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DIARY FOR OCTOBER.

1. Mon... County Court and Surrogate Court Term begins.
6. Satur... County Court and Surrogate Court Term ends.
7. SUN.... *19th Sunday after Trinity.*
8. Mon ... York and Peel Fall Assizes.
14. SUN.... *20th Sunday after Trinity.*
18. Thurs.. *St. Luke.*
21. SUN.... *21st Sunday after Trinity.*
28. SUN.... *22nd Sunday after Trinity. St. Simon and St. Jude.*
31. Wed... All Hallow Eve.

THE

Upper Canada Law Journal.

OCTOBER, 1866.

ATTORNEYS AS ADVOCATES.

It is said that some of the attorneys residing in a county town in the eastern section of Upper Canada, are in the habit of appearing at the County Court sittings there, exercising the functions of barristers, and wearing their distinctive dress. It is also said that the county judge, upon his attention being drawn to the matter, stated that he was not supposed to know who were barristers, and that he took it for granted that gentlemen of the profession would not venture to do that which they were not authorized to do.

We might also take this for granted, if the fact of their so appearing were not to the contrary; and if this be so, it becomes a question whether such a course is authorized; and if not, whether the practice ought to be continued.

We think there can be but little question that attorneys have no right to practise at the bar in county courts, any more than they have in the superior courts; and if they have no such right, it follows, we think, that the judge is bound to take notice of the irregularity. The words of the act are, to our minds, convincing: "The following persons, and *no other*, may be admitted to practise at the bar in Her Majesty's courts of law and equity in Upper Canada." (Con. Stat. U.C., cap. 34, s. 1.) Those who wish to go more fully into the subject may with much benefit examine the very able judgment of his Honor Judge Gowan, in a case of *Regina* v. *Erridge* (3 U. C. L. J. 32).

A large portion of the litigation of the country is conducted in the county courts throughout Upper Canada; and if the privileges which barristers have won for themselves, by an amount of study and an outlay of money not required from attorneys, are to be encroached upon by others, the sooner they know about it the better. It is not a question whether some of them entertain an opinion that they should be permitted so to practise, nor whether some of them would or would not venture to do that which they are not authorized to do, nor even whether some attorneys are not as fully competent to act as advocates as some barristers; but it is a question of right, which, when once determined, should be rigidly and impartially enforced.

So far as we know, the county referred to is the only one in Upper Canada where such a practice is permitted, or perhaps it would be more correct to say, not interdicted.

APPOINTMENT OF OFFICIAL ASSIGNEES.

An important decision has lately been given on this subject which it is advisable to make known to those interested as soon as possible. It came up in Chambers in a case of *Hingston* v. *Campbell* before the Chief Justice of Upper Canada.

Under the Act of 1864 it was necessary that the official assignee to be appointed under a voluntary assignment should be "resident within the district or county within which the insolvent has his place of business." In 1865 an Act to amend the first Act was passed, which by its second section enacts, that "a voluntary assignment may be made to any official assignee appointed under the Act without the performance of any of the formalities or the publication of any of the notices required by sections one, two, three and four of section two of said Act." Now it was thought by most persons that the words "*any official assignee*" enabled an assignment to be made to any assignee no matter in what county he might reside, and numerous assignments were made on this impression.

There are doubtless many good reasons why the Act should bear this wide interpretation, and as is usual in most cases, many against it; but the learned Chief Justice in the case referred to has decided against this view, not being, as he stated, able to satisfy himself that an assignment could be made to the official assignee of another county than that in which the insolvent resided and carried on his business.

This ruling on the part of so careful a judge will, we think, have a very decided effect in putting a stop to the practice that has been alluded to. This has gone so far, we are told, as that assignments have been made by insolvents in Upper Canada to assignees in Montreal. Such a course of proceeding is objectionable in many ways, and it is well that this excess, even of the supposed authority given by the last Act should be restrained.

We shall give a full report of the case of *Hingston* v. *Campbell* in our next issue.

OUR MUNICIPAL INSTITUTIONS.

Our readers will perhaps be interested in knowing that the Municipal institutions, using the words in their wide signification, of this country and the neighbouring Republic, have been the object of a close investigation and thorough enquiry on the part of the government of a continental nation.

The writer had lately a very interesting conversation on the subject with M. Kapnist, a member of the "Private Bureau" of the Emperor of Russia, who represents himself as having been deputed to obtain information and to report the result of his researches, for the purpose of enabling his Government to take such steps as may be deemed advisable, for the purpose of drafting a new scheme of municipal law for Russia.

The mass of people of that country have hitherto had no part in the management of their internal affairs; everything being prescribed, even to the most minute details, by the Emperor or his Ministers, or the Bureau entrusted with each particular department.

The Crimean war, as is said by the Russians themselves, had at least one good effect in showing the necessity of a change in the system. This change was commenced by the emancipation of the serfs, and is to be carried on by degrees, as the peasants obtain sufficient intelligence and knowledge of self-government to enable them to use the power which may be given them without abusing it.

The whole political and social life of Russia is apparently in a transition state, and that power has, with its usual sagacity and far-sightedness, set to work earnestly to ascertain the best means of improving their condition in the premises. The very intelligent gentleman who has been selected for the purpose, appears to be eminently qualified for his arduous task, and has made himself thoroughly conversant with the municipal systems of this country and of the States, which he considers well suited to the expansive country which he is seeking to benefit by his enquiries.

JUDGMENTS.—TRINITY TERM, 1866.

QUEEN'S BENCH.

Present:—Draper, C. J.; Hagarty, J.

Toronto, September 24, 1866.

Riley v. *Niagara District Bank.*—Postea to plaintiff.

Young et al. v. *Taylor.*—Appeal from the decision of the judge of the County Court of the County of Wentworth—dismissed with costs.

Flowers v. *McNabb.*—Appeal from the decision of the judge of the County Court of the County of Grey—dismissed without costs.

Ferguson v. *The Corporation of the Township of Howick.*—Appeal from the decision of the judge of the County Court of the County of Wellington *Held*, that an action against a municipal corporation for injuries sustained, in consequence of non-repair of a road within their jurisdiction, is a local action. *Held* also, that the objection to trial out of the proper county can only be taken advantage of when apparent on the face of the declaration by demurrer or by plea, and not merely on the evidence. But as in this case, the objection, though not apparent on the record, was to the jurisdiction, appeal allowed without costs.

Scratch v. *Jackson.*—Rule absolute to reduce damages to 1s., unless within ten days demandant elect to have a new assessment.

Campbell v. *Coulthard.*—Rule absolute to enter non-suit.

Fisher v. *Johnson.* — Judgment for plaintiff with costs.

Fisher v. *James.*—Same judgment.

Houghton v. *Thompson.*—Rule absolute for new trial—costs to abide the event.

Smith et al. v. *Hall.*—Rule discharged.

Amey et al. v. *Card et al.*—Rule discharged. Leave to appeal granted.

Chichester v. *Gordon et al.*—*Held* that a judge under Con. Stat. U. C., cap. 245, sec. 41, has no power to make a conditional order of committal, —thus to be committed in default of giving a note or making a payment, &c. *Held* also, that if two or more join in a defence which is good as a defence for one only, the plea is bad as to all. *Per cur*, judgment for plaintiff on demurrer to pleas.

Markham v. *The Great Western R. Co.*—Error from County Court of Essex—judgment of court below reversed.

Clifton v. *Ryan.*—Rule discharged.

The Queen v *The Corporation of the Township of Hamilton.*—*Held* that service on Saturday at four o'clock is not good service of a four days' notice for following Wednesday, and so case must be again set down before court will pass sentence on defendants.

Jones et al. v. *Guess.*—Rule discharged with costs.

Huskinson v. *Lawrence.*—Rule discharged (application for leave to appeal, stands).

Deverall v. *G. T. R Co.*—Rule absolute to enter non-suit. Leave to appeal granted.

Jones et al. v. *McMullen.*—Rule absolute to enter non-suit.

In the matter of Scott and the Corporation of the Township of Harvey.—Rule absolute to quash by-law with costs.

Hetherington v. *Port Burwell Harbour Company.*—Rule absolute for new trial on payment of costs.

In re Cameron and Kerr.—*Held* that the court has no jurisdiction to entertain application to set aside summarily an award of fence viewers—rule *nisi* refused.

Massachusetts Hospital Company v. *The Provincial Insurance Company.*—Rule absolute to reduce verdict by amount paid into court without costs to either party.

Neill v *McMillan* —Rule discharged.

Corporation of County of Lincoln v. *The Corporation of the Town of Niagara.*—Judgment for defendants on demurrer.

Thornton v. *The Sandwich Plank Road Company.*—*Held* that where the consideration of a contract is executed, defendants, a corporation, cannot, in order to escape payment, set up the want of their corporate seal as a defence. *Per cur*, postea to plaintiff.

Present:—Hagarty, J.

Toronto, Sept. 29, 1866.

Ferguson v. *Carman* —Rule absolute to rescind order, with costs to be paid by the judgment creditor.

Hayball v. *Shepherd.*—Rule discharged (leave to appeal asked and stands).

Clissold v. *Matchell.*—Rule absolute for completion of the case within a month, else leave to appeal rescinded—no costs.

Meyers v. *Baker.*—Rule discharged with costs.

In re McLean v. *The Corporation of the Township of Bruce.*—Rule discharged with costs.

Martin v. *Hanning.*—Stands till next term.

Harvey v. *Woodruff.*—Rule absolute for nonsuit.

City of Toronto v. *The Great Western Railway Co.*—Special case. *Held*, that as the judgment of the County Judge has confirmed the assessment as revised by the Court of Revision, this court cannot review or annul his adjudication.

COMMON PLEAS.

Present: Richards, C. J.; A. Wilson, J.; J. Wilson, J.

Toronto, September 8, 1866.

Dumble v. *Johnson.*—Judgment for defendant.

Hope v. *White.*—Rule absolute for new trial. Costs to abide event.

Pettigrew v. *Doyle.*—Rule absolute for nonsuit.

Fields v. *Livingstone* —Plaintiff's rule to enter verdict for plaintiff discharged.

Helm v. *Crossen.*—Proceedings stayed on payment by defendant of costs of suit and application to amend.

Monk v. *Furlinger.*—Plaintiff's rule for new trial discharged with costs.

Present:—A. Wilson, J., and J. Wilson, J.

Toronto, Sept. 24, 1866.

McCurdy v. *Swift.*—*Held* that an order will lie at the suit of the representatives of a man who was killed by a drunkard, against the tavern-keeper who supplied the spirituous liquor to the drunkard—judgment for defendant on demurrer, with leave to amend.

Milligan v. *G. T. R. Co.*—Rule absolute for new trial—costs to abide the event.

Lancaster Petroleum Company v. *Manus.*—Rule nisi to rescind judge's order refused.

Meyers v. *Brown.*—Rule absolute for new trial, without costs, unless parties agree upon a special case, on or before 5th October next.

Gore Bank v. *Tarbox.*—Rule absolute for new trial—costs to abide the event.

The Queen v. *Sherman.*—*Held per* Adam Wilson, J., that our Con. Stat. U. C., cap. 100, is in effect suspended by the Imperial Mutiny Act, and so not in force. *Held per* John Wilson, J., that the two acts are consistent, and both in force. There being a difference of opinion in the court, the rule was discharged.

Ross v. *The Corporation of Portsmouth.* —Rule discharged—leave to appeal granted.

Koster v. *Holden.*—Rule absolute to set aside non-suit without costs.

Kinsey v. *Newcombe.*—*Held* that a guardian to an infant under the statute cannot maintain ejectment in her own name—rule absolute to rule non-suit.

Steinhoff v. *Birch.*—Rule discharged.

Davies v. *Corbett.*—Rule absolute for new trial; costs to abide the event.

Hesketh v. *Ward* —Rule absolute for new trial, on payment of costs, within four weeks, otherwise rule absolute to enter a non-suit.

Siney v. *Rose.*—Postea to defendant.

McLellan v. *McLennan.*—Appeal from the decision of the judge of the United Counties of Stormont, Dundas and Glengarry—dismissed with costs.

Parke v. *Allen* —Appeal from the decision of the judge of the County of Frontenac—dismissed with costs.

In re Lamb, an Insolvent—Appeal from the decision of the judge of the County Court of the County of Carleton, sitting in bankruptcy, dismissed without costs.

Bank of Montreal v. *Scott.*—To be re-argued as to the effect of the recent enactment abolishing penalties for usury in the case of banks.

Mason v. *Babington*—Rule discharged with costs, except as to second ground of objection, and as to that, costs to be paid by plaintiff.

Lee v. *Hopkinson.*—Rule absolute for new trial; costs to abide the event, unless defendant within a week release plaintiff for rent, and the claim for price of all the goods sold by the defendant to the plaintiff.

Riley v. *Niagara District Bank.*—Postea to plaintiff.

Fisher v. Duncan.—Postea to plaintiff.

The Queen v. *Murphy et al.*—Rule discharged.

CHANCERY—ORDERS OF COURT.

September 10, 1866.

With a view to the more speedy dispatch of business in Chambers, and also to the relief of the Registrar's office, it is ordered as follows:

1. All Decrees and Orders made, after hearing in open Court, or in Chambers, are to be either prepared or examined and settled by a Clerk of the Court to be hereafter called the Judge's Secretary.

2. No minutes of Decrees or Orders are to be prepared or allowed; and all Decrees or Orders are to be prepared and completed immediately after judgment is pronounced.

3. The Court, or a Judge, will from to time to time direct what Decrees and Orders the Secretary is to prepare, and what Decrees and Orders are to be prepared in the Registrar's office.

4. The Secretary is to have the powers given to the Registrar by the 22nd, 23rd, and 42nd Orders of the 6th of February, 1865, respecting the passing of Decrees or Orders.

5. After any Decree or Order prepared by the Secretary is completed and engrossed, or any other Decree or Order is examined by him, he is to mark the same with his initials, and to deliver the same so marked to the Registrar, who is to sign and enter the same as hitherto.

6. The Entering Clerk is to note in the margin of the book the day of entering the Decree or Order, and is at the foot of the Decree to note the same date, and the book in which the entry has been made and the pages of such book.

7. In the absence of the Judge, the Secretary is to sit in Chambers, and hear any applications which the parties may choose to bring before him for this purpose; and he is immediately thereafter to submit the same, with his opinion thereon, to a Judge for his order; and the Secretary is to adjourn to a future day any applications he does not hear and of which notice was given.

8. Every Order made under the last preceding section is to be prepared by the Secretary, and signed and entered by the Registrar as hitherto; and a motion to set aside or vary the same is in the first instance to be to a single Judge upon notice.

9. When a Queen's Counsel has held a sitting of the Court under the Statute in that behalf, he is to enclose to the Secretary, as soon thereafter as may be, a statement signed by him, of his Decree in each case heard by him, with the date and place of hearing, and is to set forth the terms of his Decree either at full length or otherwise, as the case may require. His judgment containing the reasons for his Decree, if he thinks fit to state the same in writing, is also to be transmitted to the Secretary for the information of the Judges and the parties.

10. A Decree made by a Queen's Counsel is to be expressed in the body thereof to be the Decree of the Court, as if pronounced by one of the Judges; but the name of the Queen's Counsel is to be given in the margin.

11. The following books, relating to money in court, are hereafter to be kept under the superintendence of the Registrar and Secretary:

I. A book of directions to the bank to receive money.
II. A book of cheques.
III. A Journal.
IV. A Ledger.
V. A Balance Book.
VI. A book of the mortgages and other investments made under the authority of the Court.

12. The book of directions and the book of cheques are respectively to be in the same form as hitherto, or in such other form as the Judges from time to time direct or approve. But the cheques are to specify in the body thereof the amount of interest, if any, payable therewith; and the directions and cheques are respectively to be numbered consecutively, commencing with number one.

13. The Journal is to shew the total amount of money in Court on the 1st of July, 1866, (including the money belonging to suitors, and the money at the credit of the Suitors' Fee Fund Account, and of the General Interest Account), and all subsequent transactions; and the sums paid into and out of Court are hereafter to be entered from day to day; and the journal is to be so arranged and kept that at the foot of each page will appear the total amount from time to time in the bank, assuming all cheques to have been presented.

14. The Ledger is to contain a separate account for every cause or matter in which there is money in Court, and also the Suitors'

Fee Fund Account, and the General Bank Interest Account, all which accounts are to shew correctly the state and condition thereof for the time being.

15. In each of the suitors' accounts there are, from time to time, to be entered the date, purport, or short material contents, of all Decrees, Orders or Reports affecting the same; also, every sum paid into or out of the Court, and by whom paid, and for what paid, and under what authority. There is also to be credited to the account the bank interest computed and included in any Decree, Order or Report, and a corresponding transfer of interest is to be made at the bank. There is likewise to be entered in the account a statement or memorandum of any other matters material for the information of the Court or its officers, or of any of the parties.

16. To facilitate the keepingof the proper accounts, reports of sales are to be set forth briefly the terms of the sale, so far as relates to the payment of purchase money; and other reports affecting money in Court, or to be paid into Court, are to set forth in figures in a schedule a brief summary of the sums found by the Report, and which may be paid or payable into or out of Court.

17. Every deposit on Rehearing, or on a Decree or an Order for Sale, is hereafter, like other moneys, to be paid by the party making the deposit into the bank to the credit of the cause or matter.

18. Money ordered to be paid into Court is to be paid into the Commercial Bank, with the privity of the Registrar or Secretary. All sums of money paid out of Court are to be so paid upon the joint cheque of the Resistrar and Secretary, countersigned by one of the Judges, and not otherwise. The 8th sub-section of the 43rd Order of the 3rd of June, 1853, is hereby rescinded.

19. Any person desiring to pay money into Court is to produce to the Registrar or Secretary the Decree or Order, if any, under which the same is payable, and is to file a Præcipe in the form following:

In Chancery:

(*Short style of cause.*)

Required, a direction to the Bank to receive from——$——, payable into Court to the credit of this cause, under——dated——, (*or as the case may be*).

A. B., Defendant's Solicitor,

(*Date*). (*or as the case may be*).

20. The Bank, on receiving any sum of money to the credit of any cause or matter, is to prepare a receipt therefor in duplicate; and one copy is to be delivered to the party making the deposit, and the other is to be posted or delivered on the same day, addressed to the Court.

21. Cheques may be prepared by either the Registrar or Secretary, and are to be signed by both.

22. The person entitled to a cheque is to produce and leave with the Registrar or Secretary the Decrees, Orders and Reports entitling such person to the money, and is to file a Præcipe in the form following:

In Chancery:

(*Short style of cause.*)

Required a Cheque for $——[with $—— interest thereon from——to——(*being the period, if any, for which interest is payable under the Decree or Order of the Court, but has not been already taken into account and computed*)], payable to ——; and the following papers are produced herewith (*naming the Decrees, Reports, &c., shewing the party's right to the Cheque, thus*:

Decree dated——,
Report dated——, &c.)

A. B., Plaintiff's Solicitor,

(*Date*) (*or as the case may be*).

23. If the Registrar, in case the application is to him, finds the party entitled as mentioned in the Præcipe, he is to prepare and sign the cheque accordingly, computing the interest, if any, that is payable therewith, and inserting the amount in the cheque; and he is then to deliver to the Secretary the cheque and the papers produced to shew the party to be entitled thereto; and the Secretary is to examine the papers produced, and, on verifying the party's right to the sums mentioned in the cheque, he is to add his signature to the cheque, and to procure the same to be countersigned by a Judge.

24. When the Secretary prepares the cheque, the same is to be examined by the Registrar in the same manner, and is to be signed by him and countersigned by the Judge.

25. The Decrees, Orders, and Reports, produced as aforesaid, are to be redelivered to the party entitled thereto, with the cheque.

26. The Balance Book is to contain a statement entered therein quarterly, of the balances at the credit of the various accounts in the ledger at the date of such statement, such balances are to be made up on the 1st of January, 1st of April, 1st of July, and 1st of October of every year, after a comparison of the accounts in the ledger with the bank's accounts. This comparison is to be made by the Registrar and Secretary jointly, and the list entered in the balance book is to be signed therein by the Registrar and Secretary.

27. In the Book of Investments are to be entered, under the heading of the cause or matter in which any mortgage or other security has been taken by the order of the Court in the name of the Registrar or any other Officer of the Court, the date and short material contents of such mortgage, and of all subsequent orders and proceedings in relation thereto, until such mortgage is discharged by the order of the Court.

28. A list, signed by the Registrar and Secretary, of all the mortgages outstanding on

the 1st January and 1st July, in each year, is to be delivered to the Judges within ten days thereafter, and such list is to set forth in convenient form:

I. The short style of the cause or matter.
II. Date of order under which mortgage executed.
III. Date of mortgage.
IV. Amount.
V. When payable.
VI. To whom.
VII. For whose benefit.
VIII. What sums, if any, overdue for principal or interest.
IX. Name of mortgagor.
X. Locality (not description) of mortgaged property.
XI. Remarks.

29. The books kept under these orders are to be open to inspection; and the Registrar or Secretary is to give a certificate of the state of any account, or an extract therefrom, at the desire of any party interested, or his solicitor.

30. The Secretary is to take and dispose of such references under the Act for Quieting Titles, and otherwise, and to perform such other duties, and render to the Judges such other services, besides those hereinbefore named, as the Judges may respectively, from time to time, require.

31. The Secretary is to receive for drawing Decrees, taking references, or other business performed by him instead of some other Officer of the Court now performing such business, the same Fees as are now payable therefor; and no fees not hitherto payable by suitors are to be hereafter payable by reason of anything contained in these Orders. The Secretary is to keep in a book an account of the fees received by him, and to report to the Judges quarterly the particulars and amount thereof.

32. Where the name and place of business of a Solicitor have been indorsed upon any pleading or proceeding filed, it shall not be necessary to indorse such place of business on any pleading or proceeding in the same cause or matter subsequently filed, or subsequently served on any person who was served with the former proceeding.

33. When an acceptance of service of any Bill, Order, or other proceeding, and an undertaking to answer or appear thereto have been given by a Solicitor, such acceptance and undertakiug are to be equivalent to personal service upon the party for whom the same have been given, within the meaning of the Orders requiring personal service, and an affidavit of personal service is in such case dispensed with.

P. M. Vankoughnet, C.
O. Mowat, V. C.

ACTS OF LAST SESSION.

An Act for more effectually securing the Liberty of the Subject.

[Assented to 15th August, 1866.]

Whereas the Writ of *Habeas Corpus* hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof; and whereas extending the remedy af such Writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public; and whereas the provisions made by an Act passed in England in the thirty-first year of King Charles the Second, intituled: "An Act for the better securing the liberty of the Subject, and for prevention of imprisonment beyond the seas," only extend to commitment or detainer for criminal or supposed criminal matters; Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. When any persons shall be confined or restrained of his or her liberty (except persons imprisoned for debt, or by process in any civil suit, or by the judgment, conviction or decree of any Court of Record, Court of Oyer and Terminer or general Gaol Delivery, or Court of General Quarter Sessions of the Peace, or Recorder's Court, not being a Court wherein the Recorder shall sit alone without a jury) within Upper Canada, and they are hereby required upon complaint made to them by or on behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed,) that there is a probable and reasonable ground for such complaint, to award in vacation time, a Writ of *Habeas Corpus ad Subjiciendum* under the seal of the Court wherein the application shall be made, directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same, or before any Judge in Chambers for the time being.

2. If the person or persons to whom any writ of *Habeas Corpus* shall be directed according to the provisions of this Act, upon service of such writ, either by the actual delivery thereof to him, her or them, or by leaving the same at the place where the party shall be confined or restrained, with any servant or agent of the person or persons so confining or restraining, shall willfully neglect or refuse to make a return or pay obedience thereto, he, she or they shall be deemed guilty of a contempt of the Court, under the seal whereof such writ shall have issued, and it shall be lawful to and for the Judge before whom such writ shall be returnable, or any Judge in Chambers, upon proof made by affidavit of wilful disobedience of the said writ to issue a warrant under his hand and seal for the ap-

prehending and bringing before him or some other Judge of the said Courts, of the person or persons so wilfully disobeying the said writ, in order to his, her or their being bound to the Queen's Majesty, with two sufficient sureties, in such sum as in the warrant shall be expressed, with the condition to appear in the Court under the seal of which the writ was issued, at a day in the same or any ensuing term to be mentioned in the said warrant, to answer the matter of contempt with which he, she or they are charged; and in case of neglect or refusal to become bound as aforesaid, it shall be lawful for such Judge or Court to commit such person or persons so neglecting or refusing, to the common gaol of the county wherein such person resides, or may be found, there to remain until he, she or they shall have become bound as aforesaid, or shall be discharged by order of the Court in term time, or by order of a Judge in vacation; and the recognizance and recognizances to be taken thereupon shall be returned and fyled in the same Court, and shall continue in force until the matter of such contempt shall have been heard and determined, unless sooner ordered by the Court to be discharged; Provided that if such writ shall be awarded so late in the vacation by any one of the said Judges, that in his opinion obedience thereto cannot be conveniently paid during such vacation, the same shall and may, at his discretion, be made returnable in the Court wherein the application is made, at a day certain in the next term; and the said Court shall and may proceed thereupon, and award process of contempt in case of disobedience thereto, in like manner as upon disobedience to any writ originally awarded by the said Court; and if such writ shall be awarded in term time so late that, in the judgment of the Court, obedience thereto cannot be conveniently paid during such term, the same shall and may, at the discretion of the said Court, be made returnable at a day certain in the then next vacation, before a judge in Chambers, who shall and may proceed thereupon in such manner as by this Act is directed concerning writs issuing in and made returnable during the vacation.

3. In all cases provided for by this Act, although the return to any writ of *Habeas Corpus* shall be good and sufficient in law, it shall be lawful for the Court or for any Judge before whom such writ may be returnable to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation (in cases where an affirmation is allowed by law,) and to do therein as to justice shall appertain; and if upon such return it shall appear doubtful on such examination, whether the material facts set forth in the said return, or any of them, be true or not, in such case it shall and may be lawful for the said judge of the Court to let to bail the said person so confined or restrained, upon his or her entering into a recognizance, with one or more sureties or in case of infancy or coverture, or other disability, upon security by recognizance in a reasonable sum to appear in the Court wherein the application is made, upon a day certain in the term following, and so from day to day as the Court shall require, and to abide such order as the Court shall make in and concerning the premises; and any Judge before whom such writ shall be returned shall transmit into the same Court the said writ and return, together with such recognizance, affidavits and affirmations; and thereupon it shall and may be lawful for the said Court to proceed to examine into the truth of the facts set forth in the return, in a summary way by affidavit or affirmation (in cases where by law affirmation is allowed), and to order and determine touching the discharging, bailing, or remanding the party.

4. The like proceeding may be had in the Court for controverting the truth of the return to any such writ of *Habeas Corpus* awarded as aforesaid, although such writ shall be awarded by the said Court itself, or be returnable therein.

5. In all cases, in which a writ of *Habeas Corpus* shall be issued under the authority of this Act or of the said Act of the thirty-first year of the reign of King Charles the Second or otherwise, it shall and may be lawful for the Judge or Court ordering the issue of such writ, or for the Judge before whom such writ shall be returnable, either in term time or vacation, to direct the issuing of a writ of *certiorari* out of the Court from which such writ of *Habeas Corpus* shall have issued, directed to the person or persons by whom or by whose authority any such person shall be confined or restrained of his or her liberty, or other person having the custody or control thereof, requiring him to certify and return to any Judge in Chambers or to the Court, as by the said writ shall be provided, all and singular the evidences, depositions, convictions, and all proceedings had or taken, touching or concerning such confinement or restraint of liberty, to the end that the same may be viewed and considered by such Judge or Court, and to the end that the sufficiency thereof to warrant such confinement or restraint, may be determined by such Judge or Court.

6. In case any person confined or restrained of his or her liberty, as aforesaid, shall be brought before the Court in term time upon a writ of *Habeas Corpus*, and shall be remanded to custody again upon the original order or warrant of commitment, or by virtue of any warrant, order or rule of such Court, it shall and may be lawful for such person to appeal from the decision or judgment of the said Court, to the Court of Error and Appeal; and it shall be the duty of the Clerk of the Court whose decision or judgment shall be appealed from, upon notice to be given by or on behalf of the person so remanded to custody, to certify under the seal of the Court, the writ of *Habeas Corpus* the return thereto, and all

and singular the affidavits, depositions, evidence, conviction and other proceedings returned to or had before the said Court, unto the Court of Error and Appeal; and the said Court of Error and Appeal shall thereupon hear and determine the said appeal without any formal pleadings whatever: and if the said Court of Error and Appeal shall adjudge or determine that such confinement or restraint is illegal, such Court shall certify the same, under the seal of the said Court, to the person or persons having the custody or charge of the person so confined or restrained, and shall order his immediate discharge, and he shall be discharged accordingly.

7. The several provisions made in this Act, touching the making Writs of *Habeas Corpus* issued in time of vacation, returnable into the said Courts, or for making such writs awarded in term time, returnable in vacation, as the cases may respectively happen, and also for making wilful disobedience thereto a contempt of the Court, and for issuing warrants to apprehend and bring before the said Courts, Judge or any of them, any person or persons willfully disobeying any such writ, and in all cases of neglect or refusal to become bound as aforesaid, for committing the person or persons so neglecting or refusing, to gaol, as aforesaid, respecting the recognizances to be taken as aforesaid, and the proceeding or thereon, shall extend to all Writs of *Habeas Corpus* awarded in pursuance of the said Act passed in England in the thirty-first year of the Reign of King Charles the Second, or otherwise, in as ample and beneficial a manner as if such writs and the said cases arising thereon had been hereinbefore specially named and provided for respectively.

8. The said Court of Error and Appeal may from time to time and as often as it shall see occasion, make such rules of practice in reference to the proceedings on Writs of *Habeas Corpus* as to the said Court may seem necessary and expedient.

9. Nothing in this Act shall be held to impair or interfere with an Act passed during the present Session of Parliament intituled "An Act to authorize the apprehension and detention until the eighth day of June one thousand eight hundred and sixty-seven of all such persons as shall be suspected of committing acts of hostility or conspiring against Her Majesty's person and Government," but this Act shall be read therewith and as being subject thereto.

To the astonishment of the public no less than to the dissatisfaction of the lawyers, Mr. Walpole has refused the pardon so justly demanded for Mr. Toomer, intimating to the applicants that their proper course will be to indict the prosecutrix for perjury, when the convict will be admitted as a witness to tell his own story upon oath.—*Law Times.*

SELECTIONS.

DIRECTION TO JURY AS TO COSTS.

One of the most frequent questions asked by a jury before delivering a verdict in an action of tort, is—What amount of damages will carry costs? The rule has hitherto generally been to refuse the information demanded. Thus, at Wells the other day, Mr. Justice Blackburn refused to answer the question on the ground that the jury's sole duty is to say what damage the plaintiff has suffered, and then the Court says whether he deserves costs or not. But we observe that the Lord Chief Justice Erle, one of the most eminent of our Judges, acted at the recent Norwich Assizes on a contrary principle. At the close of the case of *Athol* v. *Seman*, an action of libel brought by the deputy-chief constable of the Norfolk constabulary force against the editor of the *Norwich Argus*, the jury "asked his Lordship what amount of damages would carry costs," and were informed that forty shillings would do so. Eventually they found a verdict for the plaintiff—damages one farthing.

Now we cannot doubt that the distinct knowledge of the sum which carried costs must have influenced the decision of the jury, and, with the greatest respect, we do not think that such knowledge should have been permitted to form an element in their decision. The old view of the matter, which is still adopted by most of our judges, seems to us preferable to the new. The statutes regulating costs are numerous, and depend in many cases on a variety of circumstances which have nothing whatever to do with the merit of the case. Take for example an action of tort capable of being tried in a county court. There to entitle himself to costs if he sue in a superior court, the plaintiff must recover more than £5. Now suppose a jury really believed him to have suffered in an action against a carrier, for instance, for delaying a parcel, only two pounds of pecuniary damage, but, at the same time, to have sustained a good deal of worry and mental anxiety, they would probably desire to give him his costs. But are they, from compassion or any similar motive, to mulct a defendant of £5 just because the parties might have settled their dispute in the county court? Clearly their duty, and their sole duty, is to assess the damage actually sustained and leave the rest to law. We are far from saying that in *Athol* v. *Seman* there may not have been some reasons not apparent from the report to justify the course taken by the Chief Justice. But, as a rule, it appears decidedly the best way to leave juries in the dark as to the exact consequences, pecuniary or otherwise, of their verdict. In civil and criminal cases the less a jury knows of the costs and punishment which will follow their verdict the more likely they will

be to decide "according to the evidence." It is the business of the Legislature to provide that Justice shall be done between plaintiff and the defendant in the former case, and between the Crown and the prisoner in the latter. To take a familiar illustration—if it were not a matter of common notoriety that murder was punished by death, there would be fewer unsatisfactory acquittals of murderers. It is the fear of "consequences" which often leads a jury astray when trying a capital charge.—*Solicitors' Journal.*

PUBLIC NUISANCES.

Hon. John M. Read, one of the Justices of the Su reme Court of Pennsylvania, in a case before him, a short time since laid down, very emphatically, the law upon the nature and abatement of nuisances. The matter came before him at *nisi prius* on a complaint against the erection and maintainance of a Plaining Mill. At the outset, the Judge thus stated the general priuciples governing the case. He said:

"A glass-house, a chandler-shop, a swine-yard, a pig-sty, a pig boarding house, a soap-factory, a tallow-furnace, a slaughter-house, a bone boiling establishment, a hores-boiling establishment, a mill dam, a melting-house of animal fat and tallow, a cotton press, finishing steam-boilers, the use of a public place for immigrants, brick-burning, laying up wet jute, storing wood, naptha, gunpowder, petroleum, or nitro-glycerine, a lime-kiln, a dye-house, a furnace, a smelting-house. a smith-forge, a li'ery stable, a tanne'y, gas-works—all are or have been declared nuisances. Some are nuisances *per se*, others are nuisances according to the locality in which they are placed. In offensive trades either smell or noise may create a nuisance. In dangerous trades the imminent risk of fire or explosion may be sufficient.

Carrying on an offensive trade for twenty years in a place remote from buidldings and public roads does not entitle the owner to continue it in the same places after houses have been built and roads laid out in the neighbourhood, to the occupants of which, and travellers upon which, it is a nuisance. (*Commonwealth* v. *Upton*, 6 Gray, 473.) As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighbourhood of the residences of the citizens. This public policy, as well as the health and comfort of the population of the city demand. (*Brady* v. *Weeks;* 3 Barbour, S. C. B., 159) And in 4 Winconsin, 287, *Douglas* v. *The State*, it was held that it was no defence to an indictment for maintaining a nuisance by means of a milldam, that it was erected before any inhabitants had settled along the margin of the stream flowing by it. 'There is no such thing as a prescriptive right or any other right to maintain a public nuisance' (1 Denio, 525.) 'Nor does the law recognize any distinction between the several points of a city dedicated to public use.' If the one that is before you is sanctioned, a man will have a perfect right to open another opposite this court house.' (Per Sergeant, J., Brightly's N. P. Rep. P. 74)."

He then proceeded to review the testimony, as it was developed in the court below—thus:

"It is established beyond all doubt, that the neighbours were greatly annoyed by the soot, smoke and dust from the mill, the fuel used being the refuse wood, shavings and chips of the mill. This is proved distinctly by Dr. Stewart, Mr. Rhodes and Mr. Jeanes, who specifies also the danger from cinders or sparks, which are also testified to by Messrs. Nathant, Dickey and Coffin; and Mr. Hoxie testified to constant complaints of annoyance from the soot and cinders of the mill, by all sorts of persons in the neighbourhood, his own family and nearly every n ighbour; by Mr. Josiah B. Thompson who says: "There has been constant annoyance to myself and family from the soot, smoke and cinders from the mill. This has been incessant, entering through every window when opened, covering the steps and pavement. It has interfered with the washing and drying of clothes. The nuisance has been a constant and general object of complaint among the neighbours." Mr. Berry, the hotel-keeper, gave similar testimony, and it is closed by a long list of neighbours certifying to the same or similar facts."

He adds:

"I cannot, therefore, hesitate to believe that from the causes assigned, the neighbours have suffered from this mill such annoyances and discomforts as cannot be permitted in the built up and improved parts of our city, and that it must necessarily affect also the value of property in the neighbourhood, and if rebuilt, prevent its future improvement by buildings suited to the street and the locality.

"The same witnesses prove the hazardous nature of the buisness in regard to fire, not only in regard to the mill itself but the neighbouring properties. The mill, it appears, has been on fire several times, and was burnt to the ground on the morning of the 1st of May last, injuring some of the adjoining houses, and there can be little doubt that if it had taken place at night, with a strong north west wind, it would have caused a large destruction of property, with probable loss of life."

Further reviewing the risk of fire from such establishments, he says:

"After this evidence, is it necessary for men to discuss the question whether such a mill is a public or private nuisence? It is a nuisance and the plaintiffs are entitled to relief because, no matter what improvements may be introduced, the building proposed to be erected must be a nuisance, and I should regard myself derelict if I did not interpose the strong arm of the law to prevent it."

An injunction was accordingly granted to restrain the rebuilding of the mill. This case is

so important in its principles and bearings, not only in Philadelphia, but in Pittsburgh, and all the larger towns throughout the common wealth, that it will doubtless go up for ultimate decision to the Supreme Court *in banc.*—*Pittsburgh Legal Journal.*

The consideration with which English judges treat criminals is proverbial, but there is a limit at which complaisance becomes weakness. Mr. Geo. Ellis in a letter to a contemporary, gives an example of judicial courtesy which we should hope will not be followed on any future occasion. Fortunately, for the reputation of our judges, the offender is only a "journeyman judge" sitting in no more distinguished a court than the Middlesex Sessions House. Last week a prisoner was sentenced by this singular personage to eighteen months' imprisonment with hard labour. The prisoner objected, stating his preference for five years penal servitude, the lowest term which can now be given. "Well" said the judge, "perhaps it will be better for you; the sentence is altered to five years' penal servitude." The prisoner bowed his acknowledgments and withdrew.

Now, we have no hesitation in saying that this is not the way in which a judge should exercise the discretion left to him by law. The sentence of imprisonment originally given was either just or unjust. If it was just, to alter it to a sentence the criminal liked better was trifling with justice. If it was unjust, to have proposed to inflict it was a proof of judicial incapacity. Either way, therefore, the judge brought discredit upon his office. A large discretion as to punishment is, we believe wisely left to our judges, who are thus enabled to distinguish the cases of a convict who has erred for the first time and of the "professional criminal." But although a judge of assize seldom abuses his extensive power, we fear the same cannot always be said either of the justices at quarter sessions or the inferior paid magistracy. It would be worth the consideration of the Legislature, whether some means could not be found, without detriment to the public interest, of limiting the discretion of those persons who exercise judicial functions without being thoroughly trained lawyers.—*Solicitors' Journal.*

Grand juries, like petty juries, are very useful as a means of education to those who are called to serve on them. They are also beneficial to the accused in cases where the committing magistrate is without legal experience. And we may add they are a safeguard against private malevolence, which still exists, and, also against political tyranny, which happily does not exist, but which is just possible, may one day be called into existence again.—*Ibid.*

UPPER CANADA REPORTS.

Grant v. The Corporation of the City of Hamilton.

Writs of execution against municipal corporations—Sheriff's poundage and fees thereon—When poundage and when fees

Held 1. That a sheriff is not entitled to poundage on writs against municipal corporations, unless he actually make the money.

Held 2. That where a settlement is obtained by means of the pressure of the sheriff, he is entitled to be paid reasonable compensation for services performed, although no special fee be assigned for such services in any statute or table of costs.

Held 3. That in this case, looking at what the sheriff had done, and what remained to be done, he was entitled to be paid all his disbursements, all fees fixed by the tariff of costs, and half what would have been the amount of his poundage had the money been made, less the disbursements.

Semble, a sheriff is entitled to poundage when he makes the money on a *fi. fa.* against a *corporation*, though he may, under the Municipal Institutions Act, have levied a rate to collect the amount.

[Chambers, August 12, 1865.]

A great many writs, numbering about 100, for claims, amounting in the aggregate to about $200,000, at the suit of different creditors having judgments against the Corporation of the City of Hamilton, including the writ of execution in this case, were delivered to the sheriff of the County of Wentworth, to be executed, and were severally endorsed with direction to the sheriff to levy the amount thereof by rate, pursuant to the 221 section of ch. 54 of the Consol. Statutes of Upper Canada.

Immediately upon receipt by the sheriff of each of the writs, he delivered a copy thereof, and of the endorsement thereon to the City Chamberlain, with a statement in writing of the sheriff's fees, and of the amount required to satisfy the execution, and such statement of the sheriff's fees so delivered, included the charge for the sheriff's poundage.

The writs of *fi. fa.* were sued out by a great many different attorneys, between whom and the sheriff there was a great deal of correspondence, both in writing and by personal interviews, during the time while the said writs were in the sheriff's hands, in reference to the execution thereof, and to the records of procedure thereunder, and to the delays which necessarily occurred in executing the writs.

The amount of the several writs was not paid to the sheriff within one month after the delivery of a copy of the said writs respectively to the chamberlain.

Near the end of the month of October, 1862, the amount of the said executions not having been paid to the sheriff, he proceeded to strike a rate pursuant to the statute in that behalf, and for that purpose, on or about the 27th day of October, 1862, applied for, and obtained access to the assessment rolls of the corporation (which had just been completed), and proceeded with the examination of the rolls, and with the striking of the rate until the 4th day of November, 1862, when the city clerk refused to allow the sheriff the use of the rolls, alleging that they were required by him to make up the list of voters; and thereby the sheriff was prevented from proceeding with the striking of the rate.

Application having been made by the sheriff to the city clerk, in writing, setting forth that

the sheriff would be reluctantly compelled to take such steps as he might be advised, under the circumstances, if access to the said rolls were further denied to him, and the said letter having been referred by the city clerk to the council, said council debated thereupon, and finally resolved upon a division of 15 to 5, as follows:—

"Whereas the sheriff has applied to the clerk to be allowed the use of the assessment rolls, for the purpose of enabling him to make copies to be used in striking a rate, to raise the amount of the executions in his hands; and whereas the clerk has applied to this council for instructions as to how he should act in the matter:—Be it therefore resolved, that the clerk be, and he is hereby instructed not to allow the sheriff the use of the assessment rolls, until he has placed the collector's rolls in the hands of the collector."

Thereupon the sheriff applied to the Court of Queen's Bench for a writ of *mandamus* against the city clerk, to compel him to allow the sheriff to examine the assessment rolls, which writ was granted, and was served upon the city clerk, who was then required by the sheriff to comply with said writ.

The city clerk still refused the sheriff to examine the said rolls, and having left the city, the sheriff continued to be deprived of means of access to the assessment rolls.

The sheriff then applied for, and obtained, a rule *nisi*, for an attachment against certain members of the city council for a contempt of court, in having, as was alleged, procured the city clerk to leave the country, and to deprive the sheriff of the means of examining the said rolls, contrary to the said mandamus and to the law.

Upon the return of the rule, it was agreed that it should be enlarged until the then next term, upon the city council undertaking that the sheriff should have access to the said rolls in the meantime; and the taxed costs of their proceedings were paid.

The sheriff accordingly again obtained access to the said rolls, on or about 27th November, 1862, and proceeded with the striking of the rate, which was completed on the 9th day of December, 1862.

The sheriff then notified the city clerk that he had struck the rate, and requested him to give the name of the collector to whom he might deliver the rate roll.

The city clerk replied to the sheriff, that as soon as the city council should appoint collectors, the sheriff would be notified thereof.

No collectors were in fact appointed by the said city council, either in the year 1862 or 1863.

The proceedings above briefly mentioned, entailed upon the sheriff and his officers a large amount of trouble and expense.

The striking of the rate, and preparing the rate roll, which was produced in Chambers, involved a very large amount of labour, and many thousand calculations were necessary, and in many instances to the one thousandth part of a cent, and the labour of calculation, and of supervising of the work of the clerks employed was very great.

Many difficult questions of law arose upon the proper mode of striking the rate; for example, whether the rate should include a sufficient allowance to cover expenses and losses by non-collection; how non-resident rate-payers should be dealt with; whether the sheriff in striking the rate ought to make allowance for the rates payable by non-residents, and increase the rate accordingly; and whether he ought to make allowance for deficiencies arising from the fact that the tax on a number of the rate-payers, under many of the writs, would amount to a fractional part of a cent only; and whether the amount of poundage should be included.

Upon these and other questions there were many consultations and communications between the sheriff and his solicitors, and the solicitor for the corporation; and the said corporation, and many of the rate-payers disputed the mode in which the sheriff had struck the rates, and were prepared to contest the question of their validity in the courts.

At the same time many of the plaintiffs having executions were urging the sheriff to enforce the rate.

The amount of disbursements actually paid and incurred by the sheriff under the writs was $880.91, of which a detailed account was produced in Chambers.

The amount of fees specially named in the tariff for receipt and return of writs, &c., to which the sheriff was entitled on the writs was $216.30.

The amount of the said executions were eventually arranged under the City of Hamilton Debentures Act of 1864.

The questions raised were—

1. Whether the sheriff was entitled to poundage upon any and which of the writs.

2. If not entitled to poundage, then to fix the amount of the allowance, if any, to be given to the sheriff, in lieu of poundage, in addition to such fees and disbursements as may be allowed.

Robt. A. Harrison, for the sheriff, argued, that the sheriff was entitled to poundage, unless disentitled by s 271 of the Con. Stat. U. C., cap. 22; that the latter section was inapplicable to the case of writs of execution against municipal corporations; that s. 221 of Con. Stat. U. C., cap. 54, was the special provision regulating his fees on such executions; that under that provision he was entitled to poundage, although he did not make the money; that if not entitled to his claim as poundage, he was at all events under s 271 of Con. Stat. U. C., cap. 22, entitled to "reasonable charges" for the services rendered, for which no fee was specially assigned in any table of costs; and that looking at all the trouble and responsibility which the sheriff had, he was entitled to $4805 96, being all he claimed, as reasonable compensation, or the greater portion of it, and that it would be unfair to restrict him to mere disbursements.

D. McMichael, for the City of Hamilton, argued, that a sheriff who, under 221 of the Municipal Act, levies a rate by means of collectors, is not under any circumstances entitled to poundage; that in no case is a sheriff entitled to poundage unless he make the money, *Buchanan* v. *Frank*, 15 U. C. C. P. 196; that this is as much applicable in the case of municipal corporations as against individuals; that the sheriff was not entitled to fees other than those fixed by the tariff and his disbursements, and that if entitled

at all to be paid for services in respect of which no fee was fixed by any statute or tariff, his claim was very excessive; that it was unnecessary to fix the amount of rate to be collected on such execution from each rate-payer.

Richards, C. J.—I am of opinion that the sheriff is entitled to poundage when he makes the money on a *fi. fa.* against a corporation, though he may have levied a rate to collect the money; I therefore come to the conclusion, that I ought to allow the sheriff for the services rendered by him in taking the steps he did for the purpose of making the money on the writs.

I am not prepared to say that he ought not to have prepared the copies of the assessment rolls, and fixed the amount to be collected from each rate-payer under each execution. I think the most reasonable view of the statute is, that he should prepare the rolls in striking the rate. There is no doubt he ought to have prepared the precepts referred to in the statute. As to the amount charged as paid for preparing the rolls and fixing the amount to be levied under each writ, the amount seems large, but there is nothing to contradict the statement in the affidavits filed that such amount has been paid and is reasonable for the services rendered.

I have given the subject my best consideration, and have come to the conclusion, that the fairest way to dispose of the matter will be to consider that the poundage is to be considered the proper remuneration to the sheriff for all the services he renders in collecting the money, except such services are otherwise allowed him in his tariff of fees.

In that view, he ought to be allowed the $216 30 for filing the writs, &c. Then I allow the $880.91 paid for preparing the copies of the rolls, fixing the amount to be levied from each rate-payer under each writ, the precepts, &c. This latter sum I take from $4805.96, the whole amount the sheriff would have been entitled to receive for poundage if he had made the money. This leaves $3925 05 for the poundage. Now what proportion should be abated from this for the services remaining to be performed by the sheriff and his officers in collecting the money? In fixing a compensation for what has been done, I do not think I should only give the sheriff the mere clerk's wages he may have paid out. The preliminary work done, no doubt, involved a great deal of care and anxiety, but the work remaining to be done is also of a troublesome and anxious character. All that has been done has not in any way made the sheriff liable to any action for mistakes in the amount to be levied, or for alleged acts of the persons serving under his precepts, or for loss of money after it was paid, or anything of that sort, so that he has escaped, by the settlement of these demands, a very hazardous and irksome part of his duty. As already intimated, he has been obliged to be very careful to see that all the steps he took, up to the time of the settlement were correct, for when he took them there was no certainty that he would not have been obliged to have completed the work which he had begun, and if the beginning was wrong, he would be certain to be involved in trouble. On the whole, then, I think, as to the remaining portion of the poundage, if it is divided, and one half deducted for the work remaining to be done, and the other half given to the sheriff to compensate him for what he has done, it will be the most equitable mode of adjusting the matter.

I may add, I have consulted several of my brother judges before arriving at a conclusion as to the amount that should be allowed the sheriff.

The result on the whole will be as follows:—

Amount of levy on the writs, as to which there is no dispute		$216 30
Amount paid for preparing rolls.....		880 91
Am't of poundage claimed..	$4805 96	
Deduct am't paid as above..	880 91	
	$3925 05	
One-half of above.....	$1962 52	
		1962 5
Allowed sheriff for all services rendered		$3059 74

Taking this as the data, there will be no difficulty in fixing the amount to be allowed to the sheriff in the particular suit in which the application is made.

The Auburn Exchange Bank vs. Hemmingway et al.

Sheriff — Claim to goods seized — Interpleader — Settlement between execution creditor and claimant after interpleader —Right of sheriff to poundage or other compensation or costs.

A sheriff, on 31st August, 1865, received a writ of execution against the goods of defendants for a large amount, made a seizure and advertized a sale for 13th September following; but, in consequence of a verbal claim made by the solicitor of a bank, postponed the sale, and afterwards, on 23rd September, having received a written notice of claim, applied for and obtained an interpleader order, dated 1st October, directing him to sell in ten days if the amount of the execution were not paid or security given, but he neglected to take any proceeding towards doing so till 4th November, when the requisite bond was given and all his fees to that date paid. On 22nd November the matter was compromised by the payment of a considerable sum of money to plaintiffs, less, however, than the amount of the execution *Held*, that the sheriff was not entitled, as against the execution creditors, to poundage or other compensation in lieu of poundage, or to the costs of the interpleader proceedings.

[Chambers, 2nd Feb., 1866.]

Robert A. Harrison obtained a summons, calling on the plaintiffs to shew cause why they should not be ordered to pay him poundage on the sum of $14,500, the appraised value of goods seized under the writ of execution in the cause, or why the plaintiffs should not pay the sheriff all fees for services actually rendered under the execution, and also a reasonable sum to be allowed by the presiding judge in Chambers for any services rendered for which no official fee was assigned, and all costs incurred by the sheriff in consequence of the adverse claim of the Ontario Bank, the plaintiffs and the Ontario Bank having compromised the matter, by which plaintiffs realized $10,000, owing to pressure by the sheriff, and on grounds disclosed in affidavits and papers filed.

The *fi fa.* was placed in the sheriff's hands on the 31st August, under which he immediately

thereafter made a seizure of a large quantity of goods, which goods he removed and advertised to be sold on the thirteenth of September.

Intimation was, before the day of sale, given to the sheriff by Mr. Osler, acting on the part of the Ontario Bank who claimed the goods seized, to the effect that the plaintiff's execution was fraudulent, and thus deterred the sheriff from proceeding with the sale, and he in consequence postponed the sale.

On his doing so the agent of the plaintiffs wrote to the sheriff that they would hold him responsible, while the claimants threatened an action for damages if he proceeded.

Nothing further was done until the 23rd of September, when Mr. Osler, on the part of the Ontario Bank, claim d the goods in writing.

The sheriff thereupon took the necessary steps and obtained an interpleader order on the 1st of October, by which it was directed that upon payment of the appraised value of the goods seized by the sheriff into court by the claimants within ten days from the date of the order, or upon their giving within the same time security to the satisfaction of the said sheriff for the payment of the same amount by the claimants according to the directions of any rule of court, &c., and upon payment to the sheriff of the possession money from the date of the order, that the sheriff should withdraw from the possession of the goods and chattels seized by him, &c. And it was further directed that unless such payment were made or such security given within the time aforesaid, the sheriff should proceed to sell the goods and chattels and pay the proceeds, after deducting the expenses and the possession money aforesaid, into court, to abide further order. And it was further directed that no action should be brought against the sheriff for the seizure of the goods, &c.

The claimants did not pay the money into court or give any bond until the 4th of November following, and the sheriff stated that during all that time he was put to expense, and that he devoted much time and labor to the matter. It was admitted, however, that the possession money, from the date of the order to the time of the giving of the bond, was paid by the claimants to the sheriff.

On the 22nd of November the plaintiffs and the claimants agreed to settle the matters in dispute in several interpleader suits between them, including the one herein, the plaintiff giving to the claimants control of the execution in this cause as well as another execution at their suit against the defendants in the hands of the sheriff of Norfolk, and an order to that sheriff for the proceeds of the goods seized by him. And it was also agreed that a chancery suit of Bank of Montreal against the plaintiffs, should be dismissed as against the plaintiffs. And the Ontario Bank agreed to pay ten thousand dollars to the plaintiffs—five thousand dollars down, and five thousand dollars in three months.

Under these circumstances the sheriff claimed that the plaintiff should be ordered to pay him poundage or reasonable compensation, and other moneys mentioned in the summons.

E. B. Wood showed cause.

Robt. A. Harrison in support of the summons referred to *Grant* v. *The City of Hamilton*, *ante*.

Morrison, J.—No authority was referred to on the argument, deciding that in a case like the present, the sheriff is entitled to the fees or allowances he seeks. All the authorities I can find go to shew the sheriff is not entitled to any costs anterior to his application for relief. When he seizes under a *fi. fa.* and a claim is made to the goods, he elects to proceed on the execution or abandon the seizure, or to interplead If the latter, it is for the purpose of relieving himself from the liability on account of the seizure and all responsibility for the future. Here he obtained that relief, and upon his withdrawing from the goods seized, he received all the costs adjudged to him under the interpleader order. If the sheriff had obeyed the interpleader order, which it was his duty to have done, (the claimants not having paid the money into court or given security for the value of the goods within ten days) he should have sold the goods after ten days, and in that case would have avoided the trouble he complains he was put to, and in all probability would have been reimbursed much of the expenses he now claims; but, instead of doing so, he retained the goods for nearly a month after it was his duty to sell, and any extra expense or trouble he was put to, besides the possession money that he was paid, he should, I think, have received from the claimants, at whose instance he refrained from selling, or he was himself guilty of neglect.

It was pressed by Mr. Harrison that it was through the instrumentality of the sheriff's services that the plaintiffs recovered the ten thousand dollars under the agreement made with the claimants, and that the sheriff was in consequence thereof entitled to poundage or some allowance. I cannot take this view of it. What formed the consideration for the claimants paying the plaintiffs the ten thousand dollars, or how far the seizure of the goods in this cause affected that payment, I do not know. But assuming that it was the result of a compromise between the plaintiffs and the claimants as to the goods in question, so far as the sheriff is concerned I cannot see what he had to do with it, for he had at his own instance and for his own benefit invoked the aid of the court to be relieved from all responsibility in the matter, as if he had never seized the goods at all; and instead of being instrumental in making the money for the plaintiffs out of the goods in question, he protected himself as to the plaintiffs for not doing so, and threw the burden on the plaintiffs of ascertaining their rights to these goods.

Under these circumstances I see no ground for a claim for poundage, which is an allowance for seizing and making the money, and assuming all the responsibility of the acts necessary for that purpose.

It may appear hard upon sheriffs that in such a case they may incur much expense without the means of reimbursing themselves, but it is one, among others, of the many onerous incidents attending the office of sheriff for which no compensation can be given.

I discharge the summons, but without costs.

Summons discharged without costs.

In re Clarke, One, &c.

Prohibition—Disputed facts—Matters of practice—When writ granted.

Where, on an application for a writ of prohibition, the question of jurisdiction depended on a question of fact concerning which the affidavits were contradictory, and the parties had no desire to declare in a prohibition, a certificate of the learned judge as to the fact was held to govern, and it showing all facts necessary to sustain jurisdiction, the summons for prohibition was discharged with costs.

Semble, the writ of prohibition will not lie in regard to matters of practice in an inferior court.

Quære, the effect of an application to the inferior court for the relief afterwards sought to be obtained in an application to a judge or a superior court for a writ of prohibition.

[Chambers, 1866.]

This was a summons calling on Mr. Clarke and the judge of the County Court of the United Counties of Huron and Bruce to shew cause why a writ of prohibition should not issue to restrain the judge from granting his certificate for full costs to be allowed to Mr. Clarke in two actions pending in the County Court, or to restrain the judge or clerk from taxing any greater costs than would have been allowed had the actions been brought in the Division Court, or from issuing executions for any such costs, and with such directions and commands as necessary to put the parties in the same position as they would have been had no such certificates been given.

Mr. Clarke, an attorney, brought two actions in the County Court on separate bills of costs. He recovered in both, but the amount recovered was within the jurisdiction of the Division Court, because the amounts of the verdicts were reduced by a taxation of Mr. Clarke's bills, which were taxed in one of the superior courts. These verdicts were rendered at the sittings of the County Court on the 18th Dec., 1865, and the parties, plaintiff and defendant, differed materially as to what took place in the County Court in regard to the court being moved for a certificate for County Court costs.

The plaintiffs positively asserted that applications for certificates for costs were made in court after verdict and before the trial of any other cause, while the defendant's counsel swore he was in court at the trial of both suits and remained till its adjournment for that day, and no certificate for costs in either case was asked for or obtained during the time he remained there. The plaintiffs swore that in accordance with the application made in court he afterwards applied to the judge and got the certificate signed by him.

Summonses were taken out by defendant to set aside these certificates, and were discharged by the judge of the county court.

The judge of the county court furnished a certificate of the proceedings, which was sworn to as being in his handwriting, and was to the effect that "immediately after the verdicts were rendered, applications were made in the usual way for certificates for full costs if necessary, (the jury being out in one case when the matter was named); that afterwards, in pursuance of the applications, the certificates were granted, and that afterwards a summons was obtained in each case, to shew cause why the certificates should not be set aside, which summonses were discharged. Plaintiff afterwards entered judgment and issued execution."

Robert A. Harrison (*Clarke* with him) shewed cause and argued, that the decision of the judge as to full costs was a matter of practice; that no prohibition would lie to regulate the practice of an inferior court; that the affidavits were contradictory as to whether or not certificates were properly moved; that in such case the judge's certificate of the facts should govern; that his decision on an application to set aside the certificates was final; that no appeal can be directly or indirectly had from the decision of a county judge on a point of practice; that his decision had been acted upon, and the acts done before this application, which it was sought by this application to restrain, and the application therefore under any circumstances too late.

D. McMichael (*Chadwick* with him) supported the summons and argued, that the judge had no jurisdiction to grant the certificates, unless the application for them were made immediately after the verdicts; that it sufficiently appeared on the papers filed, the application was not made till afterwards; that the judge, under these circumstances, had no power or authority to grant the certificates, and the question raised was not one of practice but of jurisdiction, and where there is an excess of jurisdiction, there is power in the Superior Court to prohibit the exercise of jurisdiction, even after its exercise has been, as in these cases, attempted.

Draper, C. J.—I understand the parties desire that I should not direct the applicant to declare in prohibition, which, when the facts are in dispute, is the usual course.

I shall not therefore refer to the affidavits, which are contradictory, but act upon the judge's certificate, which assumes that the application for the certificates were made in proper time; if so, the judge is the authority to grant or withhold, and he has granted the certificates.

I do not, however, wish to be understood as intimating an opinion that the granting or withholding is anything but a matter of practice, with regard to which, *i. e.*, as a matter of practice, I am satisfied the writ would not lie, for if it were otherwise a party could, on a motion for a prohibition, virtually get an appeal from the decision of the Superior Court on matters which, by the statute, no appeal is given.

By moving the court below to set aside the certificate, the defendant may have prejudiced his right if otherwise good. See *Stainbank* v. *Bradshaw*, 10 Ea. 349; *Roberts* v. *Humby*, 3 M. & W. 120. See also. 2 Inst. 601, 602, 619; *Darby* v. *Cosens*, 1 T. R. 552; *Full* v. *Hutchins*, Cowp. 424; *Duteres* v. *Robson*, 1 H. Bl. 100; *Griffith v. Stevens*, 1 Chit. R. 196; *Carslake* v. *Mapledoram*, 2 T. R. 478; *Argyle* v. *Hunt*, Str. 187; In re Birch, 15 C. B. 743; *Mossop* v. *Great Northern R. Co.*, 16 C. B. 580; *Great Northern R. Co.* v. *Mossop*, 17 C. B. 130; *Carter* v. *Smith*, 4 El. & B. 696.

Summons discharged with costs.

GERMAN v. ELLIOTT.

Appointment of prochein ami—Security for costs—Evidence of prochein ami.

The father of an infant is in the first instance the proper person to act as next friend in a suit by an infant. Where therefore in such a suit a brother aged 22, who, as well as the infant, lived with the father; and their being conflicting evidence as to the brother's solvency, an order was made for security for costs.

Semble, that in such a case the evidence of the father would be admissable even though *prochein ami*.

[Chambers, March 31st, 1866.]

The defendant obtained a summons calling on the plaintiff and her next friend to shew cause why proceedings should not be stayed until the next friend gave security for costs, on the following grounds:

That the said next friend, who was the plaintiff's brother, was not a proper person to have been so appointed, and is of immature years; and that he and the plaintiff are insolvent, and that the father of the infant, the natural guardian, should have been so appointed; and that an imposition had been practised upon the Court in obtaining such appointment.

The affidavits filed on the application showed that the plaintiff resided with her father, that the next friend was her brother, a young man about 22 years old, living also with her father, and stated that the brother was insolvent.

T. H. Spencer showed cause, and put in an affidavit made by plaintiff's attorney showing that "the next friend lives 35 miles from Cobourg," not convenient to any railway "or post office," disclaiming imposition on the court in obtaining the appointment of the next friend and speaking as to his belief that he is a fit and proper person to be the next friend, that the next friend is not insolvent, and the deponent believes the next friend is able to pay the defendant's costs.

There was also another affidavit by a grocer living in Cobourg; that the next friend is not insolvent, nor in insolvent circumstances; and the alleged imposition or intention to impose was denied.

DRAPER, C. J.,—I gather that the Court or Judge who made the order for the appointment of the next friend was not informed that the infant plaintiff was residing with her father in Percy, or the father would have been appointed next friend, as in *Watson* v. *Fraser*, M. & W. 660, Parke, B. says the father is "the proper and natural guardian of every infant, and as such ought always in the first instance to be appointed to act as his *prochein ami*." As to the possibility of the father's evidence being required, there is authority to show that he would, since the evidence Act, be admissible, although *prochein ami*. *Duckett* v. *Satchwell*, 12 M. & W. 779, contains nothing at variance with the doctrine in *Watson* v. *Fraser*, 8 M. & W. 660; which is distinctly recognised in *Lees* v. *Smith*, 5 H. & N. 632.

I think, therefore, I must make an order on the summons, for, besides the objection of insolvency (not very fully met, for it is not shown that the *prochein ami* has any property except his earnings as a carpenter;) the fact that the plaintiff had a father living, with whom she resided, was apparently withheld or suppressed when the *prochein ami* was appointed, and this amounts, as suggested in *Watson* v. *Fraser*, (without casting any imputation on the plaintiff's attorney), to an imposition on the Court, or at least it approaches very closely to it.

If the summons had been so framed, I think I should have preferred making an order to have another *prochein ami* appointed, and then the proper and natural guardian might have been named. It is not a case for costs on either side.

HOGG v. TURNER.
WRIGHT v. PERKIE.

Service of papers—Irregularity.

Notice of trial for 3rd April, and issue book, were handed to a servant of defendants' attorney on the evening of 26th March. The next day they were given by her to her master.

Held, that their service only dated from the 27th, and was therefore set aside as irregular.

Quære, as to the proper mode of taking the objection.

[Chambers, April 2nd, 1866.]

Robert A. Harrison obtained a summons to set aside the notices of trial in these cases with the copies and services thereof, or some, or one of them.

Ferguson, shewed cause.

DRAPER, C. J.,—In the first case the plea was filed on 22nd March. About 8 a.m. of the 27th March, a servant in the house of the father of the defendants' attorney, (who was then residing with his father,) handed said attorney an envelope which she said had been left with her the evening before, and which the attorney found to contain an issue book and notice of trial for the assizes at Berlin on the 3rd April; the attorney swore that neither the servant nor any one else told him on the previous evening that any papers had been left for him. He returned the papers on 27th to plaintiffs' attorney with a letter repudiating the service.

It appeared on the plaintiffs' side by affidavits that a clerk of plaintiffs' attorney went to defendants' attorney's office to serve the notice, and found it closed; that having searched and being unable to find defendants' attorney, his partner or clerk, the clerk of the plaintiffs' attorney proceeded to the place of residence of defendants' attorney, (his father's,) at a short distance from the office, and saw a female servant, and was told by her that defendants' attorney was not in, but she would take the papers for him and deliver them to him; and he gave them to her in an unsealed envelope addressed to defendants' attorney by name; this was before 7 p.m. He swears she received the papers from him as if it was her place to do so; and he verily believes she had the right to do so, and that it was her place alone of any of the domestics or persons at the said house. These facts and the statement of belief do not go so far as in the case of *Robinson* v. *Gomperts*, 4 A. & E. 82, and there the party to be served was not an attorney.

In the second case (an action of Dower), it appears that the issue book and notice of trial were left at the residence of the tenant's attorney on Monday 26th March, between 5 and 6 p.m. with a female servant of tenant's attorney being contained in a sealed envelope. The tenant's attorney was then absent from the city of Toronto. The papers were not received at the office of the tenant's attorney, or by any one belonging to it until the forenoon of the 27th, which was too late. The office was open until

twenty minutes to 5 o'clock on the afternoon of the 26th. The tenant's attorney has a partner residing in the city who was in town all day and in the office until 4 o'clock p.m. It appears there was no delay whatever on the part of the demandant's attorney in making up the issue book and sending it to be served with notice of trial as soon as he got the tenant's pleas. It was sworn these papers were delivered about 5 30 p.m. of the 26th to a servant connected with the household at the house of the tenant's attorney with a request that she would deliver them to Mr. Read the moment he came home, which she promised to do.

I felt at first some doubt whether in each case the issue book should not simply have been returned with a notice to the opposite attorney, that if he proceeded to trial, application would be made to set aside the proceedings. Then if the cases were tried, the matter would have come before the court in term which I should have preferred This course was not suggested, nor the present application opposed on the on the ground that it was irregular or improper.

On consideration I can draw no substantial distinction between the cases, and they appear to show as to the matter of fact that in each case the notice of trial was completely served on Tuesday the 27th, for the following Tuesday, and was not served before. This is irregular, for the time is too short by one day.

The order must therefore be made to set aside the service of the notice of trial for irregularity. *Hogg* v. *Turner*, to be with costs to be costs in the cause to the defendant; and *Wright* v. *Perkie* with costs.

I have examined all the cases noted below before coming to a decision.

Order accordingly.

Kealy v. *Cartwright*, 11 Jur. 378; *Brown* v. *Wildbore*, 1 M. & Gr. 276; *Robinson* v. *Gompertz*, 4 A. & E. 82; *Lancaster* v. *Castle*, 8 Jur. 848; *Kent* v. *Jones*, 3 Dowl. 210; *Tuck* v. *Corfe*, 7 Jur. 998; *Taylor* v. *Whitworth*, 9 M. & W. 478; *Consumers Gas Co.* v. *Kissock*, 5 U. C. Q. B. 542; *Burdett* v. *Lewis*, 7 C. B. N. S. 791; *Patterson* v. *Morrison*, 17 U. C. Q. B. 130; *Arrowsmith* v. *Ingle*. 3 Taunt. 234; *Fitch* v. *Kettle*, 3 M. & Gr. 856.

Monck v. Northwood.

Declaration—Irregularity in statutory form—Security for costs—Official assignee in insolvency.

Sec. 85 of Cap. 22, Con. Stat. U. C. is obligatory, and a declaration was held irregular and set aside because it did not commence by shewing whether the plaintiff sued in person or by attorney.

An official assignee in insolvency cannot be compelled to give security for costs.

[Chambers, 9th April, 1866.]

The plaintiff filed a declaration which commenced as follows:—"Richard Monck, official assignee, under the Insolvent Act of 1864, for the County of Kent, and official assignee of Cornelius McDonald, an insolvent, sues John Northwood who has been summoned, &c."

Robert A Harrison obtained a summons calling on plaintiff to shew cause among other things, why the declaration filed, and the service thereof, and all subsequent proceedings, should not be taken off the files, set aside, and vacated with costs for irregularity, in that the said declaration does not commence by shewing, according to the statute in that behalf, whether the plaintiff sues by attorney or in person, or why all proceedings should not be stayed until the plaintiff, an official assignee, should give security for costs. He cited Con. Stat. U. C. Cap. 22, Sec. 85, and Con. Stat. Cap. 2, Sec. 18, Sub-sec. 2.

John B. Read shewed cause, and cited Har. C. L. P. A., P. 215 and notes.

Draper, C. J.,—I have very reluctantly come to the conclusion that the declaration must be set aside for irregularity.

The 85th Sec. of Con. Stat. U. C. Cap. 22, enacts that "every declaration *shall* commence as follows, or to the like effect, (*venue*) A. B. by E. F., his attorney, (or in person as the case may be), sues C. D.," &c. The Interpretation Act provides that the word "shall" "is to be construed as imperative;" and I cannot say there is anything in the context or other provisions of the act to justify a different construction.

The exception is one of the merest form, but only great inattention could have given rise to it; and the only consequence would be to compel an amendment on payment of costs. Here it may delay the plaintiff for several months, and I have therefore felt the more unwilling to give way to the exception, but if I do not hold the statutory form binding in this case, I never can do so.

There is no ground established for security for costs in this case, and as far as my present impression goes I do not think the stay of proceedings until certain proceedings in insolvency are taken is warranted.

Considering the literal formality of the objection, I shall make an order to set aside the declaration, service, &c., with costs, which I fix at five shillings.*

Ryley et al. v. Parmenter.

Summons followed by an order—Stay of proceedings—Time for pleading—Practice.

Held that where a summons for security for costs with a stay of proceedings was obtained, followed by an order also containing a stay of proceedings, the defendant has the same number of days, after security given, in which to plead as he had at the time the proceedings were stayed by the summons.

[Chambers, May 7, 1866.]

This was an application to set aside an interlocutory judgment, signed by plaintiff as on default of plea.

The declaration was served on 24th April, 1866. A summons for security for costs, with a stay of proceedings, was signed on 28th April. An order, with stay of proceedings, was made thereupon on the 30th April, and served at 10.30 a m. On the same day an application was made for the allowance of the bond given as security,

* The Court of Queen's Bench during last Term, in a case of *Miller* v. *The Agricultural Assurance Co.*, refused to rescind an order similar to the above, as to the point of security for costs, in an action by an official assignee.—Eds. L. J.

and the security was given on the 1st May, at 11.30 a m. On the 2nd May, at the opening of the office, the plaintiff signed interlocutory judgmedt against the defendant.

W. Sidney Smith, for defendant, thereupon obtained a summons to set aside the judgment with costs, because signed too soon. He contended, that when the summons for particulars with stay of proceedings was served, the defendant had four days to plead; and by the order made thereon, the plaintiff's proceedings were further stayed until such security was given, and that he had the same time to plead after the security was given as he had when the summons staying proceedings was served on the plaintiff.

Osler shewed cause.

DRAPER, C. J.—The order being made for security for costs, with a stay of proceedings until the same was given, and this order being made on a summons which contained a stay of proceedings, the defendant was therefore right in applying for the security and for the stay of proceedings in the first instance. I must infer from that protection being given to the defendant by the summons, that there had been a previous demand for security, which had been refused. The delay was that of the plaintiffs, and I confess I do not see why he should by that delay deprive the defendant of the time for pleading which he had, when, in the exercise of a rightful claim, he stayed the plaintiff's proceedings. The distinction pointed out by Aldersou B, in *Mengens v. Perry*, 15 M. & W. 537, is, I think, very satisfactory and applicable, *i. e.* between the case of a summons dismissed and that of one followed by an order. In that case the defendant had taken out a summons for particulars which was dismissed, and the learned baron says,—"If the defendant had got his order for particulars, then he would have had the same time for pleading after they were delivered as he had at the return of the summons." Here, I think, the defendant had the same time after the delivery of the security as he had when the proceedings were stayed. I think, the interlocutory judgment must be set aside with costs.

Order accordingly.

CHANCERY CHAMBERS.

(Reported by RICHARD GRAHAME, ESQ., *Barrister-at-Law.)*

GRAHAM v. CHALMERS.

Lien—Registration of—Reversal of decree—Notice of motion.

A decree made on further directions was registered against the lands of the defendant. Subsequently the original decree was reversed on rehearing. The order then made did not specifically reverse the decree on further directions. Upon an application to discharge the lien created by the registration: *Held*, that the order reversing the original decree destroyed the lien, but that the Court could not make an order directly affecting it.

When in a notice of motion an order is applied for in the alternative, in the following words, "for such other order as shall seem just," the Court will not make an order specifically distinct from that asked for.

[Chambers, September 1, 1866.]

This was an application to discharge the lien created by the registration of a decree on further directions under the following circumstances:

A decree was made in the cause on the first October, 1858, directing certain accounts to be taken, under which the Master made his report, and the cause came on again for hearing on further directions on the thirty-first day of October, 1860, when a decree was made whereby the defendants Chalmers and Dolson were ordered to pay a sum of money found due to the plaintiff, and this decree was registered against the lands of the defendant Chalmers, and an order was subsequently made referring it to the Master to enquire what lands the defendant had, in order that the lien created by the registration might be enforced.

Subsequently, in 1862, the cause was reheard and an order made on rehearing reversing the original decree of 1858, and dismissing the bill against the defendants Dolson and Scott, and giving the plaintiff leave to apply to amend his bill against Chalmers as he might be advised. No application was made by the plaintiff under the leave thus reserved.

Crickmore now makes the present application.

The effect of the reversal of the original decree is, that all the proceedings taken under it, including this decree on further directions, would fall with it, so that the Court might on the rehearing have specifically reversed this decree, and the order made could then have been registered and destroy the lien created by it. The registration of the present order, which does not specifically reverse this decree, would do no good. The Court can now make an order by the registration of which the lien will be destroyed.

Hurd for the plaintiff.

The effect of the order made on rehearing is to reverse the decree on further directions as well as the original decree, and the registration of this order will be sufficient. The Court has no power on an application of this kind to set aside the lien which has arisen by such an order as is asked for.

THE CHANCELLOR.—It is admitted by the defendant that an order on rehearing destroys the decree on further directions. If so, its registration will do away with the lien caused by it. The Court cannot make the order asked for. It cannot discharge a *lis pendens* in this manner, the only way of getting rid of which is to obtain an order dismissing the bill.

Crickmore then asked, under the general terms of his notice of motion, (which asked, in addition to the specific relief, "for such other order as shall seem meet.") for an order directing the plaintiff to amend his bill within a certain prescribed time, or the bill to be dismissed.

Hurd objected that this application was not of the same nature as that specifically asked for, that he was taken by surprise, and that it was so far beyond the scope of the general application that the Court could not grant the application.

THE CHANCELLOR.—This application is so specifically distinct from that asked by the motion that I cannot grant it. The application must be refused with costs.

Ardagh v. Wilson.

Foreclosure—Subsequent incumbrancers.

Where by his report made under a foreclosure decree the Master appointed a time for all the subsequent incumbrancers who proved before him to redeem the plaintiff, one of whom at the time appointed paid the amount and took an assignment.

Held, that the incumbrancers who did not redeem were entitled to three months further time before the co-defendant could obtain a final foreclosure against them.

[Chambers, September 1, 1866.]

This was a foreclosure suit. By the Master's report a time was appointed for all the subsequent incumbrancers, of whom there were several, to pay the amount found due to the plaintiff. One of these incumbrancers paid in the amount and obtained an assignment from the plaintiff of his mortgage; and

McCarthy applied on his behalf for a final order of foreclosure against the other incumbrancers who had not complied with the Master's report.

The Chancellor.—A final order cannot issue in the first instance, but a further period of three months time must be given to the other defendants to redeem their co-defendant.

Saunders v. Furnivall.

Interlocutory costs, Bill of—Filing.

Where the Registrar is directed to fix the amount of interlocutory costs and to aid him in doing so, a bill of costs is prepared and taxed—the bill of costs should be filed.

[Chambers, September 1, 1866.]

In May, 1866, an order was made under which the defendant was to pay to the plaintiff the costs of an application, which the Judge directed the Registrar to fix. For the purpose of so doing a bill of costs was prepared by the plaintiff's solicitor and taxed by the Registrar. The bill was not filed.

Wetenhall applied for an order directing the plaintiff to place this bill of costs as taxed on the files of the Court.

Smart, contra.

The Registrar stated, that in practice bills of costs of this kind, which were merely prepared for his convenience in fixing the costs, were never filed.

The Chancellor, although refusing the application, on grounds which need not now be stated, directed that in future such bills should be filed when taxed.

ENGLISH REPORTS.

CHANCERY.

Ex parte Ensby. Re Ensby.

Bankruptcy Act, 1861, *s.* 86.—*Debtor's own petition for adjudication of bankruptcy—No assets.*

The mere fact that a debtor has no assets is, in the absence of fraud, no reason against his obtaining an order of discharge upon his own petition.

[L. J., June 11, 1866—14 W. R., 849.]

Ensby, the bankrupt in this case, was foreman to a farmer in Hertfordshire, who also had a wharf in London, where he sent his hay for sale. Ensby was employed at this wharf at a salary of twenty-seven shillings a week. A person of the name of Butterfield obtained some hay from Ensby for which he failed to pay. Butterfield kept out of the way for some time; but was ultimately found, and was then sued in the county court for the price of the hay, and was afterwards imprisoned. Some time after this, Ensby happened to meet Butterfield at a public-house, a quarrel ensued between them, which resulted in a struggle, in which some of Butterfield's ribs were broken. Butterfield then brought an action against Ensby for the assault, and obtained a verdict for £10 damages, and costs, amounting to more than £40. The writ in this action was served on the 5th June, 1865, and on the 7th June, 1865, Ensby raised £30 by a bill of sale of his furniture, which was the only property he possessed. This money was raised partly for the purpose of defending the action. After judgment was entered up against Ensby, he, on the 1st February, 1866, petitioned the Court of Bankruptcy for an adjudication of bankruptcy against himself; and on the 2nd February he was adjudicated a bankrupt. He afterwards applied for his order of discharge, and thereupon Mr. Commissioner Goulbourn, on the 13th April, 1866, dismissed the bankrupt's petition, thus annulling the bankruptcy. He made this order upon the ground that Ensby had disposed of all his assets before his petition, and because he was of opinion that the petition was presented solely for the purpose of defeating Butterfield's judgment debt. This was the principal debt which Ensby owed; he owed also some small sums for rent and taxes. From this order of the Commissioner Ensby now appealed.

Reed, for the appellant.

Section 86 of the Bankruptcy Act, 1861, which enables a debtor to petition for an adjudication against himself, is in no way limited in its application by the amount of assets possessed by the debtor. The Act, moreover, has, in section 98, a special provision for the benefit of paupers. The Court of Bankruptcy may have power to annul an adjudication, when the petition has been filed for some purpose altogether foreign from bankruptcy, or where there is fraud or want of good faith; but there is no such jurisdiction when there is a legitimate object in the presentation of the petition, even though there should be some ulterior object of a different nature. *Ex parte Browne*, 1 Rose, 151; *Ex parte Harcourt*, 2 Rose, 203; *Ex parte Bourne*, 2 Gl. & J. 137; *Ex parte Christie*, 2 Dea. & Ch. 488; *Ex parte Gallimore*, 2 Rose, 424; *Ex parte Phipps*, 3 M. & De G. 505; *Ex parte Wilbam*, 1 Buck, 459.

Hunter for Butterfield, the opposing creditor.

The court will not allow the Act to be taken advantage of for a fraudulent purpose; *Ex parte Gibson*, *Re Patrick*, 13 W. R. 531.

Bagley (*Bacon*, Q. C., with him) for the official assignee, no trade assignee having been appointed.

Reed, in reply.

The statutory right is clear, and the court will not assume fraud as against the debtor. The statute contains provisions for punishing a fraudulent bankrupt when a proper case is shown; and if the statute provides no means of punishing the bankrupt in a particular case, that is no rea-

son for dismissing his petition, in order to let the creditor punish him by imprisonment.

Knight Bruce, L.J.—I think the bankrupt has a right by law to apply for his discharge. Nothing is alleged against him, except that he has no property; and it is said that the law applies only to cases where there is property to be disposed of, and that the bankrupt has parted with his property improperly. Nothing, however, was made out but the absence of property. This might be material if there were fraud, but nothing of that kind had been proved. The absence of property is sufficiently accounted for. With great deference to the learned Commissioner, I think he was wrong.

Turner, L.J.—I am of the same opinion. The case rests entirely upon the assumption of the bankrupt having committed a fraud, inasmuch as he, being sued for a debt, two days after the writ was served upon him, raised £30 by a bill of sale of his furniture. Nothing else is alleged against him. It cannot be assumed that he raised this money for the purpose of evading the law of bankruptcy; it might have been raised for other purposes. It is sufficient to say that there is no proof of any fraud on the part of the bankrupt. But I think further that, in construing the Act of 1861, regard must be had to the law as it existed at the time of the passing of that Act. It is not disputed that, but for that Act, it would have been within the jurisdiction of the Commissioner to annul the bankruptcy. But when we are asked to put a limit upon the general words that "any debtor may petition for an adjudication against himself," we cannot draw a conclusion unfavourable to the bankrupt upon the ground that the Act is defective (as it undoubtedly is) in other respects; and that it provides no means for punishing a bankrupt in cases of fraud. In this particular case there is no proof of fraud, and there is no reason for dispensing with the general rule. The order must be discharged, and the matter referred back to the Commissioner.

UNITED STATES REPORTS.

SUPREME COURT OF U. S.

Lovejoy v. Murray.

(From the MS. of 3d Wallace, in advance of publication.)

A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar.

Lovejoy brought suit in one of the courts of Iowa against O. H. Pratt, and the sheriff attached certain property, which *was assumed to be the property of Pratt.* A certain Murray, however, claimed it as his. The sheriff proceeded, nevertheless, to sell, and sold the property under Lovejoy & Co.'s attachment.

This being done, Murray sued the sheriff for an alleged trespass, and in this suit obtained judgment against the sheriff for $6,233, which the sheriff satisfied to the extent of $830, leaving a balance unsatisfied of $5 403.

Murray then brought suit against Lovejoy & Co. for this same trespass; and the facts being agreed on in a case stated, the court gave judgment for the plaintiff for the amount of the judgment against the sheriff less the $830 paid by him.

On error here from the Massachusetts Circuit (where Lovejoy & Co had been sued) the following question among others was made.

Did Murray, by suing the sheriff alone, and getting *partial satisfaction* of the judgment against that officer, bar himself of a right to sue Lovejoy & Co for the same trespass?

Hutchins, for Lovejoy & Co., plaintiffs in error.

There seems to be a great conflict of opinion in the books, whether a judgment *alone* against one *tort-feasor* operates as a bar to a suit against another; some holding it to be an absolute bar, others that judgment *with execution* is necessary, and others that *satisfaction* is necessary.

In numerous cases which may be referred to in this country, it has either been decided, declared, or assumed, as we read the cases, that *judgment alone operates as a bar.* This is the direction certainly in which these cases set. Other cases would indicate that judgment and execution so operate; and in one case it has been held that absolute satisfaction was necessary.

It is impossible to reconcile the American cases. The English courts keep clear of the whole difficulty by treating the judgment, of itself, as a bar; and this, we submit, is the better doctrine.

The leading English case is *Brown* v. *Wootton*, temp. James I., reported by three different reporters, Yelverton, Croke and Moore, all essentially in one way. Sir Henry Yelverton gives the case thus:

"In trover of certain goods in particular, the defendant pleaded that the plaintiff had brought the like action against J. S. for the same goods before this action brought, in which suit he so far *prosequitus est* against J. S. that he had judgment and execution against J. S., and averred that the goods contained in both actions were the same goods. Upon which the plaintiff demurred and it was adjudged *against the plaintiff*"

This is much in point, and the case was decided in the best days of the old English law; Popham being Chief Justice; Fenner, Gawdy, Sir C. Yelverton, and Williams eminent names in judicial history, his associates. Mr. Theron Metcalf (now Mr. Justice Metcalf, of the Supreme court of Massachusetts) commenting on it, A. D. 1820, in his excellent edition of Yelverton, says:

"*No case has been found* in which the precise point adjudged in the text, viz., that in the action of trover a former recovery against one or more *tort-feasors* for the same conversion and a writ of execution sued out is a bar, *has been otherwise decided.*"

In *King* v. *Hoare*, A.D. 1844, the Court of Exchequer decided that a judgment *without satisfaction*, recovered against one of two *joint* debtors, is a bar to an action against the other; though *secus* where the debt is joint and several. The court, Baron Parke giving its judgment, refers to *Brown* v. *Wootton*, just cited, and declared that "a joint contract cannot be distinguished from a joint *tort;* thus assuming Brown v. Wootton to have been rightly decided, and in effect affirming it.

Buckland v. *Johnson*, decided ten years later in the Common Pleas of England, 15 C. B. (80 Eng. Com. L.)145, is to the same result. In that case it appeared that a father and son had wrongfully converted the goods of plaintiff by selling them; that proceeds of the sale, £150 were received by the son alone; and that the plaintiff had sued the father and recovered a verdict for £100 as the value of the goods so converted; but that in consequence of his insolvency he had obtained no satisfaction. He now sued the son. But Jervis, C. J., says, "If two jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received to recover the value of the goods for which a *judgment has already passed in the former action.* * * * The fallacy of the plaintiff's argument arises from his losing sight of the fact, that by the judgment in the action of trover the property of the goods was changed, by relation, from the time of the conversion, and that consequently the goods from that moment became the goods of the son;" and his lordship quotes with approbation the language of Barron Parke in the case last cited: "The judgment of a court of record changed the nature of that cause of action, and prevents it being the subject of another suit; and the cause of action being single cannot afterwards be divided into two."

But if the court shall be of the opinion that a party may sue and recover *separate* judgments against co-trespassers, and then *elect* which judgment he will enforce, then we say that the recovery of judgment against the sheriff, and the receipt of *partial satisfaction* on that judgment from him before the commencement of this suit, will operate as a bar to this suit. How can the court now proceed to try the original trespass when it has been partially settled for? How would a declaration be framed? How would the court proceed at the trial? What becomes of the $800 paid? Must it not be credited in some way, or deducted? and if so, how? The plaintiff is seeking to recover full damages for a wrong partially redressed.

In the Vermont case of *Sanderson* v. *Caldwell*, 2 Aiken, 195, which is opposed to our general view, the judgment first recovered was in no part satisfied.

Ball, contra.

It is a settled principle that all torts are several as well as joint, and that the injured party can maintain an action against all the tort-feasors jointly or against each one separately. Hence such party must have the right to pursue each tort-feasor to judgment and execution till he get satisfaction. That *satisfaction* is the essential matter appears even in cases contemporary with *Brown* v. *Wootton* reported in Yelverton, and which seems to be the foundation of the recent decisions in England, and is one of the citations of the opposite counsel. In *Cocke* v. *Jenner*, reported by Lord Hobart (Hobart, 66), the court in speaking of joint trespassers says:

"If they be sued in several actions, though the plaintiff make choice of the best damage, yet when he hath taken one *satisfaction* he can take no more; and if he require *two* an *audita querela* will lie."

The same idea is presented in *Corbett* v. *Barnes*, which arose soon after and is reported in Sir William Jones (Sir W. Jones, 377). The report is in Norman French, but translated, reads in the material parts, thus:

"Barnes brought trespass of assault and battery, in London, against Hill in the Common Bench and recovered; and afterwards trespass of assault and battery against Corbett in the King's Bench, and two others for the assault and battery in Hertfordshire Hill was taken in judgment, and afterwards judgment given against the three others in the King's Bench. Hill paid the damages recovered against him, and satisfaction was entered. Then Corbett was taken in execution, when he and the other two brought an *audita querela*, setting forth the whole matter, with an averment that the said assault and battery in London and Hertford was the same assault. And by Justices Jones, Croke and Berkeley, the *audita querela* lies; for although for the same assault the plaintiff may have several *actions* and recover, yet when a recovery is had against one, and *satisfaction*, he cannot have another *satisfaction;* just as where an obligation is made jointly and severally, and the obligee sues in the Common Bench one by several writ, and recovers, and afterwards sues another in the King's Benah upon the same obligation, nevertheless if one of them makes satisfaction, the other shall have an *audita querela* to avoid the execution; for the plaintiff cannot have *nisi unica satisfactio*. So here the plaintiff can have several recoveries, but if one *satisfy*, the other shall have *audita querela* to set aside the execution against him."

Many American cases decide or declare this explicitly. See *Livingston* v. *Bishop*, 1 Johnson, 290, &c.

So in the recent English case *Cooper* v. *Shepherd*, 3 Manning, Granger & Scott, 266, the former judgment had been paid, although that fact is mistake omitted in the marginal note. The court say, "plaintiff, after he has once received the full value, is not entitled to further compensation in respect to the same loss, and according to the doctrine of cases cited in the argument, by a former recovery in trover *and payment of the damages*, the plaintiff's right of property is barred, and the property vested in the defendant in that action. See *Adams* v. *Broughton*, 2 Strange, 1078, and Jenkins, 4th Century, Case 88 p. 189, where it is laid down in trespass against B for taking a horse, A. recovers damages by this recovery and *execution done thereon*, the property in the horse is vested in B., *solutio pertii emptionis loco habetur.*"

Mr. Justice MILLER delivered the opinion of the court.

The question is, did the plaintiff, by suing Hayden, the sheriff, alone, recovering judgment for about six thousand dollars, and receiving from him eight hundred and thirty dollars on the said judgment, thereby preclude himself from maintaining this suit against these defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case a bar to this action?

Parke, Baron, in the case of *King* v. *Hoare*, 13 Meeson & Welsby, 502, speaking in reference

to the same proposition in its application to actions on joint contracts, says, in 1846, that it is remarkable that the question should never have been decided in England. It is equally remarkable that the question here presented should be an open question at this day.

The faithful and exhausting research of counsel in this case, shows that there are conflicting authorities, not only on the main proposition, but on several incidental and collateral points closely connected with it. Two propositions, however, seem to be conceded by all the authorities, which bear with more or less force on the main question, and which may as well be stated here.

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable to a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one is sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of these judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.

In the latest English case upon the principal question, namely, *Buckland* v. *Johnson*, 15 C. B. 145, Jervis, C. J., holds the former judgment against the son, although fruitless, to be a bar to the second suit against the father for the same goods, upon the ground that by the former judgment the property in the goods was vested in the defendant in that action. As this is the latest case in the English courts which expressly decides the point, it may, perhaps, be received as the English doctrine. But this concession must be made with some hesitation in view of opinions expressed in other cases decided in the same country. In the very case in which that judgment is rendered, the chief justice takes occasion to correct what he supposes to be an erroneous statement of Tindal, C. J., in *Cooper* v. *Shepherd*, to the effect, "that, according to the doctrine of the cases which were cited in argument by a former recovery in trover *and payment of damages*, the plaintiff's right of property vests in the defendant in that a tion."

It was, therefore, the opinion of C. J. Tindall, that *payment of the damages recovered* is essential to vest the property in defendant, and this only a few years before the case of *Johnson* v. *Buckland* was decided. That case was decided in 1854, and mainly on the authority of *Brown* v. *Wootton*, reported in Yelverton, as also by Croke, J. The reason for the decision as given by Popham, C. J., is thus stated in the latter book: "In the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before, is reduced *in rem judicatam*, and to certainty, which takes away the action against others." If the only object, or indeed the principal object, in obtaining a judgment in trespass, was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of his logic. But as it is the purpose of the law, and the main purpose for which courts of justice are instituted, to procure satisfaction for these injuries, we do not see the sequence in the reasoning of the learned judge.

Brown v. *Wootton* was decided in Trinity Term, 3 James I Prior to that time, the law had been thought to be the other way. In *Claxton* v. *Swift*, 2 Shower, 494, Shower said, "It was never pretended, until the case of *Brown* v. *Wootton*, that a bare judgment should be a bar."

In *Cocke* v. *Jenner*, reported by Hobart, and which was in Trinity Term, 12 James 1. (only nine years after *Brown* v. *Wootton*) the question arose on a release of one joint trespasser, which was held to be a bar to a suit against the other, on the ground that it was equivalent to satisfaction; yet the language of the report leaves a strong impression that it was the opinion of the court that several judgments might be had, and that only satisfaction, or its equivalent, would bar proceedings against all who were liable. And the case of *Corbett* v. *Barnes*, cited from Sir W. Jones (time of Charles the First) which was on *andita querela*, while it holds that only one satisfaction can be had, implies clearly that several judgments may be rendered against joint trespassers. Indeed, that very case was where one judgment had been rendered in the King's Bench against one, and in the Common Pleas against three others, for the same trespass.

These cases show that, after as well as before the case of *Brown* v. *Wootton*, the law was supposed, by some of the ablest judges in England, to be otherwise than what it decides; and we know of no case in which it was followed in England as implicit authority, until *Buckland* v. *Johnson*, in 1854.

The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatum*, become merged into a judgment, which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefitted or advanced towards procuring satisfaction for his damages, by such judgment.

This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Ellenborough, in *Drake* v. *Mitchell*, 3 East, 258, "A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.

This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of personal property. Prior to *Brown* v. *Wootters*, the English doctrine seems to have been the other way, as shown by Kent, in his Commentaries, 2 Kent, 388, referring to Shepherd's Touchstone, Title, "Gift," and Jenkins, page 109, Case 88.

We have thus far confined ourselves to the examination of the English authorities, and the principle discussed in them, and we are forced to the conclusion that even at this day the doctrine there is neither well settled nor placed on any satisfactory ground.

In turning our attention to the American cases, we have been able to find but two in which the the point directly in issue has been ruled in favor of the bar of the former judgment; although there are some other cases which hold that the right of property is transferred by the judgment. The first of these two cases is *Wilkes* v. *Jackson*, 2 Henning & Munford, 355. This was an early case in the Court of appeals of Virginia, which seems to have passed without much consideration, and was mainly rested on the judgment of the same court in a former case, which does not appear to sustain it. The other is the Rhode Island case of *Aun* v. *Bates*, 7 Rhode Island, 217. It is a very recent case, decided in 1862; but the absence of any other reasoning than a mere recapitulation of the English cases, and the remark that upon their authority the court is obliged to rest its decision, deprives it of any other weight than what should be attached to those cases. This we have already considered. In addition to this, it has been decided in South Carolina and Pennsylvania, that the recovery of a judgment for the value of the goods converted, transfers the title to the defendant. *Rogers* v. *Moore*, 1 Rice, 60; *Floyd* v. *Brown*, 1 Rawle, 121.

On the other hand, in the case of *Livingston* v. *Bishop*, 1 Johnson, 290, in the Supreme Court of New York, in 1806, Kent, C. J. overrules *Brown* v. *Wootton*, and hold that judgment alone is not a bar.

In *Sheldon* v. *Kibbe*, 3 Conn. 214, decided in 1819, in the Supreme Court of Connecticut, the court, by Hosmer, C. J., enters into an elaborate examination of the authorities, and a full consideration of the question on principle, and lays down the doctrine that neither a judgment, nor the taking of the body of the defendant in execution, will bar a second action against a co-trespasser. Nothing short of satisfaction or release can have that effect.

In *Sanderson* v. *Caldwell*, 2 Aiken, 195, in the Supreme Court of Vermont, in 1826, it is held that neither judgment, nor issuing execution, nor anything short of satisfaction, is a bar to a second suit brought against another joint trespasser.

Osterhout v. *Roberts*, 8 Cowan, 43; a year later, in the Supreme Court of New York, was a plea that defendant's son had been sued, had a judgment rendered against him, and had been taken in execution and imprisoned sixty days for the same trespass. Yet the plea was held bad. The trespass was for taking a watch.

In *Elliott* v. *Porter*, 5 Dana, 299, Robertson, C. J., of the Court of Appeals of Kentucky, examines the whole subject fully, both on principle and authority, and holds that the first judgment is no bar, and that the title to the property does not pass by judgment in trespass or trover. This case is affirmed by the same court in *Sharp* v. *Gray*, 5 B. Monroe, 4.

Blan v. *Cochren*, in Alabama, 20 Alabama, 320, was an action of trespass. The defendant pleaded a former recovery against a co-trespasser, and payment of the judgment and costs so recovered to the clerk of the court. But the plea was held bad, because it was not averred that it was accepted by the plaintiff.

In *Knott* v. *Cunningham*, 2 Sneed, 204, the Supreme Court of Tennessee held that a former judgment against one tort-feasor, was no bar to a suit againt another, for the same tort, without satisfaction.

In *Page* v. *Freeman*, 19 Missouri 421, the Supreme Court of Missouri held the same doctrine.

In *Floyd* v. *Brown*, 1 Rawle, 125, Gibson, C. J., of Pennsylvania, while holding that after a judgment in trover against two trespassers without satisfaction, plaintiff cannot bring assumpsit against another trespasser, uses this language: "A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are concurrent remedies. Trespass is, in its nature, joint and several, and in separate actions against joint trespassers, being consistent with each other, nothing but satisfaction by one will discharge the rest." Trover and assumpsit, however, he holds to be inconsistent remedies.

If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment, without satisfaction, is no bar, to look at the question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial and unsatisfactory reasoning.

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatum*. For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for a first time against another trespasser in the same manner.

In reference to the doctrine that the judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle.

The property which was mine has been taken from me by fraud or violence. In order to procure redress, I must sue the wrong-doer in a court of law. But instead of getting justice or remedy, I am told that by the very act of obtaining a judgment—a decision that I am entitled to the relief I ask—the property which before was *mine, has become that of the man who did me* the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrong-doer. It is sufficient to state the proposition to show its injustice.

It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. 2 Kent, 388-9.

But in all such cases what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far effected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of the opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party the to the first judgment. Judgment affirmed.—*Legal Intelligencer.*

SUPREME COURT, PHILADELPHIA.

Boyers Estate. Hughes' Appeal. Buchanan's Appeal.

Between a judgment confessed and an assignment made on the same day, the judgment will have priority.

Chester County.

Opinion by Agnew, J.

The question upon this record is whether a judgment or a deed of assignment for the benefit of creditors, shall take preference in the distribution of a fund arising from real estate. The conceded facts are, that on the same day the judgment was entered the deed was delivered between the hours of ten and one o'clock, but there is no evidence as to the time of the entry of the judgment,—it might have been before or after the *delivery of the deed.*

There is no case to be found in the books precisely like it, yet doubtless there are familiar principles contained in many decisions, which rule this case. Were it a question between lien creditors only it might be readily solved by letting them share in the fund *pro rata*, on the ground that a day has no fractions in legal proceedings. But here the claims of the parties conflict not only in time but nature; and are so irreconcilable, one must give way to the other; and the question is, what principle must govern the precedence. A lien is but an incumbrance on title, but a conveyance passes the title away, if therefore, the judgment be prior, the conveyance is subject to it, if posterior it has no lien because the title is gone.

In principle the case falls clearly within the decision in *Mechanic's Bank* v. *German*, 8 W. & S. 304; Olaasen's Appeal, 10 Harris, 363, and like cases; admitting proof of the hour at which each transaction took place. But no proof was excluded, and the difficulty arises not from a denial of a right to give it, but from the inability to furnish it. We are then driven to the necessity of determining the rights of the parties upon the presumptions which the law must afford us. In point of fact the judgment may have been prior, it would therefore be unjust to postpone it from mere considerations of equality in the distribution. It may have been subsequent, and it would be improper to give it undue precedence It must therefore be determined upon just legal principles, and those reasons which best promote the general interests.

The rule, that, in the entry of judgments and liens of like character, rejects portions of the day is not a legal fiction, but a measure of policy to prevent litigation and serve as a guide to the public It is firmly established and is not to yield unless to the certain demands of justice.

Starting with this principle the lien of the judgment which begins with the day itself, necessarily antedates the conveyance. In this respect there is no distinction between judgments by confession and those actually pronounced by the courts. It is easily to be seen that in the case of adversary judgments, they might be often defeated by the fraud of defendants, who on the same day could place assignments for creditors on record, unless the legal presumption be maintained. Indeed, at common law, the judgment related back to the first day of the term, and it required the passage of the act of 1772, to confine its operations to the day on which it was signed, in favor of *bona fide* purchasers for a valuable consideration.

Besides these motives of public policy, reasons are to be derived from the comparative ability each party has to protect himself. The judgment creditor it is manifest has no power to protect himself against the conveyance, which has thirty days for its transit to the public record.

When he enters his judgment he may inquire for conveyances, but is answered there are none in this office, and yet one may have existed hours

beforehand. He may ask the officer to note the hour of entering his judgment, but this is no protection, and only insures his defeat when the earlier deed appears, and added to this no legal duty rests on the officer who under the law is obliged to enter the day only. But it is different with the grantee in the conveyance, he can be certain of all liens which stand before him. They are on the record and the officer is bound to inform him, and if necessary to certify the fact under his official responsibility. He can protect himself therefore by other means or if it be a purchase, decline the title and withhold his money. The grantor in a voluntary assignment stands in the same position, and if he finds judgments unexpectedly entered against him, may resort to other means to protect his creditors if within his power.

In all these inquiries *truth is the object sought* for, but having no means of determining the facts, we must adopt that legal inference which best promotes the public interests, protects the rights of individuals, and preserves the community from schemes of fraud, and useless litigation.

In this case, having no means of ascertaining the actual priority of either judgment or deed, we must allow the legal rule to operate, which rejecting portions of the day, carries back the judgment and postpones the assignment.

The decree of the court below is therefore reversed, and the record ordered to be remitted to the court below, with instructions to allow the judgment of the appellants to be first paid out of the fund, and the balance to be distributed in the manner heretofor decreed by the court below, or if the fund should be insufficient to pay the judgement of the appellants in full, them to be paid *pro rata;* and it is ordered that the costs be paid out of the fund in the first place.

Strong, J., dissents.—*Legal Intelligencer.*

Allen v. Conrad.

Defendant is entitled to recover damages for refusal to satisfy judgment, although satisfaction could be inferred from the state of the record.

Error to District Court of Philadelphia.

Opinion by Woodward, C. J.

This was an action of debt upon statute. Allen held, by assignment, a judgment against Conrad upon the record of the District Court of December Term, 1863, No. 177, for the sum of two thousand nine hundred and thirty-six dollars, which, after payment in full, and after the statutory demand for satisfaction, he had failed to satisfy of record. This suit was brought to recover damages for that neglect.

It was objected that the action would not lie, because the record exhibited such proceedings upon the judgment as amounted in law to a satisfaction of it, and therefore a formal entry of satisfaction was not necessary under the 14th section of the act of Assembly of 13th April, 1791. Purdon 576.

The proceedings alluded to were as follows; On the 7th of March, 1864, a writ of *venditioni exponas* having issued upon the said judgment, and being then in the sheriff's hands, Conrad, the defendant, made his affidavit that on the 9th day of Februray, before he had tendered to the plaintiff the whole amount of debt, interest and costs up to that time, and he prayed for a rule upon the sheriff and plaintiff to show cause why he should not pay to the sheriff the amount of debt interest and cost accrued to the 9th day of February, in full satisfaction of the said debt and costs. On the same day such a rule was granted, and proceedings stayed. April 9th 1864, the rule was made absolute and the sheriff returned *vend. exponas* "Stayed by order of the Court." There was no record evidence of the actual payment of the money to the sheriff, though the fact of payment to him and by him to the plaintiff was proved upon the trial of this cause.

Now, giving the utmost effect to the above proceedings that can reasonably be claimed for them, they amount to no more than an inferential satisfaction of the judgment. Grant that a seacher of records who happened to possess legal *skill enough to know the effect of a rule made* absolute, might infer that the judgment had been satisfied; yet the statute contemplates something more palpable, something which the man most ignorant of legal forms would understand to be satisfaction. It makes it the duty of the person who has received satisfaction, within eighty days after request, to repair to the office of the prothonotary of the court where the judgment is, and there in the office "of the said prothonotary to enter satisfaction of the judgment which shall forever discharge, defeat and release the same." The statute is thus precise in prescribing the duty to be done in order that the defendant's estate may be relieved of the lien, and in order, also, that purchasers, incumbrancers, and all the world may have the same evidence in kind and degree, of the satisfaction and discharge of the judgment as of its entry and existence. Inquirers are not to be obliged to search files and to weigh the legal effect of sheriff's returns of writs of execution, *but the record of the judgment* is to be made to inform them that the judgment no longer exists. Would a prudent conveyancer have passed a title of the defendant as uncumbered with this record before him? He would have found that the judicial order for staying the *ven. ex.* was made on the 7th of March, when the rule was granted, and that the sheriff's return "stayed by order of the court," without date, must be referred to that order. But that would imply no *payment of money. The rule was for leave to* pay the plaintiff the money that had been tendered, and upon granting the rule the execution was stayed, but the rule was not made absolute till the 9th of April. Was the money paid after that date and in pursnance of the leave thus granted?

On this point the record says not a word—it is mute. The conveyancer would have to go further to satisfy his doubts, he would have to inquire of the sheriff and examine receipts, and decide a question of fact upon such evidence as he could obtain, which the statute meant should be decided by the plaintiff himself on the very record of the judgment. The preamble to the statute recites the evils which frequently happen from leaving judgments long unsatisfied on record, although the monies for which those judgments have been rendered are justly discharged, "whereby defendants in such cases as well as the subsequent purchaser of real property suffer much vexation and inconvenience," and

we must construe the statute so as to suppress the mischief and advance the remedy.

We hold, therefore, that notwithstanding the proceeding alluded to, and the payment of the money to the sheriff, there was no such satisfaction entered upon the judgment in question as relieved the owner of the judgment from the duty of complying with the defendant's request, and the action was well brought.

The only other question upon the record regards the measure of damages. The statute prescribes no measure except as it limits them to not exceeding half of the debt. The court declined to limit the jury to nominal damages, though there was no evidence of special damages. In Henry v. Sims, 1 Wh. 187, it was ruled that in such an action actual damages need not be proved, and that the jury may take into consideration all the circumstances by which the party has suffered vexation and inconvenience. In the instance before us the statutory limit was not transcended, and we have no means of measuring the vexation and inconvenience which the defendant's neglect of a plain duty occasioned the plaintiff, and, therefore, we cannot say that the damages were excessive.

The judgment is affirmed.—*Legal Intelligencer.*

GENERAL CORRESPONDENCE.

Insolvent Act of 1864.

To the Editors of the Law Journal.

Gentlemen,—"A Barrister," in your last issue raises some questions under the Insolvent Act of 1864, and amongst others whether or not it is necessary to mail a notice to each creditor on an application by an insolvent for his discharge, and refers to a recent decision on the question—doubtless *In re Waddell*, as you suggest.

The same question arose in my practice. I argued that it was not necessary to mail the notice, and the learned county judge sustained me. I am still firmly of the opinion that the statute does not require it. My reasons are as follows.

The statute is divided into 13 sections or chapters, each one (except the first and the last) divided into several sub-sections, and having a descriptive title, as "Of voluntary assignment," "Of dividends," &c., section or chapter 11 being "Of procedure generally."

Under this clause, sub-sec. 1, it is contended by some that in applications under section or chapter 9, treating "Of composition and discharge," it is necessary to address notices to all creditors and representatives of foreign creditors within the province. I contend that it being for procedure generally, does not affect cases which are particularly provided for elsewhere in the statute. Confining this argument to notices under sub-sec. 1 of sec. 11, and referring to the notices mentioned in the act, we find that there are four places in the statute where provisions are made as to how notices shall be given: the first is sub-sec. 13, sec. 4—the assignee may sell the real estate after advertisement for the same time, and *in the same manner*, as required for sales of land by the sheriff. Mark *en passant* that this is a notice "required to be given by advertisement."

The second is sec. 3, sec. 7—notice of appeal. This notice is to be *served* on the opposite party.

The third is sub-secs. 6 and 10, sec. 9—another notice required to be given by advertisement; and the fourth is sub-sec. 7, sec. 11, generally.

Now the statute is positive in its provisions in each one of these sub-sections. The first one reads "but only after advertisement thereof," &c. Can it be contended that under sub-sec- 1, sec. 11, it is necessary, before an assignee can make a legal sale and conveyance of the insolvent estate, he must not only advertise the lands as directed in sub-sec. 13, sec. 4, but also address and mail notices, &c., post paid, as in sec. 11, notwithstanding that this sub-sec. 13 says notice shall be given "*in the same manner*" as sheriffs give notice of sales of land? Clearly not. And yet if the position contended for by Judge Logie is correct, it must go that far, because this is a notice "herein required to be given by advertisement."

The second is not a notice of meeting of creditors, nor is it a notice required to be given by advertisement. The statute in that section says it shall be served upon the opposite party and upon the assignee—positive and clear enough, but not more so than the other provisions.

The third says, "and notice shall be given by advertisement in," &c., "for two months, and for the same period in," &c. This is also positive and clear enough. Notice of the application is to be advertised for two months as directed. And upon such application, *i.e.*, the application of which notice, as directed, has been given, any creditor may appear, &c. If no other general provision were made as is made in the fourth sub-sec. quoted, there

could be no contention that it was necessary to mail notices.

The fourth is also positive and clear: "shall be so given by publication thereof, &c., and in any case, &c., giving such notice shall also, &c. To what, then, does sub-sec. 1 of sec. 11 refer? what notices does it provide for. Before answering this I will give my construction of the sub-section, and what I understand by the words "without special designation of the nature of such notice" (these words seem to be the knot). I take it there are two kinds or classes of notices referred to in this sub-sec. 1st. Notices of meeting of creditors. 2nd. "All other notices required to be given by advertisement, without special designation of the nature of such notice," *i.e.*, this sub-sec. in the first place does specially designate the nature of the notice, viz., meetings of creditors. In the second place, it, the sub-sec., does *not* specially designate the nature of the notice, but provides for all other. Other than what? That *meetings of creditors*, herein required to be given by *advertisement*, without in this sub-sec. designating their nature, as in the other kind or class, the nature of which is meetings of creditors. A reference to the statute will I think answer my question and sustain my construction.

The first place in this statute where a notice is spoken of as being required is sub-sec. 1, sec. 2. This is for a meeting of creditors, and comes under the first class, and the next sub-sec. says each notice of such meeting sent by post as *hereinafter* provided. The only provision hereinafter made that could touch this case is in sub-sec. 1, sec. 11.

The next notice is sub-sec. 8 of sec. 3. This is a notice to be given by advertisement, and falls under the second class. There is certainly no other place in the statute providing for the manner in which the notice shall be given, and yet it is clear that the whole of sec. 11, sub-sec. 1 is not applicable, for the writ is issued and placed in the hands of the sheriff, who himself knows nothing about the estate or its creditors, by one who only knows that he is a creditor, and it is simply impossible for the sheriff to mail a notice of this meeting post paid to each creditor.

The third place is sub-sec. 13 of sec. 3, and comes under the first class, being a meeting of creditors. Here again the only provision is in sub-sec. 1, sec. 11, and Mr. Abbott, the author of the act, in his book edition of it, p. 25, says in reference to this section "That provision would, however, seem inapplicable to this clause, as no list of creditors is attainable at this stage of the proceedings, and there is 'no assignee or person' calling the meeting."

The fourth is in sub-sec. 17 of same section, is a meeting of creditors; and again sub-sec. 1 of sec. 11 is the only directing clause as to how notice of such meeting is to be given.

The fifth sub-sec. 3, sec. 4, a meeting of creditors.

The sixth is sub-sec. 13, sec. 4, commented upon above.

The seventh, sub-sec. 18 of same section, a meeting of creditors.

The eighth, sub-sec. 11, sec. 5, a notice to "be given by advertisement."

The ninth, sub-sec. 2, sec. 9, another notice "required to be given by advertisement."

The tenth, sub-sec. 6 and 10 of same section, also referred to above.

The eleventh, sub-sec. 1, sec. 10, a "meeting of creditors," notice of which is to "be given by advertisement."

And the twelfth and last is sub-sec. 1 of sec. 11.

These are all designated or described where they are spoken of in the act, either as notices of meetings of creditors or as notices required to be given by advertisement, and I have pointed out several cases in which it is impossible to perform all of the conditions of sub-sec. 1 of sec. 11, and in no other place is provision made for the MANNER in which such notice shall be given. If then the clause is inapplicable to some of the cases which can only come under "procedure generally," *a fortiori* it is inapplicable where positive and specific provisions are elsewhere made for a particular notice.

Now as to sec. 11, sub-sec. 1 itself. Notice of the two kinds of classes shall be given by publication thereof FOR TWO WEEKS in," &c. "And in any case the assignee or person giving such notice shall ALSO address notices thereupon," &c. What does the word "also" mean? Clearly that in addition to *two weeks'* publication there must be a mailing of notices post paid; but not in addition to a TWO MONTHS' publication specifically and completely provided for elsewhere. The language of the statute evidently contemplates a two months' publication without notices mailed,

equivalent, in this particular case, to two weeks' publication *with notice mailed*, in general cases.

Again, (Chief Justice Draper's argument, and a conclusive one too), sub-sec. 1 of sec. 11 provides that the publication in the local newspaper shall be in one "published at or near the place where the proceedings are carried on." Sub-sec. 6 of sec. 9 selects as the local newspaper the one published "in or nearest the place of residence of the insolvent." Now every one who knows anything about the practice under the act knows that it is very often the case that the insolvent lives in one county and the proceedings are carried on in another. Sometimes he lives in Lower Canada, and the proceedings are carried on in the western part of Upper Canada. The only possible argument that can be advanced to sustain the proposition that, on an application for a discharge of an insolvent it is necessary to mail a notice post paid to each creditor is, that notice of the application may be validly given in two ways, as pointed out in sub-sec. 6 of sec. 9, or as in sub-sec. 1 of sec. 11. But you cannot add the last clause of sub-sec. 1 of sec. 11 to sub-sec. 6 of sec. 9 without adding the two prior clauses (with which it is connected by a copulative conjunction), the first of which is that publication shall be for two weeks, and the second is that such publication must be in the local newspaper published at or nearest to the place where the proceedings are being carried on. You must take all or none.

Another question likely to arise under the Act is this: can a creditor sue and recover judgment on a debt contracted and due before the assignment in voluntary, or appointment of the official assignee in compulsory liquidation; or to put it thus, in an action on a promissory note described in the insolvents schedule of creditors attached to his deed of assignment, would it be a good plea before discharge to plead the assignment or appointment under the Act? I contend it would, and form my opinion from the statute itself. The effect of an assignment, or the appointment of an official assignee, is declared to be, "to convey and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters, and other papers and documents relating to his business, &c., which he has or may become entitled to at *any time before his discharge under the Act, excepting*," &c; sub-sec. 7 of sec. 2, and sub-sec. 22 of sec. 3; and all creditors can come in and share *pro rata* in the insolvent's estate. The assignee represents the creditors, and has an absolute right of property in, as well as a right of possession of all the insolvents estate, real and personal, wheresoever situated, excepting only such as could not be seized under execution. This is much more than the writ of execution could do for the creditor in the case of a *fi. fa.*, that would only give the sheriff a right of possession of, with a lien upon certain kinds of personal or real estate situate in his bailiwick, to be sold within a limited period, and always at a sacrifice. If the creditor is not entitled to his discharge he will always remain in this way, and whenever he gets a cents worth beyond what the law exempts from seizure under execution it instantly ceases to be his and vests in his assignee—in trust for the body of creditors. The assignee has got to apply for his discharge after notice, and it would not be granted until after all the assets were converted and distributed, and until the insolvent gets his discharge. The practical effect then of the assignment and appointment is, that of *a judgment recovered*, not of an action pending, as in *Baldwin* v. *Peterman*, 16 U. C. C. P. 310. The assignee in his own name as such sues for the recovery of debts due to the insolvent, and may "intervene and represent the insolvent in all suits or proceedings by or against him which are PENDING at the time of his appointment. In suits or proceedings commenced against the insolvent after the insolvency proceedings, the assignee cannot intervene, the insolvent has no means to employ a professional man to defend him; and no matter how unjust the claim may be his hands are tied, he must submit, and when he gets his discharge from the insolvent court (the expenses of which are defrayed by the estate) he finds a judgment against him—a judgment debt contracted *after* the date of his assignment staring him in the face—a judgment founded on a most unjust and illegal claim, but "*interest reipublicæ ut sit finis litium*," and the illegal claim is merged in the legal judgment obtained *after* his assignment in bankruptcy.

By sub-sec. 9 of sec. 5, costs incurred in proceedings against an insolvent before due notice of an assignment or writ can rank upon

the estate, such costs forming a debt contracted *before* insolvency proceedings. Costs incurred after due notice do not so rank. With what constitutes due notice I have nothing to do here, the statute elsewhere points that out. Now the Statute of Gloucester, 6 Edw. 1, c. 1, says, that the plaintiff in all actions in which he recovers damages shall also recover against the defendant his costs of suit. If then a creditor can sue and obtain judgment AFTER these proceedings in insolvency the Stat. Gloucester gives him full costs of suit.

Again, the insolvent is only discharged from such debts as are proveable against his estate and existing against him at the time of his assignment, not from debts contracted afterwards. If, then, a creditor be allowed to put his claim into a judgment with costs, the original cause, *transit in rem judicatam*, is merged and gone forever. If one creditor can do this, all can, and the insolvent would find that his debts, instead of being erased by the insolvency proceedings, have, like the prophet's gourd, during the long night of his commercial death, most wonderfully increased in size, and that he owes twice as much as he did before.

The words used in sub-sec. 9, sec. 4, *supra*, giving the assignee power to intervene in all proceedings by or against the insolvent which are *pending* at the time of his appointment, of themselves shew by direct inference that he cannot be sued after assignment or appointment.

The argument used against me is, that the insolvent may never get his discharge. True, an execution debtor may never get his pay. If he never gets his discharge his assignee will not, and whenever he gets anything his assignee owns it and takes for the creditors. Could an execution do more than or as much as this?

There are no authorities against this view. *Baldwin* v. *Peterman* is not, as I have shewn. *Spencer et al.* v. *Hewitt*, Law Rep. 1 Ex. 123, is under the English Bankruptcy Act. I have not the English Act, but from the reported cases on it it seems entirely different from ours, and from the fact of there being provisions in it for a *superseadeas* of the commission, makes me think the authority is not applicable.

Yours, &c. SUBSCRIBER.

October, 1866.

[*Audi alteram partem.* The profession doubtless desire to see as much light thrown upon this Act as possible. We gladly therefore open our columns to a free discussion of its provisions. The latter question which our correspondent refers to is, he tells us, now before the County Court of his County for adjudication. We shall be glad to hear from him again when it is decided. As to the argument based upon the fact that proceedings are often carried on in another county than that in which the insolvent resides, see Editorial remarks on p. 253—Eds. L. J.]

MONTHLY REPERTORY.

U. S.

Proof of execution of will—Executor as witness—Witness to prove execution.

A will which bears the genuine signatures of three competent witnesses, who signed their names simply as "witness to signature," with nothing further, may be admitted to probate, although neither of the two survivors of them recollects anything about the circumstances under which it was executed: *Eliot* v. *Eliot*, 10 Allen.

The executor named in a will is a competent subscribing witness thereto, and may testify in support thereof, under the statutes of this commonwealth, although he has not declined the trust: *Wyman and Others* v. *Symmes*, 10 Allen.

An heir at law, who is disinherited, is a competent witness in support of the will: *Sparhawk* v. *Sparhawk and Others*, 10 Allen. 5 Am. Law Reg. 575.

APPOINTMENTS TO OFFICE.

CORONERS.

WILLIAM NOBLE RUTLEDGE, of Coldwater, Esquire, M.D, to be an Associate Coroner for the County of Simcoe. (Gazetted September 1, 1866.)

ADDISON WORTHINGTON, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted September 1, 1866.)

ROBERT M. ROY, of Belleville, Esquire, M.D., to be an Associate Coroner for the County of Hastings. (Gazetted September 1, 1866.)

ALFRED LANDER, of Frankville, Esquire, M.D., to be an Associate Coroner for the United Counties of Leeds and Grenville. (Gazetted September 1, 1866.)

NOTARIES PUBLIC.

PETER CAMERON, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted September 1, 1866.)

WILLIAM PENN BROWN, of the Village of Kincardine, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted September 1, 1866.)

FREDERICK JASPER CHADWICK, of the Town of Guelph, Esquire, to be a Notary Public for Upper Canada. (Gazetted September 1, 1866.)

JAMES YOUNG, of Carrying Place, Esquire, to be a Notary Public for Upper Canada. (Gazetted Sept. 15, 1866.)