next judgment.

The action in this case is brought upon an executed contract. The court house had been built under the supervision and to the satisfaction of the defendants' architect before action brought. The justice, therefore, of compelling the defendants to pay for the work, labour, and materials, of which they have had the benefit, is obvious; and if there be a principle upon which they are to be absolved from that just liability, it must be the principle, that being a corporation, their will cannot be expressed except through their common seal: and as they are incapacitated from making their own will known, except through their common seal, so it cannot be implied by courts of justice, from their conduct, so as to subject them to any liability either in tort or assumpsit.

Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed.

The old notion certainly was, that a corporation being a body politic, and invisible, could neither act nor speak, except by its common seal, (Bac. Abr. Tit. Corporations and Capacities,) or as it was expressed in argument in Rex v. Bigg, (3 P. W. 423,) the common seal was the hand and seal of the corporation. But that dogma, never well founded in point of reason, was from the first subject to considerable qualification, and has undergone, from time to time, still further limitations.

Matters of small amount and frequent recurrence were always treated as exceptions from the rule. It is difficult to understand the principle upon which that class of cases is said to have proceeded. Had the rule rested upon a different foundation it might have been relaxed for purposes of convenience, but being a rule of necessity, and not of policy, it is difficult to understand how it can be made to consist with the cases to which I have referred. See observations of *Macaulay*, C. J., in Marshall v. The School Trustees of Kitley (4 C. P. U. C. 373), and of *Patteson*, J., in Beverley v. The Lincoln Gas Light & Coke Co (6 A. & E. 844.) In Henderson v. The Australian Steam Navigation Company, already cited, (25 L. T 234,) *Erle*, J., says, "It would be very dangerous to vest the exception upon the ground of frequency or insignificance; nor do I gather from the cases that that has been put forward as the principle. Certainly, as to trading corporations, the exception has not been so limited; and I think that the soundest principle on such a matter is too look to the nature and subject matter of the contract, and if that is found to be within the fair scope of the purposes of incorporation, to hold the contract binding, even though not under seal" The doctrine propounded by Mr. Justice *Erle*, if it be sound, and I very much incline to think it so, would furnish a solution for most of the difficulties which have arisen upon the subject; but upon that point, which does not necessarily arise in the case before us, we need not express any opinion, because the plaintiff's right to maintain this action may be rested, as it seems to me, on well-established principles.

When it had been determined that the corporate will might be ascertained in certain cases otherwise than through the common seal, and that, as a necessary consequence, assumpsit might be maintained in such cases, either by or against corporations even upon executory contracts, the difficulty of maintaining the rule as to torts and executed contracts must have been obvious. Had the old dogma been maintained in its integrity, a corporation could not have been liable in tort unless the agent had been appointed or the act adopted under the corporate seal, and in no case could a promise have been implied by law from conduct; and upon reasoning of that sort the liability of corporations under such circumstances has been from time to time resisted. But the inconvenience and injustice of such a rule was felt to be intolerable. Had this been the law, corporations would have been, as Mr. Justice *Coleridge* has expressed it, a great nuisance —Hall v. Mayor of Swansea (Q B. 544). And it is now well settled that corporations aggregate are liable in tort although there has been nothing under the common seal authorising the agent, or adopting his act. Yarborough v. The Bank of England (16 East 6), Smith v. Birmingham Gas Company (1 A. & E. 526), Eastern Counties Railway Co. v. Broom (15 Jur. 297). Again, when land has been used and occupied by a corporation, the law implies a promise to pay a reasonable compensation. Dean and Chapter of Rochester v. Pierce (1 Camp. 466), Mayor of Stafford v. Till (4 Bing. 75), Lowe v London and North Western Railway Co. (17 Jur. 375). And when money has been wrongfully received, assumpsit for money had and received may be maintained. Hall v. The Mayor of Swansea (5 Q. B. 526).

Now, if trover and trespass may be maintained under the circumstances to which I have alluded, and if the law implies a contract when land has been used, or moneys wrongfully received, it is difficult to understand why the same principle should not be applied wherever the contract, being legal, has been executed, and the corporation has received all that it could have demanded if there had been a contract under the corporate seal. The argument seems to me. I must confess, conclusive. In Hall v. The Mayor of Swansea (5 Q. B. 526), Lord *Denman* rests the judgment of the court of Queen's Bench, which has not, I believe, been questioned, upon the ground of necessity; and that language of Lord *Denman* has been since translated by Lord *Campbell* to mean "no other than a moral necessity; that the defendants should pay their debts;" or as Mr Justice *Erle* has expressed the same sentiment, "that it was absolutely necessary that the defendants should be compelled to do that which common honesty required"—Low v. The London and North Western Railway Company (17 Jur. 376). Now, if the necessity in Hall v. The Mayor of Swansea was the moral necessity of compelling the defendants to do what common honesty required, assuredly that necessity exists to as great an extent at least in cases circumstanced like the present, when the consideration has been executed and the corporation has received all that it could have required if there had been a formal contract under the corporate seal.

But the distinction between executed and executory contracts does not depend upon the reason of the thing, however clear: it has been repeatedly recognised by judges of the greatest eminence; in The East London Waterworks Company v. Bailey (4 Bing. 287,) *Best*, C. J., in enumerating the cases in which a corporation is liable, although no contract has been executed under the corporate seal, says, "The first is when the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as we have lately decided in the Mayor of Stafford v. Till, when it was holden that a corporation might maintain assumpsit for the use and occupation of the land." And in Beverley v. The Lincoln Gas Light and Coke Company (6 A. & E. 845), Mr. Justice *Patteson*, who delivered the judgment of the court of Queen's Bench says, "In the progress, however, of these exceptions it has been decided that a corporation may sue in assumpsit on an executed parol contract; it has also been decided that it may be sued in debt on a similar contract; the question now arises on the liability to be sued in assumpsit. It appears to us that what has been already decided in principle warrants us in holding that the action is maintainable."

It is said, however, that the distinction between executory and executed contracts was exploded by Church v. The Imperial Gas Light and Coke Company (6 A. & E. 846), which has been treated by some as a governing case upon the subject. I am not certain that Lord *Denman's* language, properly interpreted, means that; his lordship's object was to negative the distinction between executed and executory contracts—not generally—but as to contracts of a particular class: contracts which would be valid without the corporate seal; and in parts of the judgment the language is distinctly limited to that object; it is said, for instance, at page 859, "assuming it, therefore to be now established in this court that a corporation may sue or be sued in assumpsit *upon executed contracts of a certain kind*, among which are included such as relate to the supply of articles essential to the purposes for which it is created the first question will be, whether, *as affecting this point, and in respect of such contracts*, there is any sound distinction between contracts executed or executory." The question proper in that principle is strictly confined to contracts of the particular class to which I have referred, and viewed as a solution of that question, the judgment is quite sound; it must be admitted, however, that the language in other parts is much less guarded, and that the case has been often assumed to be an authority for the general proposition. The Mayor of Ludlow v. Charlton (6 M. & W. 825), Clark v. The Guardians of the Cuckfield Union (16 Jur 686)

In answer to the argument deducted from Church v. The Imperial Gas Light and Coke Company, and the subsequent authorities in which that case has been recognized, an argument which possesses, I must admit, considerable force, I have to say, first, that the point was not decided. Secondly, that Lord *Denman's* reason-

ing as an argument for the general proposition, is, in my humble judgment, quite conclusive. And, lastly, that since the decision of the case alluded to, the distinction in this respect, between executory and executed contracts, has been recognized by the Court of Queen's Bench, including Lord *Denman* himself, on more occasions than one, and has received the sanction of other judges of still greater eminence In Sanders v. The Guardians of St. Neots Union (8 Q. B. 810), Lord *Denman*, delivering the judgment of the Court of Queen's Bench, says, "A motion in this case was made for a new trial on the ground that no contract under seal was proved against the defendants. But we think that they should not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for the purposes connected with the corporation." In Doe dem. Pennington v. Tanniere (12 Q. B. 1013), the same learned judge observes, "To enforce an executory contract against a corporation, it might be necessary to shew that it was by deed; but where the corporation have acted as upon an executed contract, it is to be presumed against them that every thing has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made." In The Fishmonger's Company v. Robertson (5 M. & G. 193), Chief Justice *Tindal* says, "The question therefore becomes this, whether, in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal. Upon the general ground of reason and justice no such answer can be set up." Lastly, in the Governor and Company of Copper Mines in England v. Fox, Lord *Campbell* intimates his opinion that the distinction between executory and executed contracts had not been exploded by Church v. The Imperial Gas Light and Coke Company.

Upon the whole, I quite concur in the principle enunciated upon the subject so often and so clearly by his lordship, the Chief Justice, and by the late Chief Justice of the Court of Common Pleas; I am of opinion that the distinction, in this respect, between executed and executory contracts is sound, and ought to be maintained. I do not disguise from myself that this opinion is opposed to many cases in the Exchequer, and to much that is to be found elsewhere; but when these decisions are in such manifest and painful conflict, it becomes the duty of the court to adopt that conclusion which appears upon the whole most consistent with the principles of justice; and for the reasons already stated, I am of opinion that the plaintiff is entitled to recover, and that the decision of the Court of Common Pleas should be reversed.

HAGARTY, J.—I wish to state very briefly the grounds on which I consider the plaintiff in this case entitled to recover.

It is undisputed that he completed the work remaining to be done under the sealed contract entered into with the first contractor Wallace. That he worked regularly under the architects of the defendants, who were authorized by resolutions of the council to employ persons to do this very work.

The defendants were incorporated for the express purpose of erecting a gaol and court house, and were declared "to have all corporate powers necessary for the purpose of carrying into effect the object of their erection under such provisional municipal council, and none other." Nothing is said in the statutes as to their having a corporate seal, or how they are to contract.

The plaintiff has proved that he did the work—its value, and that the defendants are in possession of it, using it as their gaol and court house and council chamber, and the courts of assize and *nisi prius* sit regularly therein.

We are now asked by the defendants to support them in ignoring all this, and, assuming that they never contracted to employ the plaintiff or pay him for his work. I hope and believe the law will not be found so rigid in its application to the wants of communities. I will not pretend to reconcile all the cases in this point. I find that corporations are held liable in trespass; in trover; in case for non-feasance; in assumpsit for money had and received, and many other cases in which the acts complained of in the implied promise sought to be enforced were not proveable by their common seal. This, without entering upon the constantly cited cases in which, some variance seems to exist in the language held by the different courts as to the peculiar circumstances under which a departure from the law is generally applicable to corporations requiring them to contract under seal, is allowable.

The cases I have referred to are those in which there seems to be no dispute as to the liability.

The presence of the corporate seal seems required to speak the voice, to shew the assent of the corporations. In the cases put, the liability is enforced without the evidence under seal, on the intelligible ground, that, having done a wrong thing, they must not be heard to say they did not either agree to do it under seal, or so promise to make restitution.

I am aware of the important difference between trading and municipal corporations, and I desire to bear them constantly in mind. In the well-known Hall v. Mayor, &c., of Swansea, (5 Q. B. 547,) Lord *Denman* says, "If the corporation have helped themselves to another's money, it would be absurd to say that they must bind themselves under seal to return it."

Patteson J., says, "The true ground is necessity. It cannot be expected that a corporation should put their seal to a promise to return moneys which they are wrongfully receiving."

Once having conceded that trover for a wrongful conversion of chattels, and assumpsit for money had and received will lie against a corporation, municipal or trading, it really seems to me, with the deepest respect for the opinion of those who differ from me, to be a play upon words to hold that they can enter into, occupy, and use as their own a building erected for them by another, and ignore all liability therefor. They could not resist an action of trover at plaintiff's suit for any loose bricks or boards which he had left lying on this land; but having affixed the same bricks and boards to their freehold, they can say they belong to them, and refuse to pay for them in an action for the price.—Australian Steam Navigation Company v. Marzetti (11 Ex. 228.)

CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

ARCHIBALD MCCALLUM v. PETER SNIDER AND JOHN MAYNARD.

Stat. 2 Wm. & Mary, ss 1, cap 5, s. 5—Construction—Damages—Costs.

It is enacted by the Imp Stat. 2 Wm & Mary, ss 1, cap 5, s 5, that in case a distress and sale shall be made for rent, pretended to be in arrear and due, where in truth no rent is in arrear or due, &c, that then the owner &c, of such goods or chattels distrained and sold as aforesaid, shall and may by action of trespass or upon the case to be brought against the person or persons so distraining, &c, *recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit. Held*, that the legislature did not mean double of the value of the goods &c, distrained *and* double costs, but only double of the value of the goods, &c., and full or ordinary costs of suit.

(Chambers, June 30, 1860.)

This was a summons obtained by Mr. *McMichael*, calling upon the plaintiff to show cause why the Bill of costs taxed in this cause, should not be referred back to the master to be revised, and why on such revision the sum of £18 19*s* 2*d*, being the amount taxed and added to the regular full costs in this cause, on the principle that double costs were taxable to the plaintiff in this cause, should not be struck off and the said costs reduced by that amount, on the ground that this action was brought under the Statute 2nd William & Mary, chap. 5. section 5, for destraining and selling when no rent was due, the jury gave a verdict for double the value of the goods distrained and sold, and that under such statute double costs, or any costs above full costs, could not be and should not have been awarded, and that there is no other statute under which the Plaintiff should have more than full costs in this cause, and that the allowance of more than full costs is contrary to the practice of this court, and upon grounds disclosed in affidavits and papers filed, and why the *fi fa.* issued in this cause (if any) should not be lessened that amount, and why the Plaintiff should not pay the costs of this application and of the revision.

Mr. *Smith* showed cause.

BURNS, J.—This action is brought to recover double value of the goods distrained and sold, when in truth there was no rent

due, and is brought under Stat. 2 Wm. & Mary, sess. 1, ch. 5, sec. 5. The words of the Act are these, "That the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators shall and may by action of trespass, or on the case to be brought against the person or persons so distraining any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

The master, in taxing the costs to the plaintiff, has allowed the Plaintiff doubled costs, and has done so, as I understand, upon the principle which governs where a Plaintiff recovers treble damages and costs, that it means treble costs as well as damages, and consequently that in this case, the Plaintiff having recovered double value, he is entitled to double costs. This decision of the Master is questioned by the application to revise the taxation.

There is no doubt, that upon the construction of the 4th sec. of the same Act, where an action is given for pound-breach or rescue of goods, and which enacts that the person grieved shall "recover his or their treble damages and costs of suit against the offender;" the Court held that the Plaintiff was entitled to treble costs as well as damages. It was so held on the ground that the word "treble" applied to the costs as well as to the damages. *Lawson* v. *Story* (19 Ld. Ray) is a direct authority for it. The case, however, seems to have been questioned in *Butterton* v. *Furber* (1 Brod. B. 517), which was an action upon the 43 Eliz. cap. 2. The court of Queen's Bench, in *Deacon* v. *Morris* (2 B & Ad. 393), which was an action on 29 Eliz. cap. 4, affirms the principle that where the word "costs" is coupled with the word "damages," treble costs should be awarded as well as damages.

It should be observed, however, that in all these cases of damages being awarded, that it is not done by the Jury. The jury give what damages they think proper, and then the damages as well as the costs are trebled, in the manner which is understood to govern in awarding treble damages or costs at the entry of the Judgment.

In the present case, the Jury awarded as they were told to do, double the value of the goods as damages. That was the proper direction to give, as appears from *Masters* v. *Farris* (1 C. B. 715). There is in this case no awarding double damages, as in cases under the 4th section of the Act. The plaintiff recovers only single damages, but the Jury are bound by the Statute to award those single damages on the principle of double of the value of the goods distrained and sold. Then, when we come to the costs to be given, the words are, "together with *full* costs of suit." There is nothing coupling the word "costs" with the award of damages, as in the other case. It is quite clear to my mind that the expression does not mean double costs, but only means the full costs of suit whatever they may be.

Then the Plaintiff contends that if he is not to be allowed double costs, the Statute must mean something more than a Plaintiff's ordinary costs, and he contends that full costs should be construed to mean costs between solicitor and client, and that if double costs be disallowed, then he should have a revision upon that principle. The case of *Jamieson* v. *Trevelyan* (24 L. J. Ex. 74), upon the statute 17, Car. 2, cap. 7, sec. 3, using precisely the same expression, is an express decision to the effect that, "full costs of suit" means nothing more than the "ordinary costs."

The Defendants' summons to have the taxation revised, in order to disallow the double costs, must be made absolute and with the costs of this application and revision.

Summons absolute with costs.

MARTHA PALMER v. MICHAEL RODGERS.

Cavil action—Arrest—Grounds for discharge.

The mere fact that both plaintiff and defendant are foreigners, does not of itself warrant the setting aside of an arrest made under a writ of capias.

A technical objection to the form of the affidavit to arrest, must be made before the time for putting in bail expires.

An objection to the effect, that although the writ of capias is issued from the Common Pleas yet the affidavit to arrest is not intitled in any Court, is a technical objection to the form of the affidavit.

Quære.—Can a defendant apply to set aside a writ of capias, or the arrest made thereunder, on the alleged ground that there was not at the time of the making of the affidavit good and probable cause for the plaintiff believing that the defendant, unless forthwith apprehended, was about to quit Canada with intent to defraud his creditors, or the plaintiff in particular?

Quære.—If such be a good ground of application, has a Judge, in Chambers, authority to entertain the application?

Semble,—A person in custody on a criminal charge, may be detained in custody in a civil suit.

Where defendant was illegally detained in close custody, without warrant, at the instance of the plaintiff, on a charge involving the subject matter which was afterwards stated in the affidavit to arrest, as creating the demand for which the defendant was ordered to be held to bail in the cause, the defendant was discharged from custody on entering a common appearance to the action.

(Chambers, 31 May, 1860.)

This was a summons obtained by the defendant upon the plaintiff, to show cause why the defendant should not be discharged out of custody in this cause, and the order to hold to bail and capias, and the arrest of the defendant thereunder, and subsequent proceedings had thereon, set aside on the following grounds:

1st.—Because the defendant was a foreigner and a citizen of the State of Michigan, one of the United States of America at the time of the making of the affidavit to hold to bail, and the order for a capias to issue in this cause, and such arrest under the writ of capias in this cause, and had not been a resident of this country, and the affidavit to hold to bail could not be legally made alleging that there was good and probable cause for believing that the defendant, unless he should be forthwith apprehended, was about to quit Canada with intent to defraud his creditors generally, or the plaintiff in particular, for the reason above stated.

2nd,—Because the plaintiff is a foreigner and a citizen of the United States of America, and resided in the said State of Michigan, at the time of the making of the affidavit, to hold to bail, the order for said capias to issue, and the arrest in this cause; and that the defendant was during the respective times, aforesaid, a citizen of such State, and a foreigner, and the affidavit to hold to bail required by the statute in such case, could not under such circumstances be legally made for the reasons before stated.

3rd,—Because the affidavit filed on which the order to hold to bail in this cause was granted, was not at the time of the issuing such writ of capias, nor from thence, hitherto, hath said affidavit been entitled in any count, and therefore the writ of capias issued out of the Court of Common Pleas is not supported by any affidavit to hold to bail intitled in that court.

4th,—Because there was not at the time of the making such affidavit, to hold to bail, on said order, or the issuing such writ of capias, a good and probable cause for the plaintiff believing that the defendant, unless he should be forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular.

5th,—Because the plaintiff caused the defendant to be arrested while he was in custody under criminal process, and privileged from arrest for debt.

6th,—Because the plaintiff procured the defendant's arrest in a fraudulent manner, by causing his person to be detained in custody under a pretended criminal proceeding, to enable her to arrest him for debt in this cause, and by duress and imprisonment resorted to by the plaintiff to enforce his detention, to enable her to arrest the defendant for debt in this cause.

Benson, for the application.

J. B. Read, contra.

The following cases were cited during the argument:—*Frear* v. *Ferguson*, 2 U. C. Cham. R. 141. *Swift* v *Jones*, 6 U. C. Law Journal, 63. *Barry* v *Eccles*, 3, U. C., Q. B. R., 112. *Robinson and Harrison's* Digest, p. 51.

RICHARDS, J.—As to the different grounds mentioned in the summons for defendant's discharge from custody, I have arrived at the following conclusions.

1st and 2nd,—The mere fact that plaintiff and defendant are both foreigners, does not of itself, in my judgment, warrant the setting aside of the arrest; *Terry* v. *Comstock*, in Chambers, January, 1860, a case much like this, may be referred to on that point.

3rd,—This is an objection to the *form* of the affidavit, in its nature technical, and I think defendant should have applied before the time for putting in bail had expired; *Downes* v. *Stokes*, 4 Dowl, P. C. 125; *Patterson's Common Law Practice*, 729; *Primrose* v. *Baddeley*, 2 Dowl. P. C. 350; *Sugars* v. *Concanen*, 5 M. & W. 30.

4th,—I am uncertain whether I ought to set aside the arrest on this ground or not. I have doubts as to the propriety of doing so and stronger doubts as to my authority as a Judge in Chambers to do so.

5th.—I am not prepared to say that a person in custody on a criminal charge may not be detained in a civil suit.

6th.—I think the defendant intitled to his discharge on this ground. He was illegally detained without warrant at the instance of the plaintiff, on a charge involving the subject matter which is stated in the affidavit as creating the demand for which the defendant was ordered to be held to bail in this cause. After detaining him to answer the criminal charge, and knowing it could not be sustained, she proceeds to arrest him in a civil suit, involving the same matters. Though I find no case expressly in point, I think the analogy sufficiently clear to order the discharge of the prisoner from custody on this ground, on entering a common appearance to the action.

CHANCERY.

(Reported by Thomas Hodgins, Esq., *Barrister-at-Law.)*

Smith v. Port Hope Harbour Company.

Practice—Dismissal of Bill by plaintiff before decree.

After a cause has been heard and is standing for judgment, the plaintiff cannot dismiss his bill on *præcipe*, but only on special motion.

After the hearing and while the cause was standing for judgment, the plaintiff dismissed his bill on *præcipe*, with costs. The defendants having prayed cross-relief in their answer, *Cattanach* moved to set the order to dismiss aside, and

Esten, V. C., granted the motion, holding that such an order could, at that stage of the suit be granted only on special motion.

Afterwards on the motion of *G. D. Boulton*, notice having been given to the defendants,

Esten, V. C., made an order to dismiss the bill, on the ground that the defendants could not obtain cross-relief in this suit.

Goodhill v. Burrowes.

Practice—Sale or Foreclosure—Property unsaleable.

Where a sale has been asked for by a defendant and granted, and has proved abortive, the proper course is to file a petition to have the decree carried out.

In this case a decree for sale has been drawn up on the plaintiff consenting thereto, and waiving the deposit. Several attempts were made to sell the property for the amount of the debt, but it would not bring the full amount; and application was now made for an order, absolute, for foreclosure.

The Chancellor.—In this case, it appears that the plaintiff is laboring under great hardship, that there have been numerous attempts to sell the property to pay off the mortgage debt, but they have failed owing to the property not being worth the amount due. In some cases the Court has imposed terms, that if the sale did not bring the amount due, then foreclosure; but there is no such provision in this decree. A rehearing, I think, would not do. The only remedy is to sell on the usual terms. I think the proper course is to file a petition in the nature of a bill to carry out the decree. A party having asked for a sale, and failed to sell for the amount required, should not be allowed to keep a decree alive to the injury of the plaintiff.

COUNTY COURTS.

IN MATTERS OF APPEAL.

(Before His Honor Judge McKenzie, County Judge for the United Counties of Frontenac, Lennox and Addington.)

H. Cartwright and The Corporation of the City of Kingston.

Sarah A. Wilson and The Corporation of the City of Kingston.

Wm. Holditch and The Corporation of the City of Kingston.

W. M. Herchmer and The Corporation of the City of Kingston.

Non-Residents—Assessment of personal property—Con. Stat. U.C. c.55, ss.38,39, 40.

Held, 1st. That the Assessment Act of Upper Canada requires every person to be assessed for personal property, at his place of business or place of residence. 2nd That if the owners of personal property, being within a particular Municipality, be not themselves resident within that Municipality and have not a place of business within it, they cannot be properly assessed in respect of such personal property.

(11th July, 1860.)

These were appeals from the Court of Revision of the City of Kingston.

The appellant, H. Cartwright, was assessed for $1,000 stock in the Kingston Gas Light Company, and resided at the time the assessment was made, in the incorporated village of Portsmouth. The appellant, Sarah Ann Wilson, was assessed for $1,000 stock in the Kingston Gas Light Company, and resided in the township of Kingston when she was so assessed. The appellant, William Holditch, was assessed for $4,000 stock in the Kingston Gas Light Company, and resided at the time when he was assessed, at Plymouth, in England. The appellant, W. M. Herchmer, was assessed for $2000 stock in the said Kingston Gas Light Company, and resided at the time he was so assessed, at the incorporated village of Portsmouth, in Canada.

The appellants respectively appealed from the decision of the Court of Revision for the Corporation of the City of Kingston, to the County Judge, on the ground that they were not liable to be assessed for stock in the Kingston Gas Light Company, being non-residents, and having no farms, shop, factory, office, place of business, or place of residence within the limits of the Municipal Corporation of the City of Kingston.

J. A. Henderson, and *T. Parke, Junr.*, for appellants; *Agnew* for the Corporation.

McKenzie, Co. J. — By "The Consolidated Assessment Act of Upper Canada," the terms "Personal Estate" and "Personal Property," include "*shares in Incorporated Companies*," as well as goods, chattels, moneys, notes, accounts, and debts, at their full value, and all other property except land and real estate.—Consequently, the stock in question must be treated to all intents and purposes as personal property in the deciding of the appeals under consideration.

I find a plain and intelligent provision made in the Assessment Act in respect to the manner of assessing the land and real property of non-residents; but I find no such class of persons as non-resident owners of personal property recognized by the Act.—There are no such persons mentioned from the one end of the Act to the other. The framers of the Act must have had the common law idea of personal property before their eyes when they prepared it. According to the common law, personal property signified any moveable thing, quick or dead, belonging to and following the person into all lawful places. Personal property seems to be a thing appertaining to the person and moving with it. Whereas, "land" and "real property" are fixed, permanent and immoveable. Land, according to the Assessment Act, must be assessed in the "*Local Municipality or Ward in which the same lies*," no matter where the owner resides. But as to "personal property" the Act establishes a very different rule of assessment.

By the 38th section it is enacted, "That every person having a farm, shop, factory, office or other place of business, where he carries on trade, profession or calling, shall, for all personal property owned by him (wherever situate,) be assessed in the township, village or ward where he has such place of business at the time when the assessment is made." By the 39th section, it is enacted, "That if a person has two or more places of business in different Municipalities or Wards, he shall be assessed at each for that portion of his personal property connected with the business carried on thereat; or if this cannot be done, he shall be assessed for part of his personal property at one, and part at his places of business, or for all his personal property at one such place at his discretion." And by the 40th section, it is enacted, "*That if any person has no place of business, he shall be assessed at his place of residence.*" If the above words mean anything, they mean that a person must have such a place of business as is specified in the 38th section, or such a place of residence as is

mentioned in the 40th section of the Act, within the limits of the municipality, before he can be assessed for personal property in it.

Business or residence in a municipality seems to be the governing point for the assessment of personal property in it. It is not necessary here to inquire into the reason for placing the assessment of personal property in municipalities in Upper Canada upon such a footing. It is possible, however, that the Legislature wished to place non-residents on a more favourable footing than residents in this respect, with a view of encouraging the introduction of foreign capital into the Province, and as an inducement to non-residents to invest their money in public companies formed for local improvements and otherwise. Persons who carry on business in a municipality, or who may have a place of residence therein, stand in a different relation to the municipality from non-residents. The municipality owes many duties and obligations to residents, and such as carry on business in it—such as protection to property and person—municipal regulations for the maintenance of order—for repairs and improvements, and the like, which cannot be claimed by or extended to non-residents.

Be this as it may, the Assessment Act of Upper Canada requires that every person shall be assessed for personal property at his place of business or place of residence. And as the present appellants had no places of business or places of residence within the limits of the Municipal Corporation of the City of Kingston at the time they were respectively assessed for stock in the Kingston Gas Light Company now in question, they were improperly assessed for the same.

I therefore order that the Assessment Roll for Sydenham Ward be amended by striking out the name of H. Cartwright in respect to the $1 00 assessed against her for so much stock in the Kingston Gas Light Company: that the Assessment Roll for St. Lawrence Ward be also amended by striking out the name of William Holditch in respect to the $4,000 assessed against him for so much stock in the same Company; that the Assessment Roll for Sydenham Ward be further amended by striking out the name of W. M. Herchmer in respect to the $2,000 with which he stands assessed for so much stock in the said Kingston Gas Light Company. At the hearing it was admitted that Sarah Ann Wilson is Executrix of the last will and testament of William Wilson, deceased; and that there is an office on Brock street in St. Lawrence Ward wherein the affairs of the estate under the will, are conducted and settled. I cannot accede to the views propounded by the learned counsel for the respondents, Mr. Agnew, in reference to the office or place of business. The office in question, would, no doubt, fit the liability of the appellant, Sarah Ann Wilson, for any personal property she held as executrix, but cannot be construed without straining the words of the statute to an unnatural and unwarrantable extent, to mean her place of business within the signification of the statute. It is not her place of business. She has no such place. It is the place of business of the executrix and executors of the will of the late William Wilson, deceased, out of which a liability to assessment in another form will arise, but cannot control her liability to be assessed for stock in question. I, therefore, order that the Assessment Roll for St. Lawrence Ward be further amended by striking out the name of Sarah Ann Wilson in respect to $4,000 with which she stands assessed for so much stock in the Kingston Gas Light Company.

The decision of the Court of Revision reversed.

(Before His Honor Judge ROBINSON, in the County Court of the County of Lincoln.)

FRENCH v. WEIR.

In this case the plaintiff sued the defendant on the common counts, including count for money had and received. At the trial in Sarnia, during the September sittings of the Court, it appeared in evidence that the defendant, being a contractor, had employed various sub-contractors, and among them certain persons under the name or firm of Featherstone, Gerard and Company, who were indebted to the plaintiff in a considerable amount; and these sub-contractors not being able to pay, and the defendant being indebted to them, one of them went with the plaintiff to the defendant, who obtained from the sub-contractor a receipt for the sum claimed in this suit, as so much money paid to him; and the defendant then wrote across the plaintiff's account, in pencil, "*if this account is correct pay it*," and directed this order to his clerk, who refused to pay it because it was only written in pencil. It was also proved that the defendant promised to pay the plaintiff's account, and had since that promise paid others of the same nature, to the extent of fifty-six cents on the dollar. It was also proved that the plaintiff was about to attach certain goods of sub-contractors, but did not do so on defendant's promise of payment.

At the close of the plaintiff's case, it was objected by *M. C. Cameron*, of Toronto, the defendant's counsel, that no case had been made out, there being no privity of contract established between plaintiff and defendant: that defendant promised in consideration of plaintiff not attaching to pay, there should have been a special count and that there was no evidence whatever to sustain a verdict on the common counts.

The learned Judge seemed to think so too, but the plaintiff's counsel refusing to submit to a non-suit, the case went to the jury, who found for the plaintiff and $106 86 damages, being at the rate of 56 cents on the dollar on plaintiff's claim.

In October Term, *Davis*, for the defendant, obtained a rule calling on the plaintiff to shew cause why there should not be a new trial on the law and evidence, and because there was no privity of contract and no cause of action that would sustain a declaration on the common counts; and because the verdict was perverse and against the Judge's charge.

Mackintosh shewed cause, contending that the plaintiff was clearly entitled to recover under the count for money had and received by the defendant to the use of the plaintiff, citing *Israel* v. *Douglas*, 1 H. Bl. 239; *Wilson* v. *Coupland*, 5 Pal. 228; *Walker* v. *Rostrom*, 9 M. & W. 411.

ROBINSON, Co. J.—The facts of this case seem to me to come fully within the principle established by *Walker* v. *Rostrom*, 9 M. & W. 411. There was an appropriation of a sum of money coming to Featherstone, Gerard, Bycraft and Company, from the defendant to the plaintiff. This arrangement was made by the defendant, the plaintiff, and one of the firm. According to Lord Abinger, such an arrangement could not be altered without the consent of all parties. The plaintiff can therefore recover the amount as money had and received to his use.

Rule discharged.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

Non-residents—Collection of Taxes.

GENTLEMEN,—I beg to ask you, through the press, in a way you may see fit to let it be known, whether the treasurer that gives the wild lands to the sheriff for sale every five years for taxes, or another that at the end of six or seven years offers them for sale, fulfils the Assetsment Act of 1853.

Lands assessed in 1855, due 1st May, 1856; in 1856, due 1st May, 1857; in 1857, due 1st May, 1858; in 1858, due 1st May, 1859; in 1859, due 1st May, 1860.

Please to let it be known whether the lands assessed in 1855 should now be offered for sale by the sheriff, and whether the county treasurers should not pay over the balance of wild land taxes when they strike the balance, and add 10 per cent. on the 1st May, and not on the 1st of January in the following year, as is the case in certain counties.

The explanation of the above will be of great service to new townships.

I have the honor to be, Gentlemen, your obt. servt.,

J. F.,

Treasurer of a new Township.

Tilbury East, 25th June, 1860.

[Our correspondent does not seem to understand the working of the Assessment Act as regards the collection of taxes due on the lands of non-residents. Rather than answer his questions in detail, we shall explain the law in general terms.

No land shall be sold for taxes unless a portion thereof has been due for five years. (Con. Stat. U. C. cap. 55, sec. 123.) Then the treasurer of the county is to issue a warrant to the sheriff of the county, commanding him to levy upon the land for the arrears due thereon, with costs. (Sec. 124.) After the issuing of the warrant, the treasurer is to receive no payment on account of the sums contained in the warrant. (Sec. 128.) Immediately upon receipt of the warrant, the sheriff is to advertise a list of the lands. (Sec. 128.) The day of sale is to be more than three months after the first publication of the list. (Sec. 130.) The sheriff, at the time and place appointed for the sale, is to sell by public auction so much of the land as may be sufficient to discharge the taxes, and all lawful charges in and about the sale, and the collection of the taxes. (Sec.137.) Within one month after sale, the sheriff is required to make a detailed return to the treasurer, of each separate parcel of land included in the warrant, and to pay him the money levied by virtue thereof. (Sec. 144.) The owner of the land sold may, at any time within one year from the day of sale, redeem the estate sold, by paying or tendering to the county treasurer, for the use and benefit of the purchaser, the sum paid by him, together with 10 per cent. thereon. (Sec. 148.) All moneys received by the county treasurer, on account of the taxes on non-residents' lands, whether paid to him directly or levied by the sheriff, constitute a distinct and separate fund, called the Non-resident Land Fund of the county. (Sec. 154.) The treasurer is required to open an account for each local municipality with that fund. (Sec. 155.) The surplus moneys in the fund may, by the Council of the county, be from time to time, by by-law, apportioned amongst the municipalities ratably, according to the amounts received and arrears due on account of the non-resident lands in each municipality. (Sec. 163.)—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. THOMPSON v. ROSS. *Nov.* 2.

Seduction—Services—Child in service doing work for parent with permission of master.

The daughter of the plaintiff was in the service of the defendant's mother, and with the permission of her mistress, worked to assist her mother in making shirts at her mistresses house, after the domestic labours of the day were at an end.

Held that there was no such service rendered to the mother as entitled her to maintain an action for seduction.

C. P. MORRIS v. BARRETT. *Nov.* 15.

Payment under a judge's order—When to be made—The day named in the order falling on Sunday.

Where a payment was to be made under a judge's order on the 25th day of the month, and that day fell on a Sunday, and tender of it was made on the Monday before judgment had been signed which was afterwards done.

Held, that the tender was made at the proper time and that the judgment should be set aside.

C. P. HEMMINGS v. HALL, ET AL. *Nov.* 9.

Escape—Damages—Payment by execution creditor to Sheriff—Receipt of money from sheriff by plaintiff's attorney.

A. having recovered in an action judgment against B. for £15 5 B was taken in execution on a *ca sa*, B. paid the £45 5 to the sheriff who thereupon let him out of custody. The attorney who had been employed to issue execution authorised F. to receive the money so paid to the sheriff; the sheriff paid F. £20 of the £45 5 of F. promising to bring the Attorney's receipt for the money, whereupon F was to receive the remaining £25 5. F. disappeared with the £20. A brought an action against the sheriff for the escape, the sheriff paid £25 into court, and A. replies—damages *ultra*.

Held, that on this issue the defendant was entitled to the verdict.

C. P. RAMAZZOTTI v. BOWRING. *Nov.* 24.

Undisclosed principal—False representation by clerk—What question to be left to the jury.

In an action by an undisclosed principal for goods supplied to the defendants by his clerk N. It appeared that N. was indebted to the defendants, and that upon B., one of the defendants, applying to him for payment, he represented himself to be "the Continental Wine Company," and got him to take some wine and spirits in part payment of the debt There was no evidence to show that the defendants knew that N. was only clerk to the plaintiff. The Judge's direction to the jury was, that if they believed that the Continental Wine Company was at the time of the contract being entered into carried on by the plaintiff, he was entitled to recover, notwithstanding that N. represented himself to be the Continental Wine Company and to be the principal in the contract.

Held, that the direction was wrong, and that the proper question to be left to the jury was, whether the plaintiff allowed N. to hold himself out as the owner of the Continental Wine Company, so that a person dealing with him might suppose that he was dealing with the principal.

EX. WHITE v. LEESON. Dec. 7.

Tenant for life—Act enabling to grant leases—Power to lay out ways

By a private act for enabling a tenant for life to grant leases, it was enacted that "it should be lawful for him to lay out and appropriate any part of the land and hereditaments therein authorised to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants and occupiers thereof."

Held, that it was competent for the tenan for life to lay out and appropriate part of the lands as a private road, and grant a right of way thereupon to some only of the lessees under the powers of the act.

It was contended that a road laid out pursuant to the act should by virtue of the act be for the benefit of all. But the Court said that would go to show that if a square with large houses were set out with an enclosure, all the tenants on the estate would have a right to walk in it, though they live in cottages at a distance.

EX. WARLOR v. HARRISON. Nov. 26.

Auctioneer—Sale without reserve—Principal and Agent—Pleading—Amendment.

An advertisement of sale by auction without reserve, means that neither the vendor, nor any person on his behalf shall bid, and that the property shall be sold to the highest bidder.

At such sale the plaintiff was the highest *bona fide* bidder for a mare; but the auctioneer knocked down the lot to the next bidder, who was the owner, and entered his name in the sale book as purchaser. The plaintiff tendered the price which he had bid, and demanded the mare, but the auctioneer refused to deliver her to him.

Held, that the auctioneer was liable to the plaintiff in an action for breach of contract.

Held, also, by MILLES J., and BRAMWELL, B. that upon the evidence in the case the auctioneer was liable to the plaintiff for the breach of an undertaking on his part that he had authority to sell without reserve, and that the declaration ought to be framed accordingly.

Held, (affirming the judgment of the Queen's Bench) that the auctioneer was not liable upon a count charging him with a breach of duty as agent of the plaintiff.

Before the contract has been complete, the owner may revoke his authority to the auctioneer to sell; but at the peril of having to indemnify the auctioneer, if, by reason of his employment he has incurred any liability. But held that in this case the bidding of the owner of the mare did not amount to such revocation.

The court will exercise largely it powers of an amendment, in order to determine the real question in controversy; and in the case allowed the pleadings to be amended.

CHANCERY.

M. R. VEAL v. VEAL. July 26.

Donates Mortis Causa—*Unindorsed Promissory Note.*

A delivery of unindorsed promissory notes payable to the donatrix, held a sufficient delivery to constitute good *donates mortis causa.*

M. R. GOULDER v. CANNON. Nov. 5.

Will—Separate estate—Husband and Wife.

A devise to trustees for "the use and benefit of a woman, she to receive the rents from the tenants herself whether married or single," does not create a separate use.

A direction in a Will that no sale or mortgage should be made by the devisee will go for nothing, unless the estate be properly limited to him.

L. C. PIGGOTT v. STRATTON. Nov. 12.

Building lease—Covenant—Representation.

A lease for 999 years, with restrictive covenants as to the mode of building upon the land demised, was granted to S., who sold a house built thereon to P., representing that he S., was prevented by his lease from building on other parts of the land, so as to interrupt the sea view. S. also granted an under lease to H., to whom S. made similar representations; S. covenanting to observe the lessees' covenants in the original lease, and to indemnify H. in respect to any breach. H. assigned his under lease to P. Subsequently S. surrendered his original lease, and obtained a fresh one not containing the restrictive covenants.

Held, that the covenant of S. in the under lease to observe all the covenants in the original lease, had the same effect as if the latter covenants had been repeated at length in the under lease; and, also, that S. was bound by his representations.

L. C. THIEDEMANN v. GOLDSCHMIDT. Nov. 8.

Bill of Exchange—Acceptance obtained by fraud—Title of indorsee for value—Jurisdiction.

H drew a bill of exchange on the plaintiff, and induced him to accept it by sending with it a forged bill of lading. H then indorsed the bill of exchange to the defendants for value without notice of the forgery. The plaintiff filed a bill against the indorsers, to restrain them from suing him at law, and praying that the bill might be delivered up to be cancelled.

Held, that the fraud practiced on the acceptor was no defence against the indorsers for value.

Fraud being a good defence at law to an action on a bill of exchange, there is no ground for seeking relief in equity. And *semble* the bill in the present case would have been demurrable if it had not prayed that the bill of exchange might be delivered up.

M. R. PEDDER v. PEDDER Nov. 11.

Revivor—Executor.

Where there is a sole plaintiff in a suit, and a sole defendant, and the defendant dies, having appointed the plaintiff his sole executor, an order to revive may be obtained by the plaintiff as executor, against the persons beneficially interested who have been summoned to attend the proceedings in Chambers.

M. R. *In Re* DAVIE, *Exparte* WHITE. Nov. 12.

Taxation—Solicitor—Costs.

Where a bill of costs is paid under a protest, an order to obtain some document on which the solicitor whose bill of costs is sought to be taxed has a lien, the objectionable items in the bill ought to be specified before payment.

V. C. S. HANCOCK v. ROLLISON. Nov. 16.

Practice—Dismissal of bill for want of prosecution.

A bill was served on a defendant on the 14th of March, to which an answer was put in on the 28th of April following; the answer became sufficient on the 16th of June. No further steps having been taken in the cause, the defendant in the following November, moved to dismiss for want of prosecution. The court refused the plaintiff leave to amend, and dismissed the bill with costs.

M. R. STAMSFIELD HALLAM. Nov. 11.

Husband and Wife—Equity of Redemption—Mortgage.

Where a husband and wife have joined in a Mortgage of the wifes copyhold and freehold estate; and the equity of redemption has been reserved to the husband and his heirs *simpliciter*, and the husband during their joint lives pays off the mortgage with the wifes money, and dies, leaving their son his heir-at-law; the court will, in the absence of any evidence of an intention, alter the course of the descent of the equity of redemption, decreeing a reconveyance by the husband's heir to the use of the wife in fee.

M. R. THOMPSON v. ROBINSON. Nov. 18.

Will—Legacy—Nephew and Niece and Grand Nephew, and Grand Niece.

A bequest to A. and B., as "nephew and niece," although in the subsequent part of the Will, the testator alludes to them as the children of his nephew, will not be sufficient to indicate that in a subsequent bequest to nephews and nieces," the testator intended that his grand nephews and grand nieces should be included.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

MICHAEL LAWLOR, Esq., M D., Associate Coroner City of Toronto.

LORENZO CLOSSON, Esq., M.D., Associate Coroner United Counties of York and Peel.

DANIEL COON, Esq., M.D., Associate Coroner County of Perth.—(Gazetted 21st July, 1860.)

NOTARIES.

ROBERT MORTIMER WILKISON, of Kingston, Esquire, Barrister at Law, to be a Notary Public in Upper Canada.

JOHN WESLEY KERR, of Cobourg, Esquire, Attorney at Law, to be a Notary Public in Upper Canada.

GEORGE SECORD, of Gainsborough, Esquire, to be a Notary Public in Upper Canada.

CHRISTOPHER ZOEGER, of Petersburgh, Esquire, to be a Notary Public in Upper Canada.

WILLIAM CANNON, of Westmeath, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 21st July, 1860.)

TO CORRESPONDENTS.

A DIVISION COURT CLERK—F. OSLER—Under "Division Courts," p. 181.

J. F.—Under "General Correspondence," p. 190.