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DIARY FOR JUNE.

6. SUNDAY ..... *2nd Sunday after Trinity.*
6. Monday . Recorder's Court sits. Last day for notice of trial for County Court.
11. Saturday ..... *St. Barnabas.*
12. SUNDAY ..... *3rd Sunday after Trinity.*
14. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
19. SUNDAY ..... *4th Sunday after Trinity*
20. Monday..... *Accession Queen Victoria, 1837.*
21. Tuesday ..... Longest Day.
23. Thursday.... Sittings Court of Error and Appeal.
24. Friday..... *St. John Baptist.* Midsummer Day.
26. SUNDAY ..... *5th Sunday after Trinity.*
29. Wednesday .. *St. Peter.*
30. Thursday ..... Last Day for County Councils finally to revise Assessment Rolls.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

JUNE, 1864.

OUR BANKS AND OUR USURY LAWS.

Usury, in the common acceptation of the term, may be defined to be the contracting for and taking a rate of interest for the loan and forbearance of money, which is higher than that allowed by law.

In olden times, the taking of any money for the use of money was accounted usury, and considered disreputable. Now, the recovery of interest, under certain restrictions, is protected by the Legislature. Whether any restrictions are wholesome, and do or do not tend to cramp trade and actually produce a high rate of interest, it is not our intention to discuss.

It was provided by the statute 12 Anne, st. 2, cap. 16, which embodied enactments made originally as far back as the reign of Henry VIII., that no person, upon any contract, should take, accept or receive, for the loan of money or other commodities, above the rate of five per cent. per annum, under penalty of forfeiture of treble the money lent; one half to the Crown, and the other moiety to him that would sue for the same. The same statute further enacted, that all bonds, contracts or assurances, whereby there should be reserved or taken above the rate of five per cent. per annum, should be utterly void.

The statutes which have from time to time been passed in this Province on the subject of interest and usury are, 51 Geo. III. cap. 9; 7 Wm. IV. cap. 5; 12 Vic. cap. 22, sec. 23; 16 Vic. cap. 80; 19 Vic. cap. 48; and 22 Vic. cap. 85. These have been consolidated and arranged, and may now be found in Con. Stat. C. cap. 58, and Con. Stat. U. C. cap. 42, sec. 8, and cap. 43.

The general Act respecting Banks incorporated before the Union of the Provinces and any Bank incorporated by the Legislature since that period, granting to such Banks certain privileges, and defining them, is chapter 54 of the Consolidated Statutes of Canada. The general Act "respecting Banks and freedom of banking," under the provisions of which individuals or joint-stock companies are authorised to carry on business as legally authorised "bankers," is Con. Stat. C. cap. 55.

The legal rate of interest fixed by law in this country was formerly, as well for Banks as for others, six per cent. per annum. The late statute of 22 Vic. cap. 85, sec. 3 (Con. Stat. C. cap. 58, sec. 4), provides, however, that no Bank incorporated by act of Parliament, or by Royal charter, or established under the Free Banking Act of 13 & 14 Vic. cap. 21 (Con. Stat. C. cap. 55), "may stipulate for, take, reserve or exact a higher rate of discount or interest than seven per centum per annum; and any rate of interest not exceeding seven per centum per annum may be received and taken in advance by any such bank." But although the Legislature has thought fit to add one per cent. per annum (and in fact a fraction more, as will hereafter be seen, owing to the discount being retained out of the amount loaned) to the legitimate profits of the banks, it has not in the slightest degree relieved them from the consequences of usurious transactions. The provisions of 51 Geo. III. cap. 9, sec. 6, are still in force as regards banks, and are now to be found in the Consolidated Statutes of Canada, cap. 58, sec. 9. The section reads as follows:—"And except as aforesaid, all bonds, bills, promissory notes, contracts and assurances whatsoever, made or executed in contravention of this act, whereupon or whereby a greater interest is reserved and taken than authorised by this act or by some other act or law, shall be utterly void, and every bank or banking institution, and every corporation, and company, and association of persons not being a bank, authorised to lend or borrow money as aforesaid, which directly or indirectly takes, accepts and receives a higher rate of interest, shall forfeit and lose for every such offence treble the value of the moneys, wares, merchandize or other commodities lent or bargained for, to be recovered by action of debt in any court of competent jurisdiction in this Province; one moiety of which penalty shall be paid to the Receiver-General for the uses of Her Majesty towards the support of the Civil Government of the Province, and the other

moiety to the person who sues for the same." This section, it will be seen, is substantially the same as the statute of Anne, already mentioned.

The old statutes respecting usury have been construed liberally by the courts, so as to effect the suppression of usury as far as possible. Lord Mansfield, in giving judgment in a case of *Floyer* v. *Edwards*, Cowp. 114, says: "Where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute." The later cases, however, show a disposition to relax much of the old strictness with respect to usurious transactions. Sir J. B. Robinson, C. J., in giving judgment in an action brought on a covenant contained in a mortgage to a building society, where the defence of usury was set up, said, "It may be quite true that the taking shares with a view to borrowing, and not with the intention of continuing upon the footing of an investor, is only a contrivance to evade the usury laws; but we cannot but see very plainly that such societies are in themselves contrivances to evade by statute the usury laws, and therefore we cannot see much force in the objection, especially since the alterations in the laws regulating interest (16 Vic. cap. 80, &c.), which have in effect abolished usury altogether." (*Canada Per. Building Society* v. *Rowell*, 19 U. C. Q. B. 124. See also the remarks of Draper, C. J. C. P., in *Commercial Bank* v. *Cameron*, 9 U. C. C. P. 378.) This is very different language from that used by Lord Mansfield; and though true it is that the statutes do not abolish usury as far as banks are concerned, yet it shows the leaning of the courts and the tendency of the age.

To a somewhat similar effect are the remarks of Vankoughnet, C., in *Drake* v. *Bank of Toronto*, 9 U. C. Chan. Rep. 116; 8 U. C. L. J. 320, where he says: "Although a perusal of the whole evidence in this cause cannot fail to impress one with a strong feeling that in the dealings of this bank with the firm of G. R. & H., an attempt has been made to elude the provisions of the recent statute of this Province, prohibiting the taking by any bank of more than seven per cent. per annum for the loan and forbearance of money, I do not think the evidence here is of that clear and conclusive character to warrant relief being granted to plaintiffs on that ground." He goes on, however, to show that if the evidence is conclusive the courts will apply the statute strictly: "When the Legislature was repealing the laws restricting the amount of interest to be taken by private persons for the use of money, it saw fit to retain those restrictions in their full force so far as the banking institutions of the country are concerned; feeling no doubt that, as there are conceded to those bodies vast and important privileges and advantages in the conduct of their business, they ought to be restricted in the amount of interest they should be permitted to charge, and there can be no doubt as regards them the laws against usury remain in force, and in a proper case will be applied with the utmost rigour."

The ordinary transaction of discounting a bill or note by a bank is a lending within the statute of Anne, and the word "discounting" is expressly used in our statute. It has been laid down as a general rule of law, that if the interest be retained at the time of the loan, the contract is usurious (*Barnes* v. *Worlich*, Noy 41; Cro. Jac. 25; Yelv. 30). But in favor of trade an exception was allowed in the case of the discount of bills. Our statute expressly recognizes the right to receive and take interest in advance, and in the acts of incorporation of several of the banks in this country it is expressly provided that such banks, "in discounting promissory notes, bills or other negotiable securities or paper, may receive or retain the discount thereon at the time of discounting or negotiating the same."

One effect of this privilege is, that interest is charged, not on the sum actually advanced, but, on the sum for which the bill or note is made payable. Thus if a bill for $100 at twelve months date is discounted at seven per cent. per annum, the sum actually paid to the borrower is $93, and the $7 discount retained is, in fact, interest on the $100 at the rate of about $7 53. It is evident that the longer the date of the bill, the greater the amount of interest retained, the less the actual advance, and the higher the rate of interest on the advance; so that if a bill or note at fifteen years date were discounted at seven per cent., the interest would more than annihilate the principal. (See Byles on Bills, p. 246.) We suspect that this view of the subject does not often strike those parties who are in the habit of getting notes "done," or perhaps they would not be quite so anxious to have their paper made at as long dates as possible.

Another and a more obvious consequence is, that the discounter really makes compound interest, as the discount that he retains is lent again to a subsequent borrower, and so on *ad infinitum*.

It has long been a well settled principle of law, that if money is lent at an exhorbitant rate of interest, upon a casualty by which the principal as well as the interest is put in hazard and the risk of an entire loss is run, this is not usury. Of course we do not allude to the ordinary risk attendant upon the lending money upon bills or notes, but to something beyond this; as for example, a contract of bottomry or respondentia, that is, pledging a ship or her cargo as a security for the repayment of money borrowed at an excessive rate of interest, or for a contract of insurance in consideration of the payment of a premium to the insured as an equivalent to the risk run by the insurer

(Blac. Com. 457), or the purchasing an annuity, running the risk of the annuitant's death, or with a clause of redemption by the grantor, or putting money into a business upon condition of receiving therefrom a share of the profits besides interest, or in fact by entering into any "speculation," as this word is used in the mercantile world (Blac. Com. 461; *Roberts* v. *Trenayne*, Cro. Jac. 505; *Chesterfield* v. *Jansen*, 1 Wils. 286; *Hawkins* v. *Bennett*, 7 C. B. N. S. 507; 30 L. J. C. P. 103). But banks and bankers can derive no consolation from this doctrine, as they are forbidden to engage in any business which does not come strictly within the meaning of a banking business. "Speculations" clearly do not come within the scope of a bank charter, though some banks seem to have rather a loose notion of their position in this respect. Bank managers and directors should remember that if a loss should arise from engaging in such transactions, they might be held liable by shareholders to make it good to them.

Of a somewhat similar nature, but less objectionable as far as banks are concerned, are charges made beyond the rate of legal interest to remunerate the banker for his trouble and expenses in the transaction of his legitimate business. But here the Legislature, as did the common law, very properly steps in to his relief. Custom, in England, permitted a banker to take and accept from his customer a commission or per centage, to cover the expenses of transmitting money or bills and notes for payment from one place to another, for collecting money on them, and for agency and other incidental expenses. These charges are regulated in this country by statute 19 Vic. cap. 48, providing that any bank carrying on business either under a Royal charter or under act of incorporation, in discounting any note, &c., *bona fide* payable at a place within the Province, other than the place at which it was discounted (and other than its own places of business or agencies—Con. Stat. C. cap. 58, sec. 7), may receive and retain in addition to the discount an amount not exceeding one-half per cent. on the amount of such note, &c., to defray the expenses of agency and exchange attending the collection of it.

This privilege is limited by the subsequent statute of 22 Vic. cap. 85 sec. 4 (Con. Stat. C. cap. 58 sec. 5) which enacts that no bank or banking institution carrying on business as such in Canada, in discounting at any of its places of business or agencies any note, &c., payable at any other of its places of business or agencies, shall receive or retain in addition to the discount any amount exceeding the following rates per cent., according to the time it has to run, on the amount of such note, to defray expenses, &c.—that is to say, under thirty days, one-eighth per cent.; between thirty and sixty days, one-fourth per cent.; between sixty and ninety days, three-eighths per cent; ninety days and over, one-half per cent.

It is a very common practice with some of the banks to discount notes at one of their offices or agencies which are made payable at another office or agency; of course charging and deducting from the amount advanced to the borrower the commission authorised by statute. Now, it is not pretended by either party that these notes *will* be paid at the office where they are made payable, and, in point of fact, the party who expects to pay the note, makes his arrangements to take up the note where it was discounted, before it is sent away *for collection*. It seems to us that Lord Mansfield would, in olden times, have called this "a shift devised by the wit of man to take the loan out of the statute." It may be argued that the notes are made before they are brought to the bank (which is not always the case) and the bank authorities have nothing to do with any arrangement between the maker and payee of the note: and that the most that can be said against them is, that they will not discount any notes except those made payable at another of their offices, that the borrowers can please themselves whether they will bring them the notes or not, that there is no compulsion in the matter, and that the statute permits them to make the extra charge on such notes. But they cannot in the majority of instances deny that there is a tacit understanding that they will discount notes for certain parties, *if* they are made payable in such a manner, *so that* they can make more out of their money than the seven per cent. allowed by statute. The borrowers cannot get the money without submitting to this extra charge, and sooner than go without, they promise to pay certain sums of money at a place where they never in the slightest degree intend or expect to pay them. Parties certainly are not compelled to go to these banks with their notes, but necessity knows no laws, and they get, or think they get, their money's worth. But all this is no reason why the banks should endeavor to elude the provisions of a statute which expressly restricts them to receiving a certain rate of interest, and no more than such rate of interest, *as interest*, but only a remuneration for expenses and trouble incurred in these legitimate banking transactions. The acts of incorporation of most of our banks contain clauses similar to the enactment of 19 Vic. cap. 48, but they may now be considered as regulated by secs. 5 & 7 of Con. Stat. C. cap. 58. There is this difference in the wording of these two sections—the words "*bona fide* payable" being used with reference to notes payable at a place not being the place where the same was discounted, and other than one of the bank's own agencies; and the word "payable," without more, being used in the case of notes payable at

the agency or office of the bank discounting the note, not being the place where the same was discounted. This may be used as an argument in favor of the transaction referred to. Every case must be governed by its attendant circumstances, but subject to the broad principle that any corrupt intention by bank authorities to take and actually receiving an amount of interest exceeding the rate of seven per cent. per annum allowed by law will bring them within the statute.

There are other ways known to bankers for obtaining an increased rate of interest on their money. In *Drake* v. *The Bank of Toronto*, a bill was filed on behalf of the plaintiffs, praying, amongst other things, that the plaintiffs might be declared entitled to some bank stock owned by a debtor of both plaintiffs and defendants in preference to the latter; that the bank might be ordered to allow a transfer of it to be made, or that it might be sold and the proceeds applied towards the claim of the plaintiffs in preference to that of the defendants. The plaintiffs claimed under a transfer of the stock to them by way of security from the debtor, and the bank claimed a lien under their charter until certain notes and bills made and endorsed by the debtor should be paid off. The bill alleged that these notes had been discounted upon a usurious consideration, and in contravention of the statute. The bill enumerated five notes made and endorsed by the debtor to the bank, which notes, it was alleged, were by the bank discounted for the debtor upon an illegal and corrupt agreement, whereby the bank should and did receive from the debtor upon the discount of the said notes a higher rate of interest than seven per cent., and charged that the notes in the hands of the bank were utterly void, and that in respect thereof the bank had no lien on the stock. The defendants denied all knowledge of these alleged usurious transactions, and submitted that the pretended usury was so vaguely and generally pleaded and alleged in the bill, that the plaintiffs were not entitled to give any evidence thereof. It was ruled, however, by Esten, V.C., that as between a stranger and a party to the transaction, the usury was stated with sufficient particularity, and that the evidence of the debtor, offered at the hearing on behalf of the plaintiffs, ought to be received. The evidence given was principally that of the debtor who got the notes discounted, and the cashier of the bank. It was admitted that the principal part of the proceeds of the discount was given to the debtor in the shape of drafts on New York and Montreal, for which the debtor had to pay an additional premium. The debtor swore positively that the understanding between himself and the cashier was that he should take drafts in this manner, and that the latter said that discounting at 7 per cent. did not pay, and, in fact, it was upon this understanding that he obtained accommodation from the bank. This was, on the other hand, denied by the cashier, who stated that the understanding was that the debtor would require these drafts in the course of his business, and that a customer would be charged a higher or lower rate of premium according to the sort of account he kept, the bank having different rates for different parties; but that the cash price of exchange differed from day to day. The Vice-Chancellor in the course of his judgment said—"I have no doubt that if upon a discount of bills or notes the borrower should be paid wholly or in part with a draft charged at a rate beyond the market price for cash at the time, it would be usury." But as far as the facts proved before him were concerned, he did not think them sufficient to bring the case within the rule he lays down, as it was possible, consistently with the evidence, no matter what his suspicion might be, "that on the day on which these transactions occurred, the defendants might have charged the same rates for cash as were charged to this person on these discounts. There is nothing in the evidence to show that this was not the case." In speaking of the understanding between the parties as to taking drafts for discounts, he says, "the understanding may have been nothing more than this, namely, that the bank preferred those customers who required exchange; that they would not continue the accounts of those who do not require exchange, although they would not force a draft upon any one, or charge more than the current rates; and it is possible that the knowledge of this fact may have induced the debtor sometimes to purchase drafts when he did not require them, but of his own accord, and without being required so to do by the bank."

The evidence was most carefully weighed by the learned judge, and the benefit of the doubt given in favor of the defendants.

The Commercial Bank v. *Cameron* was an action on a bond given to secure a cash credit. The defendant pleaded usury in that the plaintiffs charged him a quarter per cent. on all cheques drawn on this account, besides the usual interest of (at that time) six per cent. It appeared from the evidence that this charge was made on cheques drawn on all deposits, as well as on the cash credit account. The judge who tried the case charged the jury that the transaction was not, in his opinion, usurious, and the Court of Common Pleas upheld his ruling.

It is strange that juries have seldom been called upon to pronounce verdicts of usury between banks and their customers. It is seldom that a customer has the courage to raise such an issue. But we feel confident the banks take usury of which the world knows nothing. It is not for us to discuss the question whether the usury laws in regard to banks should be abolished. So long as usury by banks is

prohibited it is our duty to see the law is upheld. We do not agree with the writers of old who thought it as criminal to take a man's money for usury as to take his life. Alive or dead, in olden times, the usurer was an object of abhorrence, if not of vengeance. Sir Edward Coke wrote that all usury was "damned and prohibited." Many a juror if permitted to pronounce an opinion on certain bank transactions, would not be less emphatic. Banks have great privileges, and should not abuse their privileges. Better for them to take warning in time. Legitimate business will be found profitable enough. Greed may end in loss, if not confusion—perhaps destruction.

BAR COSTUME.

A subscriber desires to know if there is any law to regulate in Upper Canada the color or cut of a Barrister's coat. We know of none beyond the custom which prescribes the dress of a gentleman. It would be indecorous for a gentleman to attend a dinner or evening party in a shooting coat and top boots. It would be equally so for the barrister so to appear in court. It would be indecorous for a gentleman to appear in the society of select friends at dinner in gray coat, sky blue vest and blood-red necktie. It would quite as much so for the barrister thus to appear in court. These matters, though small in themselves, are strictly governed by the rules of good breeding.

It was reported, shortly after the elevation of the present Chancellor to the Bench, that barristers could only appear before him when clean shaven. While some thought the regulation a good one, many deemed it a hoax. The latter was discovered to be the fact. It is not usual for members of the bar to wear mustachios such as would be the glory of a heavy dragoon. But there is no printed rule forbidding such a display of hirsute appendage. Nor is there any rule, of which we have knowledge, prescribing the color of an advocate's coat. But by usage it is determined that black is the appropriate, as it is the becoming color. And so well is this settled by universal consent that we apprehend a violation of it would not merely receive the condemnation of the bar, but the attention of the bench.

Some men deem bar etiquette of little moment. Some would discard the white necktie and black gown as we in Upper Canada have discarded the wig. We are not yet prepared to follow to so great an extent the example of the United States bar. The want of decorum in many of the cities of the United States is proverbial. Familiarity breeds contempt. Free and easy manners while in court too often beget disrespect for the bench and want of self-respect in the bar.

So long as members of the bar respect themselves they will command the respect not only of the bench but of the public. May heaven long postpone the day when barristers can with propriety appear in court in the garb of the prize ring or race course. Whenever that day shall come the bar will cease to be a profession of gentlemen—will cease to be respectable—will cease to be respected.

NEW BOOK OF FORMS, &c.

We have great pleasure in drawing the attention of the profession generally to an advertisement which appears in another column, chronicling the first attempt in Upper Canada to produce a compilation of Forms for the use of practitioners and others in the conduct of a suit at Common Law.

If the forms given are sufficiently numerous and complete, this book, may in some measure be a substitute for Chitty's much more expensive English book of Forms, containing as it does much that is quite useless in this country.

We observe that it is the author's intention, in addition to the tariffs of fees in different Courts and forms of Bills and directions for preparing and taxing them, to give a table of Conveyancing charges. And with respect to this we sincerely hope that it may be a step towards the introduction of *some* degree, at least, of uniformity and certainty in a matter of every day practice, which, at present, is in a most unsatisfactory state.

We have already much that is now promised by Mr. McMillan. We have the compilation of rules and tariffs, both old and new, well known as Draper's Rules. We have Mr. Harrison's Superior and County Court Rules under the Common Law Procedure Act, 1856, with voluminous notes. We have also Mr. Harrison's Manual of Costs in County Courts, containing, amongst other things, a collection of cases bearing on the subject of the taxation of costs, besides several miscellaneous reprints of the Rules of different Courts, &c. But the book now advertised is intended, we believe, to supply the want, especially to students and county practitioners, of many forms, especially in Chamber matters not as yet to be found in any known publication, besides giving other information in a more compact and collected shape than we have hitherto had it.

We understand that Mr. McMillan, who had published his prospectus before the announcement of Mr. O'Brien's book on the Practice of the Upper Canada Division Courts, has decided upon leaving out the portion connected with that subject, correctly thinking that it can be much more thoroughly and satisfactorily treated in a work entirely devoted to it.

A GOOD APPOINTMENT.

J. Hubley Ashton, late one of the editors of the Philadelphia *Legal Intelligencer*, has been appointed to the office of Assistant Attorney General of the United States. Though a young man Mr. Ashton is a man of much promise, who has earned for himself the good will and respect of all who knew him.

JUDGMENTS.

QUEEN'S BENCH.

Present: DRAPER, C. J; HAGARTY, J.; MORRISON, J.

Monday, May 16, 1864.

Perry v. *City of Ottawa.*—Rule *nisi* to enter nonsuit discharged.

Begley et ux. v. *St. Patrick's L. Association of Ottawa*—Special case. Postea to defendant, and judgment for defendant on demurrer.

Kemp v. *Mc Dougal*—Rule discharged.

Grant v. *Young.*—Rule *nisi* to enter nonsuit or reduce verdict discharged.

Cummins v. *Terry.*—Rule discharged.

SELECTIONS.

CRIMINAL CASE—TEMP. EDW. I.

THE KING v. HUGH.

A man named Hugh was accused of rape. The prosecution was not by the woman, but at the suit of the King. The prisoner was brought to the bar by two persons, one of whom was his friend. The Justice told his friend that he might stand by the prisoner to give him comfort, but not to advise him? The prisoner requested that he might have counsel, but the Justice said: "You must know that the King is plaintiff in this case and prosecutes *ex officio*, and the law does not permit you to have counsel against the King where he sues *ex officio*; if the woman were the prosecutor, you should have a counsel against her; but against the King you shall not; wherefore we command all pleaders of your counsel to leave the court."

When they had gone, the Justice said: "Hugh, answer; lo the thing charged against you is a very likely thing, and a thing of your own doing; so you can well enough, without any counsel, answer whether you did it or not. Moreover, law ought to be general and applicable to all persons, and the law is, that where the King is a party *ex officio*, you shall not have counsel against him; now if, in contradiction to this, we should allow you to have counsel, and the jury should give a verdict in your favor (which please God they will do), people would say that you were acquitted by reason of the partiality of the Justices; consequently we do not dare grant your request, nor ought you to make it. Therefore answer." Hugh was a cautious man, and although he was as (afterwards appears) innocent of the crime laid to his charge, he knew the risks which even innocency runs from the subtleties of law, falsities of witnesses, and timidity of jurors; and he made up his mind to take every possible technical objection, and to avail himself of every possible privilege, so he began by pleading his clergy.

"Sir (said he), I am a clerk, and I ought not to answer without *my ordinary.*" Thereupon, his ordinary appeared and claimed him. But the Justice was aware of Hugh's domestic ties, and replied, "We tell you that you have forfeited your privilege of clergy, inasmuch as you are a bigamist, having married a widow; tell us whether she was a virgin when you married her; and you may as well tell us at once; for we can find out in a moment from a jury." Hugh thought he might as well risk the chance of a lie, and said that she was a virgin. "We will soon find this out," said the Justice. So he charged the jury, and they found that she was a widow when Hugh married her. So the Justice decided that he had lost his privilege of clergy, and required him "to answer as a layman, and agree to those good men of the twelve, for we know that they will not tell a lie on our suggestion." Hugh answered, "Sir by them I am accused; I will not agree to them. Moreover, sir, I am a Knight, and I ought not to be tried except by my peers."

The Justice replied, "Because you are a Knight, we will that you be judged by your peers." The reporter then adds, that Knights were named, and that Hugh was asked if he wished to challenge any of them. Hugh, however was pertinaciously obstinate. "Sir (said he), I do not agree to them. Take whatever inquisition you like, but I will not agree to them."

The Justice, doubtless was used to scenes of this kind; so in next addressing the prisoner, he mingled warning with persuasion, but the length of the argument which he seems to have used may perhaps, be attributed to the knightly rank of the prisoner, whom the Justice immediately addresses by his proper title. "Sir Hugh," said he, "if you will agree to them, please God, they will find for you, but if you will refuse the common law, you will incur the penalty therefor ordained, to wit: one day you shall eat, and the next day you shall drink, and on the day when you drink you shall not eat, and *e contra*; and you shall eat barley bread, and not wheaten bread, and drink water," &c. And the reporter says, he gave a long reasoning (which it is to be wished, he had set down), showing why it would be better for the prisoner not to demur, but to put himself on the jury. So Hugh gave way, but only one step. He said: "I will agree to my peers, but not to the twelve who have accused me; therefore, hear my challenges against them."

"Willingly (said the Justice), but if you have any reasons why any of them should be removed, give them *viva voce*, or in writing."

Sir Hugh then made a slip. "Sir (said he), I cannot read therefore I pray a counsel." "No, (said the Justice) the King is concerned." Sir Hugh then requested the Justice to take his challenges and read them. "No (said the Justice), they must come from your own mouth." "I cannot read them," said the prisoner." "How is this" (said the Justice) you claimed your privilege of clergy, and now it turns out that you cannot read?" Sir Hugh stood quiet, quite abashed. The Justice pitying his confusion, and trying to give him confidence, said: "Do not be down-hearted, now is the time to speak." And, addressing a person in court, he asked him if he would read the challenges of Sir Hugh. The person addressed answered that he would do so if furnished with the book which Sir Hugh had in hand; and, on the book being handed to him, he told the Justice that he found there set down challenges against several of the jurors, and asked if he should read them aloud. But the Justice said, "No, read them in a whisper to the prisoner; they must be propounded by his own mouth." This was done, and, on the challenges being found good challenges, those challenged were removed from the inquest. The Justice then charged the inquest, and they found that the woman was ravished by some of Sir Hugh's men, and that he was not accessory. He was consequently acquitted.—*Law Reporter.*

POLITICAL EQUALITY.*

(From the "Law Magazine and Review.")

It is a favourite doctrine of the so-called advanced school of modern politicians, that government which interferes equally with the liberty of all, ought to be equally under the control of all. But not only is the assertion on which the claim is based erroneous, but even its truth would not support the claim. Though the office of government were to restrain liberty, the pressure would bear more hardly on the strong than on the feeble spirit. The argument, therefore, which, resting on the restraint to freedom, supports the claim of the weaker citizen to a share of political power, favours the demand on the part of the more energetic citizen of a greater share of that power. But it is altogether ineffectual to support the doctrine either of equality or inequality of political power. Though of negative force in limiting the number of those from whom the governing body is to be selected, to those who are subject to the government it is of no positive force in supporting the claim of those who are incapable of discharging political duties. No argument, in truth, can sustain a claim to attempt that which the claimants are unable to perform.

And, while the argument drawn from the supposed functions of government is invalid, that function itself is the reverse of the true office of government. So far is the restraint of liberty from forming the duty of government, that its one end is to secure for its subjects the greatest amount of liberty on the whole. Without directly interfering with their efforts under the name of advancing their progress, its great office is to remove the restraints on individual activity, and secure for its subjects a fair start in the work of their own self-improvement.

The whole argument, therefore, of the advocates of political equality is, both in its reason and its consequent, erroneous. In asserting that error we have, in a general way, referred to the quality in the citizen which both founds his right to political power, and determines the extent of that power, and we have alluded to the functions of government to which that power corresponds. In proceeding therefore, to a fuller inquiry into the nature of that power and of those functions, it will be proper to state the question in a form which raises both points.

Does there exist in man a special power of which political influence is the object, and is that power and the right which corresponds to it equal in all men?

I. *The right.*—Right may be defined as a relation between a subject and an object—a relation of power on the one hand, and subjection on the other. The only subjects of rights are persons, and the only objects of rights are things; whether external objects, or such qualities of mind as respect, obedience, gratitude. As to the varieties and the origin and measure of rights, they are of two kinds, one absolute, the gift of nature or the result of culture, the other relative, conventional, the gift of other men.

The powers of the subjects of those rights, differ essentially as the rights themselves. With regard to the powers corresponding to absolute rights, they are bestowed on men for some purpose, they have relations to other things. Power has two relations. Subjectively it is related to the necessities and wants of its possessor and of other men, and gives him the right, and lays him under the obligation of supplying those necessities: objectively it is related to the objects fitted to supply those necessities, and gives its possessor the right to appropriate those objects for the benefit of himself and others. But absolute or real power exists independently of those relations. Though the supposition would imply a deficiency or redundancy in the arrangements of providence, it is conceivable that absolute power should exist without any want to be relieved or any objects to be appropriated, and, therefore, without any rights attached to the power.

But the powers which correspond to conventional rights do not form part of the absolute character of the subject of the rights. They have no independent existence. Instead of creating the rights, they are created by the rights, and exist only so long as the rights exist. They are logical as distinguished from real powers.

II. *The object of the right.*—We come now to the more important inquiry into the sphere and functions of government. The word government has two meanings. Viewed as the governing body it is society, through its representatives, speaking in a tone of command; viewed as an organisation, it is the machine employed by society for furthering a considerable number of its ends. What is the portion of the social field which government occupies?

There are two great ends to which all the endeavours of man should be directed, one negative, the other positive. All his energy, so far as it respects himself, ought to be directed either towards the prevention of self-deterioration, or towards the accomplishment of self-development. And society, which supports and strengthens all the aspirations and strivings of men, necessarily finds its efforts directed towards those two great goals of all human endeavour. Society, in its lower and negative function, as a government, employing force either in its pure form or in the shape of compulsory assistance, strives to preserve the objects of its care from deterioration; and in its higher and positive function, as a friend, endeavours, by encouragement and the offer of aid, to secure for those objects the highest developments of which they are capable.

And government, in turn, has its negative and positive functions. Corresponding to those duties respectively, are the two great motives which prompt and guide all the actions of a good government—justice and charity. Both seek to preserve men from deterioration. In its negative function, government, as a judge, prevents one man from developing himself at the expense of his neighbour's deterioration. In its positive function, as a reformer, it endeavours to raise that portion of society which has fallen below the common level, moral, intellectual, and physical, of the mass of its members; or, as a friend, affords support to those who through weakness are ready to sink. Justice is the foundation of government, but charity is its superstructure. In both its functions government is essentially conservative.

The duties of government, therefore, are not to be determined by directing attention merely to actions themselves, and choosing such as it may seem right for a government to undertake, but also to the persons subject to the government, and selecting those whose condition makes them the fit objects of the authoritative interference of society. The positive work of government is directed to the cases of those who are unable or unwilling to contend with nature, external or internal, and its tone of command is equally authoritative, whether it affords aid or employs force alone. Those who have fallen below the common level of society are presumed to have lost, and those who remain at or above that level are presumed to have retained, command of themselves and of external nature. And government assumes the command where it has been lost or relinquished.

Liberty, therefore, is the great end of government. In its negative function it endeavours to protect men from the injustice of their fellows; in its positive function it strives to liberate men from the overpowering pressure of external nature, or of the lower part of their own infernal nature.

But property also is one of the objects of government, and the duties of government in regard to it are analogous to those which relate to persons. Government preserves the property under its control from disorder and deterioration.

* We insert this article, which contains some ingenious and original ideas on the subject, without committing ourselves to the opinions of the author.—ED. L. J. U. C.

An example of the legislation which provides for the preservation of persons is the poor law; and of that which provides for the preservation of property—the legislation on salmon fishing. But government endeavours to maintain the excellence of property as a whole, and pays no attention to special cases of deterioration; whereas, in the case of persons, its efforts are directed to the individual and isolated cases of those who have fallen below the common level of society, leaving the maintenance of that standard as a whole, the ebb and flow of the tide, to the case of society in its positive function.

But has government rights in as well as duties to its objects, beyond the right to discharge those duties? It has been maintained by those who desire to make the possession of property the foundation of a direct claim to political power, that government disposes of property. But government has no right to the property of which it is loosely said to dispose, just as it has no right to the persons of those who are in certain respects under its control. For government does not legislate in the strict sense of that word. That is the privilege of God alone. The governing body merely secures that the laws which God has established shall be ascertained and translated into the laws of the realm. It applies the law already fixed to the general case, as the ordinary judge applies it to the special case. The function of government, therefore, is judicial.

III. *The power which creates the right.*—Is there any absolute power in man which gives him an absolute right to a share of political influence proportioned to that power? Or are the right and the power which correspond to it created by contract?

An express social contract is out of the question. But does the mere fact of social life raise the presumption of an implied contract? Duty and interest are the primary motives of social life, and it is as certain that that duty and that interest are universal, as that the ability to direct wisely the operation of government is only partial among men. All are, therefore, bound to enter into society, but no one would dream of asserting that children have political ability. Society, therefore, existed before there was either the power or the right in some of its members to take part in its government. The mere existence of society, then, does not raise the presumption of an implied contract that political power should be shared either equally or unequally by all.

If, on the other hand, the arrangements of Providence are complete, there must be a power existing in nature corresponding to the social want or necessity which the maintenance of order and justice supplies. An absolute power and absolute right and duty to exercise political functions must, therefore, exist, and that power must have a character corresponding to the nature of the functions which it is fitted to fulfil. The functions of government are judicial, intellectual. The power, therefore, which corresponds to those functions must be an intellectual one. Political intelligence, then, is the grand principle on which any claim of distribution of political power should be founded, and the extent of the power should be proportioned to the strength of the intellect.

But what if the possessors of the intelligence should use their power for their own selfish ends. May a better result be anticipated from other arrangements than from those of Providence? Will the representation of all the interests of society in just proportion secure legislation perfectly impartial? Let us compare the competing claims of interest and intelligence, as founded, not on right primarily, but on expediency.

The objections to the theory of interests lie on the surface:

1. To try to secure a body politic and legislative, with evenly balanced interests, is to attempt an impossibility.

2. Suppose this impossibility got over, the laws, in order to be impartial, must be passed unanimously. And, as the theory of interests demands that each legislator shall give expression solely to the interests which he represents, all the laws would serve the interests of the majority.

3. The laws would not only be one sided but confused, because there is no disturbing element like the passion of self-interest.

4. The controlling influence of elevated public opinion on such a legislature would be much weaker than on a refined and intelligent one.

5. The practice of such a theory would lower the standard of morality, not only of the legislature, but of the constituencies which elected it.

The advantages of the theory of intelligence exactly correspond to the disadvantages of the other theory.

1. There is no such impossibility as in the former case.

2. Chosen on account of their ability to ascertain the truth, the governing body and the legislature would feel the trust imposed on them to found their laws on truth, which is impartial.

3. Symmetry of legislation would be secured when the laws were passed by a legislature capable of working according to a plan.

4. Intelligence is peculiarly sensitive to the influence of elevated public opinion.

5. The standard of political morality in both the legislature and the constituencies would be raised.

But apart from this detail, there is a presumption that the theory which, asserting that a legislature chosen on the principle of intelligence will legislate on the principle of self-interest, proposes to elect that legislature on the principle of self-interest in order to secure legislation based on pure intelligence and truth, is a false theory.

IV. *Tests of the power.*—Political power and political intellect ought, then, to be in the same ratio. How is the presence of this intellect to be ascertained, and its strength measured? From the theoretical we must pass to the practical part of the subject.

The negative test of the presence of political intellect is, that the claimant of political power must be at the stage of advancement to which the mass of society has reached, and be, therefore, beyond the sphere of government aid. That social position is necessary and sufficient as a security that the citizen shall clearly apprehend and dispassionately judge the political questions which he will have a share in deciding. If the citizen has clearly before him the negative and subordinate functions which belong to government, and acquiesces in their completeness as functions of government, he will not use his influence to turn the material power attached to the executive to other and selfish purposes. A qualified universal suffrage, therefore, if such an expression may be used, is the true foundation of the scheme of distribution of political power.

The positive tests which measure the strength of the intellect, and determine the extent of the right, are the subject of a more important and difficult inquiry. Those tests imply the existence of disparities in the strength of individual intellects. Any proof of that inequality is unnecessary. He who asserts that any real power which forms part of the independent character of a man, and specially intellectual power, is equal in all, must consider himself more intelligent on this point than the man who controverts him. Setting aside, therefore, an opinion which contradicts itself, we may assume that the political knowledge of the statesman is greater than that of the peasant.

What then are the positive tests? Omitting the test of examination, which tests the intelligence, not of the answerer but of the author whose books he has read, three leading tests have been proposed:—

1. Property, which, as a test of the presence of the intellect, not of the extent of the power, is the test at present in use.

2. A man's engagements or profession.

3. Social position.

These are all, of course, indirect and most imperfect tests of political intelligence. But the first and the last qualifications are supposed to found a direct claim to political power. The claim is founded on the fact that government disposes of property. But it has been shown that the functions of government in regard to its objects are entirely judicial. The proprietors of possessions of every kind are equal before the law, and therefore, with the single exception of political intellect as corresponding to the social want, they are equal before the government. For in regard to such profession, government has but one function, itself reverently to receive the eternal laws which regulate the relations of persons and property, and to dispense those laws. The poet and the philosopher and the man of science or literature are entitled to high consideration and power in society engaged in its higher work of advancing humanity, but government or society in its lower function must be indifferent to them. To maintain, therefore, that social power should be translated into political power involves the erroneous assertion that political work is co-extensive with social work.

Taken as tests of political intelligence, however, all three are true though imperfect tests. But there is an insuperable objection to the third test, the social one, which does not apply to the others. The first two are definite, they are in fact measures, but the third is no measure at all. How is social position itself to be measured? But apart from this objection, it so happens that in our constitution ample provision has been already made for giving political expression to the political capacity which is considered to be implied in the possession of the first and last qualifications, namely, wealth, birth, and high character. One entire chamber, the House of Lords, is reserved for the wealthy, the high-born and the noble. With nearly one-half of the political power of the country placed in such hands on a mere presumption, it would be unfair to demand additional influence.

We are, therefore, restricted to the test of profession, or of those attainments to which definite marks, such as academical degrees, have been given by society, together with any other tests which can be proposed with acceptance. No single test ought to be applied. If he tests are real and workable, the more numerous they are, he better will be the result.

Besides the test of profession and academical degrees, another may be proposed, namely, age, extending our measure up to a fixed and by no means advanced period of life. It has been found necessary to adopt tests of general intelligence as political tests, because, with the exclusion, for the reason already stated, of examinations on the particular subject of political science, it appeared that we possessed no direct test of political intelligence. But here we have a test comparatively direct. Life in a society which is self-governing, forces political knowledge not merely into the memory, but into the very nature of the citizen. The education of circumstances is, in a practical knowledge like politics, better than the education of books. Moreover, fast governments are bad governments: all true political progress is slow progress. Experience, therefore, not energy, is the primary requisite in the citizen. A man at thirty years is probably a much better politician, in the right sense of that word, than a man at twenty or twenty-one. If the unit of particular power in the case of this particular test were fixed as at the twentieth year, and if each decade up to the fiftieth year brought to the citizen an additional vote, it would bring also to the State additional political knowledge. The advantages of this test are—

1. That it is a true test.
2. That it is a definite one.
3. That it includes all citizens justly.

While all the other tests have a certain character of invidiousness, the test of age would be highly grateful to those who are at the bottom of the social scale. Among millions, few may reach the House of Lords; not many, compared with the mass of society, are engaged in high professions; but all, without exception, whom death does not overtake, must reach the years which, with political experience, bring political power. The young voter who, in his heat, desired, with the aid of others of like influence and years, to alter the whole political frame, would more contentedly await the season of increased political power, which would bring a change of opinions as well as of influence.

It will not be out of place in an article which advocates a suffrage almost universal, to refer to a scheme of representation, which, with such a suffrage, would secure in the legislature the most perfect representation of the body politic, but which, with the present distribution of political power, would be simply a plan to facilitate bribery. We refer to Mr. Hare's proposal to represent numbers rather than local constituencies.

Large constituences of, say, ten thousand voters with, say forty thousand votes, would be created by universal suffrage, and the decrease in the number of the legislature of which Mr Hare's plan would afford an opportunity. Bribery, therefore, which would find willing objects, principally among single voters, would become a moral impossibility. And the harmless result of the representation of a few crotchets in the House of Commons would signalise the perfection of the representation. The advantages of Mr. Hare's plan are, among others—

1. That the representation is perfect; an advantage which includes most of the others.
2. That not only minorities, but individual citizens are represented: no vote is lost.
3. That advanced opinions are represented.
4. That a greater responsibility would rest on citizens who voted, not in herds, but as individuals.
5. That all but the most apathetic citizens would take part in national affairs, when not restricted to local candidates to whom they are indifferent.
6. That men of the highest intellect and the most elevated moral character would present themselves as candidates.

But whatever be the details of the plan which is to perfect the political constitution two general conclusions may be drawn from the consideration of the whole subject.

1. That the franchise must be extended to every man of full age who is beyond the sphere of government assistance.
2. That the suffrage must be graduated according to the political intelligence of the citizen.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 122.)

[N.B., Corrections.—Between "of" and "trespass," on 4th line from bottom, page 121, insert "the doctrine of." Strike out all after the words "that plea," on page 122, and continue as under.]

To render the subject more clear the matter of these sections may be divided as follows, viz.:

[A] In order to maintain an action or prosecution *against any person for anything done in pursuance of the*

Division Courts Act, it is necessary, and these sections require,

1st. That a notice in writing of such action and the cause thereof shall be given to the defendant one month at least before the commencement of the action.

2nd. That the action shall be commenced within six months after the fact committed.

3rd. That the action shall be laid and tried in the county where the fact was committed.

[B] And for the further protection of such persons they have certain privileges under the sections named, that is to say,

I. The defendant may tender amends before action brought.

II. After action brought he may pay into court a sufficient sum to cover the damages which he has neglected to tender in due time.

III. The defendant may plead the general issue, and give any special matter in evidence under that plea.

[A] But in order to entitle a party to the protection of these sections, it is not necessary that the thing should be authorised by the act—a thing is done "in pursuance of the act" when the person who does it is acting honestly and *bona fide*, either under the powers which the act gives or in discharge of the duty which it imposes, reasonably supposing that he has authority, though he may erroneously exceed the powers given by the act, yet if he act *bona fide* in order to execute such power or discharge such duties he is to be considered as acting in pursuance of the act, and entitled to the protection conferred on persons whilst so acting. The following cases illustrate the foregoing positions:—*Gaby* v. *Wilts & Berks Canal Co.*, 3 M. & S. 580; *Theobald* v. *Crichmore*, 1 B. & Al. 227; *Parton* v. *Williams*, 3 B. & Al. 330; *Lidster* v. *Borrow*, 9 A. & E. 654; *Smith* v. *Shaw*, 10 B. & C. 284; *Cann* v. *Clipperton*, 10 A. & E. 582; *Booth* v. *Clive*, 10 C. B. 827; *Cox* v. *Reid et al.*, 13 Q. B. 558; *Arnold* v. *Hamel*, 9 Ex. 404; *Kerby* v. *Simpson*, 10 Ib. 358; *Read* v. *Coker*, 22 L. J. C. P. 201; *Jones* v. *Howell*, 29 L. J. Ex. 19; *Hazeldine* v. *Grove*, 3 Q. B. 997; *Hailes* v. *Marks*, 30 L. J. Ex. 389.

In an action of trespass brought against the defendant, as servant of P., for apprehending the plaintiff whilst fishing at the mouth of a river in which P. had a fishery; the defendant gave evidence to show that P.'s fishery included the place where the plaintiff was apprehended. The jury, however, defined the limits of the fishery, so as to exclude the place by a few yards, but they also found that P. and the defendant reasonably believed that it included the place. This finding was held to entitle the defendant to judgment, as being within the provision of the Malicious Trespass Act, which was passed for the protection of persons "acting in the execution of this Act." "A party," said Pollock, C. B., "is protected if he acts *bona fide*, and in the reasonable belief that he is pursuing the Act of Parliament. One who acts in perfect execution of the Act of Parliament has no need to tender amends, and does not stand in need of any protection. The protection is required by him who acts illegally but under the belief that he is right," *Hughes* v. *Buckland*, 15 M. & W. 346, and see *Horn* v. *Thornborough*, 3 Exch. 846.

In *Booth* v. *Clive*, 10 C. B. 827 (under the protection clause in the English County Courts Act), for an illegal commitment after prohibition, *Jervis*, C. J., in summing up, told the jury that if the defendant in trying the case and making the order acted under a *bona fide* belief that his duty made it incumbent on him to do so, notwithstanding the prohibition, "the act done by him must be considered in pursuance of the County Court Act, and he was entitled to notice of action," and that it was for them to say whether the defendant reasonably believed he was bound to proceed, and if 'reasonably' meant anything else than 'good faith,' it meant 'according to reason' and in contra distinction to acting 'capriciously.' And this ruling was confirmed by the court. But the reasonableness of the defendant's belief is a subordinate question; the governing question is, did the defendant believe that the facts existed which brought the statute into operation and honestly intend to enforce the law is all that is material, as appears by the case of *Hermann* v. *Seneschall*, 6 L. T. N. S. 646. This was an action for false imprisonment, tried before *Byles*, J. The defendant had given the plaintiff into custody on a charge of passing counterfeit money. The learned judge left the following questions to the jury:—*First*, did defendant honestly believe that the plaintiff had tendered him bad money, and that he (the defendant) was exercising a legal power? *Secondly*, did the defendant reasonably believe so? The jury answered the first question in the affirmative, and the second in the negative, and gave £5 damages. On a motion to enter a verdict for defendant, no notice of action having been given under 24 & 25 Vic., c. 99, "I think," said *Erle*, C. J., "the governing question in respect to notice of action for the jury, was whether the defendant really believed that the facts existed which brought the statute into operation and honestly intended to enforce the law, and if under such circumstances as I have adverted to, the jury found that the defendant did so really believe, and did so honestly intend, I think the verdict should be for the defendant. The question whether there were reasonable grounds for that real belief and that

honest intention, I think, is subordinate to the governing question, very material to be pressed on the attention of a jury. As the jury have found that the defendant really did believe that plaintiff had passed the counterfeit coin and honestly intended to put the law in motion—that is really finding that he acted *bona fide*." And the second finding was determined to be no ground to entitle plaintiff to keep his verdict. "The second finding of the jury (said *Williams*, J.) is nothing but a finding that in their opinion, notwithstanding the plaintiff's real belief that a state of facts existed, justifying him in doing what he did, he ought not to have believed it." (And see *Hardwick* v. *Moss*, 31 L. J. Exch. 205.)

The Protection Statutes applying to personal actions and not to actions for the possession of things taken, notice of action, &c., would not be necessary in actions of replevin. (*Fletcher* v. *Wilkins*, 6 East. 283; *Waterhouse* v. *Keen*, 4 B. & C. 211; *Gay* v. *Matthews*, 7 L. T. N. S. 504.

In *White* v. *Morris*, 11 C. B. 1015 the bailiffs of a county court had taken goods in execution, having previously received an indemnity from the execution creditor. They were held to be entitled to the protection of the statute, notwithstanding the goods turned out to be the property of a third party. It is questionable whether an execution creditor, interfering in the execution of the process of the court, is entitled to such notice. (*Cronshaw* v. *Chapman*, 31 L. J. Ex. 277.)

So much with regard to the question, in what cases, and under what circumstances, an act or thing may be said to be done "in pursuance" of the Division Courts Act, and when consequently a party would be entitled to its protection.

Assuming then an action brought against a party within the sections referred to, these sections require as already stated,

1st. That notice must be given in terms of the provision, stating the cause of action, and the plaintiff's intention to commence proceedings. And it will be necessary to refer to some of the cases that have been decided as to the requirements of a notice under analogous enactments.

DIVISION COURT JUDGES—CONTEMPT OF COURT.

We refer our readers to the masterly judgment of the Chief Justice of Upper Canada, reported on another page, as to the powers of judges of courts of inferior jurisdiction to commit for contempt of court, and as to the relative position of the bench and the bar in the conduct of a suit in court.

UPPER CANADA REPORTS.

ERROR AND APPEAL.

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

[Before the Hon. ARCHIBALD McLEAN, C. J.; the Hon. P. M. VANKOUGHNET, Chancellor; the Hon W. H. DRAPER, C. B., C. J., C. P.; His Hon. V. C. ESTEN; His Hon. V. C. SPRAGGE; the Hon Mr. Justice RICHARDS, and the Hon. Mr. Justice MORRISON.]

THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY BANK v. THE BANK OF BRITISH NORTH AMERICA.

Bill of exchange—Bill of Lading—Duty of Agent.

A bill of exchange was sent by a banking institution in the United States to a bank in Toronto for "collection and remittance," &c., accompanying which was a bill of lading for 10,000 bushels of wheat, which, on the bill of exchange being accepted by the drawees was delivered over to them, they being the consignees named in such bill of lading. *Held*, affirming the judgment of the court below, that it was not the duty of the bank here as the agent of such foreign bank in the absence of special instructions to retain the bill of lading until the bill of exchange was paid

This was an appeal from the judgment of the Court of Queen's Bench, as reported in the 21st volume of the reports of that court at page 284, where the facts out of which the action rose as also the pleadings in that action are fully set forth,

From that judgment the plaintiffs appealed, alleging that the judgment was not according to law, and that on the facts as they appear in the judgment the rule *nisi* for a new trial thereby refused should have been made absolute.

Hector Cameron for the appellants.

Eccles, Q. C., and *Galt, Q. C.*, for the respondents.

In addition to the cases cited in the court below, *Wood* v. *Thiedman*, 10 W. R. 856; *Cumming* v. *Shand*, 5 H. & N. 95; *Smith* v. *Virtue*, 9 W. R. 146; *Brown* v. *Hare*, 4 H. & N. 822; *Wright* v. *London Dock Company*, 5 Jur. N. S. 1411; *Hoare* v. *Dresser*, 5 Jur. N. S. 371; *Schuster* v. *McKeller*, 7 Ell. & B. 704; *Wingate* v. *The Mechanics' Bank*, 10 Barr. 104, *Opie* v. *Serrill*, 6 Watts & Sergt 264; *Smith* v. *Lascelles*, 2 T. R 187; *Van Casteel* v. *Booker*, 2 Ex. 691; *Mitchell* v. *Ede*, 11. A. & G. 888; Story on Bailments, sec. 137; Story on Agency, secs. 52, 82, 84, were refered to and commented on by counsel.

After looking into the authorities

VANKOUGHNET, C.—Three material allegations are contained in plaintiffs' declaration 1st. That the plaintiffs delivered to Cassels as agent of the defendants the bill of lading in the pleadings mentioned, to hold the same and the property therein mentioned (being a cargo of wheat) as security for the due payment of a certain bill of exchange, also in the pleadings mentioned, and by the plaintiffs transmitted to the defendants for collection. 2nd. That the defendants, contrary to their engagement and duty in that behalf, delivered the bill of lading to Clarkson, Hunter & Co., upon whom the bill of exchange was drawn, and who upon accepting it received the bill of lading from the defendants. 3rd. That by means of the bill of lading, Clarkson, Hunter & Co., obtained the possession of the wheat. We are of opinion that these allegations are not sustained in proof, and that the plaintiffs' action therefore fails. There was no evidence whatever of any instructions to the defendants to hold the bill of lading and the property covered by it till the bill of exchange was paid. The wheat was never in the possession of the plaintiffs or defendants, nor was there any instruction or request from the plaintiffs to the defendants to take the wheat out of the possession of the shippers, whose agents, Clarkson, Hunter & Co., received it in Toronto on its arrival there. The plaintiffs when they received the bill of lading knew in whose custody the wheat was, and to whose custody it was going, and they by no act of their own, either by instruction to the defendants or otherwise, interfered with this custody. The wheat in question was out of the possession of the shippers, for Clarkson, Hunter & Co. were only their agents here to receive it according to the terms of the bill of lading, and it is proved that they obtained the delivery of it without producing or using the bill of lading, and without

reference to it. The defendants received no instructions how to deal with the bill of lading, and it was not unreasonable for them to think that it was to be handed to the party who accepted the bill of exchange. They had no information about the wheat, and were not told to take any action in regard to it. As it left Milwaukee, so it reached and remained in Toronto in the possession of the shippers and their agents.

It might be more prudent for a bank to apply for and receive precise instructions how to deal with such an evidence of title to property, as a bill of lading when it is transmitted to them without any instructions at all. As banks here may themselves become the assignees and holders of bills of lading, and thus become entitled to the property covered by them, so also I suppose they may become agents to deal with them for others who transmit such instruments to be held in security for payment of an accompanying bill of exchange, and these may be transmitted under such circumstances as will render it necessary for a bank receiving them to act with great caution in dealing with them, that they may avoid any liability.

The other members of the court concurred.

Per Curiam.—Appeal dismissed with costs.

COURT OF QUEEN'S BENCH.

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

IN RE THE RECORDER AND JUDGE OF THE DIVISION COURT OF THE CITY OF TORONTO.

Criminal information.

On application for leave to file a criminal information against a Division Court Judge, for his conduct in imposing a fine for contempt upon a barrister employed to conduct a case before him.

Held, that such leave should never be granted unless the court see plainly that dishonest, oppressive, vindictive or corrupt motives influenced the mind, and prompted the act complained of, which in this case was clearly not shewn

Quære, whether such information is proper in the case of a judge of an inferior court of civil jurisdiction, in relation to a matter over which he has exclusive jurisdiction. (Q. B., E. T. 27 Vic.)

This was an application for leave to file a criminal information against a judge of a division court, for his conduct in imposing a fine of five dollars upon a barrister who was employed to conduct a case before him.

The facts are sufficiently stated in the judgment.

DRAPER, C. J.—The barrister states on affidavit that on the 5th of April last, as counsel for plaintiff in that case, he applied to have the trial postponed, on account of the absence of a material witness: that the judge required proof that the witness had been duly subpœnaed, and that proof of that fact was given: that the judge held that the money tendered to the witness was insufficient in amount, and "in a sneering manner" so declared: that thereupon the barrister made the following observation, ', I hope there is nothing evinced in this matter but for forwarding the ends of justice." He swore also that he did not "insult" or intend to "insult" the judge on this occasion: that the judge, however, "without hesitation, or saying a single word, stated, 'I fine you five dollars for a contempt of court," and ordered the barrister to be taken into custody until he paid the fine, which was settled forthwith. The affidavit further stated the deponent's belief that the judge on this, as on former occasions, wilfully endeavoured to aggravate him, for the purpose of entrapping him into some recriminatory language, to afford him a pretext to gratify his long cherished malice, which he "unmistakeably and unjustifiably evinced the same day previously" towards the deponent; and it also contained a strong statement of opinion as to the unfitness of the judge for his position, for reasons which, even if well founded, have no connection with this application, and the unnecessary and impertinent introduction of which is calculated to suggest inquiry as to the *bona fides* of this application.

I am not prepared to decide that the proceeding asked for is at all proper in the case of a judge of an inferior court of civil jurisdiction, in relation to a matter over which he has exclusive jurisdiction. The Consolidated Statute of Upper Canada, chapter 14, appears to have been passed to afford a remedy where the judge of a county court is guilty of misbehaviour in office. But assuming for the moment that a case might occur which would justify our granting this extraordinary remedy, there are general considerations which must have their influence on our judgment in deciding upon the particular circumstances on which the application is founded.

It would have a very injurious effect on the administration of justice before these tribunals, and would greatly lessen the respect to which their judges are, as I well believe, entitled, if the superior courts gave the least encouragement to applications like the present unless upon grounds of the weightiest description. In most contested cases, small or great, the tempers and passions of suitors are warmly excited, and as in these courts the parties themselves very frequently conduct their own cases, unless the judge were promptly to suppress the slightest approach to indecorum or disrespect it would soon become impossible for him to transact the business brought before him. If such apparent indecorum proceeds from a member of the bar, some of whom appear not as attorneys merely, but in the higher character in the Division Courts, it becomes the more indispensable for the judge to exercise his full powers to put it down, for the barrister has not the excuse of the personal excitement of the suitor, and must be assumed to know that it is his duty to aid not to embarrass the judge in the faithful discharge of his functions. Hence if his conduct were even erroneously treated by the judge as contemptuous, and consequently the adjudication of contempt would on a full and deliberate examination be found incorrect, this would afford no ground whatever for a criminal information, which I apprehend will never be granted unless the court see plainly that dishonest, oppressive, vindictive or corrupt motives influenced the mind and prompted the act the judge complained against.

The power of punishing contempts by fine is given by statute to the judge of a Division Court, and such a power though, like any other power by which a man becomes as it were a judge in his own cause, and can exercise his authority without any direct control, and perhaps without any responsibility, is dangerous as open to abuse, it is nevertheless found indispensable. Contempts are perhaps the most undefinable of offences, for they may consist in looks and demeanour as well as in positive acts and expressions, and though our statute uses the word "wilfully insults," it does not appear to me to change the application or extent of the power given.

Very extensive as this power of fining or committing for contempt unquestionably is, it is a matter of satisfaction to know that in relation to the conduct of business in open court its exercise has been rarely called for. There has been and I trust always will be a mutual self respect, and high appreciation of their respective duties between the bench and the bar, which has materially advanced the true interest of suitors, and promoted the satisfactory conduct of judicial business, and I have had a sufficient number of years experience to enable me to speak in the highest terms of the aid I have thus derived from the profession, and my brothers, I know, concur with me in this feeling. But occasional exceptions will arise, sometimes from peculiar cases, and, in instances happily not frequent, from the conduct of particular individuals. It is more easy to feel than to describe how an advocate may exhaust the patience and wear the temper of any judge, by continually keeping on the verge of what he well knows to be forbidden ground, and by occasionally overstepping the line, after oft repeated check and caution from the bench, in the ardour, real or affected, of his zeal for his client. When such conduct is long persevered in, it produces almost inevitably in the judge's mind a sense that it requires scrupulous watching in order that the advocate may if possible be restrained within proper limits, or, if he will exceed them, may if necessary be promptly punished, and thus it may well happen that the judge may pronounce the advocate to be in contempt, where a bystander who knew nothing beyond the immediate occurrence might deem the decision harsh or even unwarrantable. I cannot take upon myself to say that what appears on the affidavit in this case excludes the possibility of such an influence operating on the mind of the judge in question.

But however this may be, considering the facts brought before us, I have not the slightest hesitation in saying that they do not make a case for a criminal information, if the power to grant it were established beyond all dispute.

I think, therefore, the rule should be refused.

HAGARTY, J., and MORRISON, J., concurred.

Rule refused.

Regina v. Lee.

False Pretences.

The prisoner sold a mare to B., taking his note for the purchase-money, one of which was for $25, and a chattel mortgage on the mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterwards sued B. upon it, and obtained judgment.

Held, that the prisoner was properly convicted of obtaining the $25 by false pretences.

(Q. B., H. T. 27 Vic.)

This was a criminal case reserved at the Quarter Sessions for the county of Simcoe, on the 8th September, 1863.

The indictment alleged that the defendant at, &c., on &c., "unlawfully, fraudulently and knowingly, by false pretences, did obtain from one Jeremiah Baldry, the sum of twenty-five dollars, the property of the said Jeremiah Baldry, with intent to defraud."

The evidence was as follows —

Jeremiah Baldry.—Last fall I bought a mare from Lee for $62.50 I gave him notes for the amount, and a chattel mortgage on the mare as security for the one of the notes was for thirty cords of wood, payable in three months: the other was for $25, payable in money six months after date: I had gone on delivering the wood on the first note as agreed, and up to a day or two of the time it became due. I thought I might be a little behind, but he told me it would make no difference, to make myself easy. Towards the latter end of the winter Lee told me the time for payment of the wood note had passed, and he would close the chattel mortgage for the mare: he said that the time for the first note having passed it would throw in the second note, and he would sell the team unless both notes were paid. I was only a day or two behind, and only a few cords of wood, as I thought. Lee was in a great passion with me, and talked very loud, we were at Dunlop's tavern: he left me for awhile, but shortly after came into the room with Rogers, the bailiff, and, I thought to take the mare. I told Rogers the difficulty, and that I had no money to pay; he proposed to leave his horse with me and pay up both notes. I traded with him, and he Rogers, paid up Lee for me. Lee said it was then too late to get the notes from Mr. McCarthy's office, where they were, but he would get them next morning. Rogers took a receipt from Lee, and Lee was to get up the notes the next morning.

Cross-examined.—The papers on the purchase of the mare were signed, I think, in Mr. McCarthy's office. I am no scholar; I think I put my name to two notes, and that a mortgage was given. I spoke before Rogers and Lee of what the bargain was. Lee said the whole transaction was wound up: I was clear. The bargain with Rogers was, I was to give my horse and nine cords of wood for his, and he to settle all I was due Lee. It was before I saw Rogers and Lee together that Lee said the note for the wood being over due would bring in the other, and that he would close the chattel mortgage if I did not pay all.

Joseph Rogers.—I am high constable. On the 16th of March I was called in by Lee and Baldry to look into their matters. Lee stated that Baldry had not delivered wood in time according to a contract or sale of a mare, and that the chattel mortgage on her became due, and that he would seize the beast, the whole amount being due. I went into their accounts, Dr. and Cr., and struck a balance, I debited first Baldry with the first payment, $37, and deducted from it the wood delivered I found that Baldry had paid near the amount, all to a trifle; the last payment of $25 was left untouched. Lee insisted he would have the whole money, or he would proceed under the bill of sale and sell: Baldry said he could not pay it. I then proposed to trade my horse with Baldry, so as to enable him to pay Lee, I said I would do this, I said his horse and mine could be valued and I would allow him the difference, and help him out of the trouble. Dunlop put the valuation on it, and it was agreed that I was to exchange horses with Baldry, he giving me nine cords of wood, and that I was to pay Lee the $25 for Baldry, I then paid Lee the $25: I gave him at the moment all the cash I had on me, $14 or $15, and my I. O. U. for the balance, which I took up next day, and I took from Lee the receipt produced.

The receipt was as follows:—

Barrie, March 16th, 1863.

Received from Mr. Jeremiah Baldry the full amount due on a certain chattel mortgage, given by the said Jeremiah Baldry to one Robert Lee, Esq., to whom I am agent. And I hereby release all the goods and chattels from said mortgage, it being as above mentioned this day paid up in full.

R. Lee
per C. E. Lee,
Agent.

After the receipt was passed Baldry said. "What about the notes" then it came out, and I for the first time heard, that two notes were given for the mare, as well as the mortgage: I said to Lee. "What about the notes?" He said they are in Mr. McCarthy's hands, I will get them and return them to-morrow." I subsequently heard that one Bird had got the second note for $25: I spoke to Lee about it, and he said he had forgotten the circumstance of parting with it to Bird: that he had pawned it to him for $15, but that he would take it up and give it to Baldry. When this note fell due I again saw Lee, when he said he would not take up the note, as Bird was claiming more than $15 After this Bird sued Baldry in the Division Court on this note for $25, and got a judgment for the whole amount against Baldry. Lee afterwards offered to secure the matter, and gave an assignment of land in security: this was after the investigation, when Baldry laid his charge before the magistrate. The settlement included the notes: the bill of sale, as I understood, was collateral to the notes. none of the securities were produced.

Cross-examined —Up to the time the receipt was passed nothing was said by Lee or Baldry about the notes; I did not know there were notes passed passed by Baldry until then; Lee said he was acting for his brother.

Henry Bird.—I purchased the note produced from Lee; it is made by Baldry, and is for $25, due six months after date. It was on the 23rd of February I purchased it from him; I paid at the time $15, and Lee was to trade out the rest. When the note became due I sued Baldry on it, and he urged against my claim what he states to-day about paying Lee. The defence was not allowed, as I purchased in good faith before the note was due; and I got a judgment against Baldry: Rogers paid me the judgment this day.

Cross-examined.—At the time of the trial Lee disputed my claim on the note to more than $15, but he never offered me even that amount The note was to be mine, and I was to give goods for the balance over $15. Some time after I got the note, Lee asked me if I would give it to him back, by paying me $15: I said I would, but he did not give it to me.

James Dunlop.—Lee, Baldry, and Rogers were at my tavern about the horse. There was, as I understood them, a balance of $25 due by Baldry to Lee. I understood Lee had a note for it, but I did not see the note. Lee said, when Rogers drew up the receipt he had the two notes in Mr. McCarthy's office, and that he would deliver them up next day. I saw Rogers pay Lee in full, for Baldry; I settled the difference in the trade between Rogers and Baldry. The talk about the notes I mostly think was after the receipt given.

DEFENCE.

D'Arcy Boulton, Esq.—I was walking through a room in my office when Lee and Baldry were making a bargain, last year, about the horse. The amount of the wood note was $37.50 It was left in my office; the note for $25 was not.

At the close of the case for the prosecution, *McCarthy* for the prisoner, objected that there was no case.

1st. On the ground that the money obtained by the prisoner was received from Rogers, and not from Baldry.

2nd. That though the evidence might shew fraudulent dealing, there was nothing to shew a false pretence as to an existing fact

The learned judge of the County Court, who presided, ruled against these objections, and left the case to the jury. He told them it was not necessary the money should have passed from Baldry's hand to the prisoner's; if the jury were satisfied that Rogers, by Baldry's authority, gave Lee the money, and that the latter received it as Baldry's money, that would be a sufficient obtaining money from Baldry. As to the question of false pretence, he directed the jury to consider, was Baldry induced to part with his money by the false statements of Lee, knowingly false on his part? and that what passed between Lee and Baldry when alone as well as what passed in the presence of Rogers, might be taken into account. The jury were asked to say.

1st. Did Lee falsely pretend that he had the $25 note in his possession, or under his control, with the motive of inducing Baldry to part with his money?

2nd. Did he falsely pretend that he was in a position to discharge Baldry in respect to the $25 note, with the like motive?

3 Did he falsely pretend that he was in a position to discharge Baldry from further liability, in respect of the original transaction?

And they were told that any of these questions, if they could be answered in the affirmative, made out a false pretence as to an existing fact.

The jury found the prisoner guilty, and stated in answer to the court, that they found the particular false pretence referred to in the first question above proved, namely, that Lee falsely pretended he had the $25 note, &c.

The question submitted to this court was whether, upon this evidence, the conviction ought to stand.

S. Richards, Q. C., for the Crown, cited *Regina* v. *Heygill* 1 Dears. C. C. 315.

M. C. Cameron, Q. C., contra.

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

We do not see how we can hold this conviction wrong. There was evidence for the jury, and the learned judge correctly left it to them. It was for the defendant to have proved the chattel mortgage spoken of, if he relied on any of its provisions. The substance of the charge is, that defendant obtained $25 from the prosecutor, by falsely pretending to him that he was in a position to enforce payment thereof from him by the promissory note; and we certainly cannot say the jury erred in holding that the defendant, by his words and conduct, gave the prosecutor to understand that he held such claim against him, and that had the truth been told, namely, that the note was then in the hands of a lawful holder, competent to enforce payment from the prosecutor the latter would never have paid the money.

Erle, C. J. in *Regina* v. *Jennison*, 6 L. T. Rep. N. S. 256, says, "One false fact, by which the money is obtained sufficiently sustains the indictment, although it may be united with false promises, which would not of themselves do so."

We think it is a case coming within the mischief which the statute was designed to meet.

The law as to false pretences has been construed of late years in a more liberal spirit than formerly.

We also refer to *Regina* v. *Huppel*, 21 U. C. Q. B. 281, and the English cases there cited, and to *Regina* v. *Butcher*, 3 L. T. Rep. 110, and a well known case of *Regina* v. *Barnard*, 7 C. & P. 784, to the effect that words are not necessary, but that conduct and acts are sufficient.

Conviction affirmed.

COMMON PLEAS.

(Reported by E. C. JONES, *Esq., Barrister-at-Law, Reporter to the Court.)*

MONTGOMERY v. BOUCHER ET AL.

Promissory note—Interest—Rate of in note—Measure of damages.

Defendant having made his promissory note payable two months after date, with interest at the rate of 20 per cent. per annum, and having made default in payment thereof at maturity, upon the trial of the case in an action brought by the holder the plaintiff, against the defendant, the learned judge left it to the jury as a question of damages as to the amount they would allow after the note became due, not exceeding 20 per cent., which was objected to by the plaintiff's counsel The jury found for plaintiff, allowing interest only at 6 per cent., after the note matured. Upon motion to increase the verdict by the difference between 6 and 20 per cent. on leave reserved. *Held* that the rate of interest agreed upon by the terms of the note is the amount which should be allowed by the jury as interest when allowing interest in the nature of damages, from the maturity of the note to the entry of judgment. [C. P., H. T. 27 Vic.]

Action brought on a promissory note dated 28th January, 1862, made by defendant, payable two months after date to R. B. Miller, or order, for $320, at 20 per cent. per annum, for value received. Note endorsed by Miller to the plaintiff. Counts followed for money lent for interest, at the rate of 20 per cent. per annum, and on the account stated. Plaintiff claimed $600.

Defendant denied the making and endorsing of the note, and as to the other counts pleaded never indebted.

The cause was taken down to trial at the Fall Assizes of 1863 for York and Peel, before Mr. Justice Wilson. The making and endorsing of the note was proved, and it appeared the money was borrowed to enable a patent to be taken out temporarily till a mortgage could be given for it. Plaintiff wanted Boucher to renew it, because it would soon be settled. The plaintiff claimed 20 per cent interest from the date of the note to the time of taking the verdict.

Defendant objected that plaintiff was only entitled to recover 20 per cent. until the note matured, and after that the jury would give such damages as they thought right, not exceeding 20 per cent. He referred to *Ward* v. *Morrison*, 1 Car. & Mar. 368; *Howland* v. *Jennings*, 11 U. C. C. P. 272; *Keene* v. *Keene*, 3 C. B. N. S. 144.

The learned judge left it to the jury as a question of damages as to the amount they would allow after the note became due, not exceeding 20 per cent. The plaintiff's counsel objected to the charge of the learned judge. Leave was reserved to the plaintiff, if the jury gave less than 20 per cent., to apply to have added an amount to make the interest up to 20 per cent., if the court should be of opinion that the learned judge was bound as a matter of law to direct the jury to allow that rate. The jury gave a verdict for plaintiff for $355 51, allowing the interest only at 6 per cent. after the note matured. If the 20 per cent. for the whole period had been allowed, the verdict would have been $429 34.

During Michaelmas Term, *Tilt* moved pursuant to leave reserved, to increase the verdict to $429 34, on the ground that the learned judge who tried the cause should have directed the jury to find at the rate of 20 per cent. for the plaintiff during the whole time, from the date of the note to the time of rendering the verdict, in accordance with the rate of interest specified to be paid in the note.

The rule was enlarged until Hilary Term last, when the defendant shewed cause in person. He contended that the amount of damages for non-payment of a bill of exchange or promissory note, on the day it became due, was a matter to be decided by the jury, and that the established rule was to give interest in the nature of damages. That the jury were not even bound to give that. When the contract was to pay a certain sum on a day certain, with interest, the interest became a part of the principal under the contract; and when a defendant could not be held to bail for interest as damages, he could always be arrested when it was part of the agreement to pay interest. Here the contract was to pay 20 per cent. for two months. After that, the jury could give damages for not performing the contract. That the cases most favorable to the plaintiff only show that the jury might give the increased interest in the nature of damages, not that they were bound to do so. He again referred to the cases that were mentioned at the trial, and to Mayne on Damages, 118, 120; Con. Stat. U. C., ch. 43, s. 1, 2, p. 449.

Tilt, contra, contended that the parties themselves having fixed the rate at which the money was loaned, that same rate continued, and the jury ought to have been directed to find for the plaintiff in that way. He referred to *Howland* v. *Jennings*, and the cases there cited; to the Bills of Exchange Act, Con. Stat. U. C. ch. 42, sec. 13, 14; *Hudson* v. *Fawcett*, 2 D. & L. 81; *Crouse* v. *Park*, 3 U. C. Q. B. 458.

RICHARDS, C. J.—The authorities all seem to concur that, as to interest accruing after the note or other instrument becomes due, it is recoverable by way of damages for the detention of the amount payable by the contract. In Williams' Saunders, vol. 1, 201, note *n.*, it is stated, "The usual covenant in a mortgage deed is to pay the principal and interest on a certain day, but there is no covenant to pay interest after that day; therefore, in debt on such a deed, the interest subsequent to the day of default must not be claimed as part of the debt, but as damages for the detention of the debt."

In *Ward et al* v. *Morrison*, in 1 Car. & Mar. 368, the action was to recover a promissory note for £600 payable 12 months after date, at the rate of 6 per cent. The interest had been paid when the note became due; and the question was at what rate the jury should allow; 5 per cent. or 6 per cent., from the time the note became due. Wightman, J., in summing up said—"If the parties have made a contract for six per cent. on a bill of exchange, they must abide by that contract. but when you have to allow interest as damages for the non payment of money at the agreed on, you will probably think 5 per cent. sufficient." The jury found for the plaintiff, with interest at the rate of 5 per cent.

In *Cameron* v. *Smith*, 2 B. & Ald., p 308, Bayley, J., said —"Although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury in order that they may find the amount; and it is competent for them either to allow five per cent. or four per cent, according to their judgment of the value of money, or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder. These circumstances shew that interest is in the nature of damages and is no part of the debt."

In *Price* v. *The G. W. Railway*, 16 M. & W. 244, defendants gave a bond to the plaintiffs under an act of parliament pledging certain estates, tolls, &c, and all the interest of the company therein, to hold to plaintiffs until the said sum of £1000, together with interest at the rate of 5 per cent. per annum, payable as thereinafter mentioned, should be fully paid. And it was stipulated that the said principal sum of £1000 should be payable and repaid on the 15th January, 1844; and that in the mean time the Company should, in respect of the interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants thereunto annexed the several sums mentioned in such warrants respectively, at the times specified therein. The coupons were duly presented half-yearly and paid, but the Company did not pay the principal until after action brought, when they paid the principal into court.

The question for the opinion of the court was, whether the plaintiff was entitled to recover interest from 15th January, 1844, to the bringing of the action.

Parke, Baron, in giving the judgment of the court, said, "This is substantially a mortgage. The constant and invariable practice is to give interest by way of damages in such cases." In the argument counsel said in effect how can you imply from an express contract to pay interest to a certain day a contract to pay it beyond that. Parke, Baron, said, "The jury give it as damages for the detention of the debt. It is not recoverable *as* interest on the contract itself." Alderson, Baron, said, "Surely there is a great difference between giving interest as damages on interest-bearing money or the contrary. If the money be employed on interest, it is reasonable to suppose it would continue to be so employed."

In *Morgan and another* v. *Jones*, 8 Ex. 620, the question raised was whether the mortgagee of certain shares of a vessel could, after the time for redemption had passed, charge more than 5 per cent. interest on the loan. The mortgage deed was in the ordinary form, contained an absolute assignment of the shares of the vessel, with a proviso for redemption on payment of the principal money and interest, at the rate of 10 per cent. in six months after the execution of the deed. There was no proviso for payment of interest after the expiration of the six months.

The mortgagors contended that the mortgagees could not claim at all events more than 5 per cent. interest after the expiration of the six months from the date of the mortgage.

The judge at the trial, Wightman, J., was of opinion that, as the principal was not paid at the time specified, the interest continued payable at the same rate. On the argument, Parke, Baron, said, "It was a sale of a chattel redeemable on a certain day." Then if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It was considered that *Price* v. *The G. W. Railway*, (16 M. & W. 244) decided the case, and the ruling of the judge at *nisi prius* was upheld.

In the case of *Gibbs* v. *Fremont*, 9 Ex. 25, the question of how much interest should be allowed was discussed. There the defendant, in the State of California, drew bills on Mr. Buchanan, Secretary of State of the United States, at Washington, D. C. The bills were protested for non-acceptance, and defendant was served with notice in Washington. It was left to the jury to say what was the rate of interest in California and Washington respectively from 1847, when the bills were protested, up to the time of the action brought; and whether the plaintiff was entitled to recover as damages interest, and if so, whether the interest was to be calculated at the California rate or the Washington rate. The jury found that the California rate was 25 per cent., and the Washington rate 6 per cent., and that the plaintiff was entitled to recover interest at the Washington rate. Leave was given to the plaintiff to move the court to increase the verdict by adding 19 per cent. interest to make it equal to the California rate, if the court should be of opinion that the plaintiff was entitled to recover at that rate.

In giving judgment Alderson, B., said, "If the interest be expressly or by necessary implication specified on the face of the instrument, there the interest is governed by the terms of the contract itself. But if not, it seems to follow the rate of interest of the place where the contract is made" He further stated, "It is not to be left to the jury at which rate he ought to pay, for it depends on the rule of law. The amount of the interest in each place is to be so left, and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact. Here the jury has found interest to be due, and that there was damage which ought to be recovered in the shape of interest. They have also found what the usual rate of such interest is at Washington and in California, but which rate is to be adopted by them is, as we think, a question purely of law for the direction of the judge to the jury." The court thought the California rate the proper rate, and ordered the verdict to be increased by the additional interest.

In *Keene* v *Keene*, 3 C. B. N. S. 144, one of the items of plaintiff's claim was a bill of exchange for £900, payable 12 months after date, with interest at 10 per cent. per annum. Plaintiff claimed 10 per cent. interest from the date of the bill to the time of the computation of the damages. It was referred to the master. Defendant contended that plaintiff was entitled to only 5 per cent. interest in the nature of damages after the maturity of the bill. The master allowed ten per cent. interest for the whole period. It was moved to refer it back to the master for reconsideration. In argument the defendant's counsel contended the bill in effect was a bill for £220. Willes, J., said, "That clearly is not so. Until the maturity of the bill, the interest is a debt, after its maturity the interest is given as damages at the discretion of the jury. Colonel Fremont had to pay 25 per cent, the (Californian rate of interest) * * * see *Gibbs* v. *Fremont*, 9 Exch. 25. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed, and the master is substituted for a jury."

Cockburn, C. J., said, "The master has, as he well might, given in the shape of damages the rate of interest the parties themselves have contracted for. I think he has done quite right."

Crowder, J., said, "The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money." The rule to refer to the master was refused.

In *Howland* v. *Jennings*, 11 U. C. C. P. 272, on the authority of *Keene* v. *Keene*, this court refused to reduce the verdict of a jury who had allowed interest for the whole period from the date, at the rate of 20 per cent. per annum, on a promissory note payable one month after date, with interest at that rate. The defendant contended that from the time the note became due only 6 per cent. should have been allowed; and the judge at *nisi prius* gave him leave to move the full court to reduce the verdict, which they refused to do.

On the whole we think the weight of authority is in favor of the interest agreed upon by the parties, being the proper amount to be allowed by the jury as interest when allowing interest in the nature of damages, from the time the note matures to the time judgment is to be entered. It may also be argued that this is the proper mode of estimating the interest or damages to be allowed, as being that which was in the contemplation of the parties when they entered into the contract, according to the doctrine laid down in *Hadly* v. *Baxendale*, 9 Ex. 341.

The rule will therefore be absolute to increase the damages to $429 34, pursuant to leave reserved.

Per cur.—Rule absolute.

CRAWFORD v. BEARD ET AL.

Contract—To be performed in the United States—How payable—Greenbacks.

The defendants reside at Toronto, in Canada; and one of them when at Cleveland, or as plaintiff contends at Toronto, wrote to plaintiff, who resides in Cleveland, as to coal, to which letter the plaintiff replied and addressed his letter to the defendants at Toronto agreeing to furnish coals at Cleveland at $2 75 per ton. *Held* the place where the money is payable governs the question as to how it is to be paid, and as the goods were to be delivered at Cleveland it is to be presumed they were also to be paid for there on delivery and that therefore plaintiff must accept American currency in payment thereof.

C. P., H T 27 Vic.]

Plaintiff declared on the common money counts for goods sold, money lent, money paid, money had and received, interest, and

the account stated. Damages three thousand five hundred dollars. Writ issued on the 23rd of December, 1862. Special plea of never indebted, except as to goods sold and delivered, and for interest. And to so much of the declaration as alleges goods sold and delivered, and for interest, defendants say the goods sold were a quantity of coal, to wit, 724 tons, which were so sold and delivered and accepted at Cleveland, in the United States of America; and by the contract the defendants agreed to pay, and plaintiff to accept $2 75 per ton, and $1991 was the amount so payable to the plaintiff for the said 724 tons of coal, under the agreement which said sum was due and payable, and by the contract was to be paid to said plaintiff at Cleveland in the said United States; and another quantity of coal, to wit, 285 tons, which was sold and delivered under another contract, whereby plaintiff agreed to deliver and defendants to accept said last mentioned coal at Cleveland aforesaid, and plaintiff agreed to accept and defendants to pay the sum of $804 of lawful money of Canada for such coal, so delivered under the last mentioned contract, and defendants say the interest and forbearance of money in the declaration mentioned, is for interest and forbearance on the said sum of $1991 and $804, and there is due and owing therefor to plaintiff $43 05 as such interest, and the defendants say except as to the said sum of $1991 of lawful currency of the United States, which said sum is equal to $1314 06 cents of lawful money of Canada, and the said sum of $804 of lawful money of Upper Canada, and the said sum of $40 of lawful money of Upper Canada, making in all $2152 of lawful money of Upper Canada, they were never indebted to the plaintiff, and the defendants bring into court the said sum of $2153 06 of lawful money of Canada, and say that is enough to satisfy the claim of the plaintiff in respect of the matters therein pleaded to.

The plaintiff takes issue on the several pleas of the defendants.

The cause was taken down to trial before the present Chief Justice of Upper Canada, at the last spring assizes for the counties of York and Peel.

The contract was contained in a letter put in, dated the 30th of July, 1862, and the reply to it.

A gentleman called as a witness said he was an exchange broker, residing at Toronto, and that he could have bought a draft on New York with Canada money at 85 per cent. discount. That draft would be payable in New York in treasury notes, for it would have been drawn payable in current funds. In Buffalo or Cleveland Canada money would probably have been 2 per cent. less than gold, which might have made the treasury notes 30 or 35 per cent discount. On cross examination he stated the treasury notes are the current money of the United States. There are gold coins of $1, $2½, $3, $10 and $20 and there was also a silver currency. Canadian gold and American gold were at par. He only knew of treasury notes by custom of dealing, he had received and paid them out, and remitted them to New York; for $1000 in gold paid him here, the witness would give a draft on New York taking the gold at 54 per cent premium. If he sold a draft on New York payable in gold, he would charge one per cent. premium on it, receiving gold or Canada notes here. If a draft payable at sight were drawn at Cleveland, payable here, the witness would give $1000 for it, if payable in our money, charging the usual discount.

A professional gentleman, a lawyer in the United States, stated that by an act of Congress, passed on the 25th of February, 1862, the secretary of the treasury was authorised to issue one hundred and fifty millions in treasury notes, and a similar sum by an act of July. These notes were a legal tender except in payment of customs dues and interest on government bonds and notes—(it was admitted that for goods sold and delivered in the United States, treasury notes are a good tender). He thought the act constitutional. The copy of the clause, in referring to these bonds, he handed in was as follows: "and they shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid." He added, treasury notes are lawful money for cash. But if he took $1000 in treasury notes to a broker he could not get $1000 in gold. They are in law lawful money for all purposes except what are excepted, for any other purpose they are legal currency.

Another witness, a resident of Toronto, stated that he was offered for Canada money within ½ per cent. of what they would give for gold. A bill drawn in New York on Canada would be, if paid in gold, ½ per cent discount. He called treasury notes currency of the United States.

There was a verdict rendered for the plaintiff for $685 with leave reserved to move to reduce it on the evidence, the court to draw conclusions of fact therefrom, or order a verdict for the defendants.

In Easter Term last *Crombie* moved a rule *nisi* to enter a verdict for the defendants, pursuant to leave reserved, on the ground that from the evidence given at the trial the defendants were entitled in law to a verdict.

This rule was enlarged by consent to Trinity Term.

During the Term *Eccles, Q. C.* shewed cause and contended that the contract did not necessarily create a debt payable in Cleveland; that the letter being written by the defendants in Canada was creating a debt here as far as they were concerned, that the contract was to pay in money not in treasury notes; that the coin of the United States remains the same as it was, and that what the act of Congress permits is that people may tender these greenbacks, as they are called, in payment of their debts, and that we, and our courts, are not bound to take the equivalent here. He referred to Story on the Conflict of Laws, secs. 336 and 308 to 314 inclusive.

Anderson contra. The *lex loci* governs as to the value of the money in which the demand is to be paid. The contract was to deliver to defendants in Cleveland a certain number of tons of coal at a certain price, and arose out of a letter which plaintiff received there and replied to from that place. The question was simply what were the damages the plaintiff sustained by the breach of defendants' contract. Whatever sum would put him in the same situation as he would have been in if the contract had been performed is all he can ask as damages from a court or jury here. It is clear defendants could have paid in greenbacks at a large discount from Canada money, when the debt becomes due, and all that plaintiff can now ask them to give him is what was then the value of the debt in greenbacks as compared with Canada money, and the interest. He referred to *Scott* v. *Bevan*, 2 B. & Ald. 78; *Don* v. *Lippman*, 2 Tudor's Leading Cases on Mercantile Law, 244; Westlake on Private International Law, sec. 232.

ADAM WILSON, J.—It appears the plaintiff is a resident at Cleveland, in the United States, and the defendants are residents of Toronto, in this province.

The defendants, on the 29th of July, wrote a letter to the plaintiff, addressed to him at Cleveland, proposing to take from him certain quantities of coal at certain prices. It was not quite agreed where this letter was written, the defendants saying at Cleveland, by one of them while there for the purpose of making a bargain. The plaintiff does not admit this, from which he leaves it to be inferred that it was written by the defendants at their residence and place of business in Toronto. The letter itself has, by some means, been lost or mislaid since the trial.

The plaintiff, on the 30th of July, in Cleveland, answered the defendants' letter addressed to them at Toronto, in the following words:

"I will let you have the 100 tons, to be delivered here free on board at $2 75 per ton, as I am anxious to sell you, even by so doing I should disappoint some of my other customers. I would like you to send for it in as small cargoes as convenient for you, and not more than one vessel at a time, as it sometimes comes in very slow. Please advise me when you will probably send for first cargo, also when your vessel leaves your place to come here."

Nothing seems to have been expressly said of the time when or the place where the money was to be paid.

This then is the case of a contract made in one country, which is to be performed in another, if the defendants' letter were written here, or the case of a contract made entirely in one country, and that country the United States, if the defendants' letter were written at Cleveland.

In the former case the rule is that the place where the money is payable is the one which is applicable to the question, and as the goods were deliverable at Cleveland, and no express provision was made for payment, the presumption is that the goods were to be paid for on delivery, and therefore at Cleveland. Story's Conflict of Laws, sec. 280.

In such a case then, when a suit is brought, the plaintiff should recover such a sum in the currency of that country, as will approximate most nearly to the amount to which the party is enti-

tled in the country where the debt is payable, calculated by the real par and not by the nominal par of exchange. Story's Conflict of Laws, sec. 309.* The general rule that the debtor must follow his creditor to discharge his debt has much bearing in determining the place of payment.

These defendants could have paid this debt in Cleveland in the funds of the United States at their nominal and legal value there, for it is there their money was payable.

If the contract had been that the defendants should pay the plaintiff in Canada or in London, the defendants could no more have compelled the plaintiff to take payment in Cleveland, as if the debt had been payable there, without indemnifying the plaintiff against this breach of contract in paying the plaintiff in Canadian or English funds according to the value of money in these countries, than they could with impunity have violated any other of the conditions of the contract. *Suse* v. *Pompe*, 8 C. B. N. S 538. If, however, the defendants' letter was written in Cleveland, then the entire contract was made there, for the posting of the plaintiff's letter of acceptation concluded the bargain. *Dunlop* v. *Higgins*, 12 Jur. 295; *Duncan* v. *Topham*, 8 C. B. 225; *Scott* v. *Pilkington*, 2 B. & S. 11. And as performance, and payment as a consequence, were to be there also, there can be no doubt that payment made in the funds of that country, or in their equivalent if made in a foreign country, will be a due performance of the contract. *Gibbs* v. *Fremont*, 9 Exch. 25. If a depreciation takes place in the currency between the making and performance of the contract, the debtor may pay the amount according to the value which the currency bears when the debt falls due. Story, sec. 313 a.; *Pilkington* v. *The Commissioners for Claims*, 2 Knapp Rep. 18. A depreciation can scarcely be said to exist in this particular case, for in the country in which the money is payable, a particular currency of that country, the treasury notes, are declared by the legislative authority to be lawful money, and a legal tender in payment of all debts, except as before stated.

In either view of the facts of the case we think the defendants are entitled to succeed. The rule will therefore be that the postea be delivered to the defendants.

Per cur.—Postea to defendants.

TYKE v. COSFORD.

Account stated—Evidence of.

In support of an account stated as set out in the declaration the following memorandum was put in as evidence:

$300—Good to T. T to the amount of $300, to be paid to him, or his order, at E. C.'s mill, in the township of Elma, in the county of Perth, in lumber at cash price. (Signed,) J. C, Sen.
J. C.

Held, a sufficient acknowledgment of debt or liability, and a promise to pay, and that it imported a sufficient consideration to sustain the account stated in the declaration. (C. P., H. T., 1864.)

This was an appeal from the county court of the county of Wellington, in ordering the plaintiff's verdict to be set aside, and a nonsuit to be entered. The declaration stated

1st. That the defendant Cosford, and one John Cosford, who died before the commencement of the suit, being, on the 27th of July, 1861, indebted to the plaintiff in the sum of $300, for money found to be due from the defendant and John Cosford to the plaintiff, on accounts stated between them, did then, in consideration of such indebtedness, in writing acknowledge themselves so indebted to the plaintiff in the sum of $300, and agreed to pay the same to the plaintiff or his order in lumber, at cash price, at Edward Cosford's mill in the township of Elma. And the plaintiff says that although he has always been willing and ready to receive the lumber at cash price, at the said mill, in payment of the $300, according to the agreement, yet the defendant did not at any time, nor did John Cosford, in his lifetime, deliver the lumber to the plaintiff, or to any one on his behalf, at the said mill or elsewhere, although a reasonable time for such delivery had elapsed before the commencement of this suit, but neglected and refused so to do.

2nd. That the defendant was indebted to the plaintiff for money found to be due to him on an account.

The defendant pleaded to the first count;

1st. He did not promise.

2nd. A denial of the breach.

3rd. Payment.

And he also demurred to it because it contained no sufficient breach of performance of the agreement, and because it did not shew such a demand or refusal as to entitle the plaintiff to recover.

To the second count the defendant pleaded;

1st. Never indebted.

2nd. Payment.

3rd. Set off.

Upon which issue and joinder were taken.

The agreement put in at the trial was as follows:

PEEL, July 27th, 1861.

$300—Good to Thomas Tyke to the amount of three hundred dollars, to be paid to him, or his order, at Edward Cosford's mill, in the township of Elma, in the county of Perth, in lumber at cash price.

JOHN COSFORD, SEN.
JAMES COSFORD.

A great deal of evidence was given on both sides, as to whether the plaintiff had ever demanded lumber and been refused, but it is not material for us to consider this question as the case does not turn upon it; but it does seem it would be difficult for the plaintiff to treat the defendant as guilty of default for non-delivery of the lumber, when no time is mentioned for it, and when therefore the defendant could not be prepared to perform his agreement until he was specially notified by the plaintiff when it was he desired the delivery to be made; and when it may be the plaintiff might also have to specify the kind of lumber that he would require; it does not even appear that the plaintiff was ready and willing to have received the lumber; but this may be corrected in the court below if the plaintiff is entitled to succeed in his present application, which assumes the plaintiff's cause of action to be correctly stated.

The objection to the plaintiff's recovery turned upon the exceptions taken by the defendant's counsel at the trial.

1st. That the memorandum produced was not sufficient evidence of an account stated.

2nd. That there was no evidence of any consideration *dehors* the contract or due bill, or consideration to support either count.

3rd. That the memorandum shews a void promise.

The plaintiff obtained a verdict subject to the defendant's moving to enter a nonsuit on these grounds.

The defendant did move, and his rule for entering it was made absolute.

The learned judge, in giving judgment, was of opinion that the memorandum above mentioned, "good to, &c.," did not import any consideration, as the words "value received" were held to import in *Waddel* v. *McCabe*, 3 O. S. 502, and that the admission by the defendant to one of the witnesses, when he presented the writing to him, that it was "all right, and he would have to pay it," was not sufficient evidence of any previous liability or consideration to make him chargeable.

It is against the rule for a nonsuit, upon this ruling, that the plaintiff has appealed.

The case was argued this term by *S. Richards*, Q. C., for the appellant. He referred to Chitty on Bills, 10 Edn. 357; *Belcher* v. *Cook*, 4 U. C. Q. B. 401, *Cummings* v. *Freeman*, 2 Humphreys, 143; *Harrow* v. *Duggan*, 6 Dana, 341; *Marrigan* v. *Page*, 4 Humphreys, 247.

Jno. Read, contra, objected that there was no consideration on the face of the instrument. He referred to *Boulton* v. *Jones*, 19 U. C. Q. B. 517, *Fahnestock* v. *Palmer*, 20 U. C. Q. B. 307; *Corporation of Perth* v. *McGregor*, 21 U. C. Q. B. 450, *Reed* v. *Reed*, 11 U. C. Q. B. 26; *Teal* v. *Clarkson*, 4 O. S. 372; *Hall* v. *Morley*, 8 U. C. Q. B. 584.

ADAM WILSON, J.—The grounds of appeal stated are to the effect,

1st. That the plaintiff should not have been nonsuited.

2nd. That the instrument produced at the trial was evidence of an indebtedness by the defendant to the plaintiff as alleged.

3rd. That the evidence of the acknowledgement, made by the defendant on production to him of the instrument, "that it was all right and he would have to pay it," was evidence of an indebtedness to be left to the jury.

4th. That there was evidence sufficient to entitle the plaintiff to maintain his verdict.

We shall lay the account stated out of the question, as there was no evidence given to prove any account stated in fact, or any other accounting than that which, it is contended, is to be implied,

and was the consideration for the making of the special agreement, and as the promise made on that occasion was to pay in lumber and not in money, it cannot support the account stated and set forth either in fact or law. *Hopkins* v. *Logan*, 5 M. & W. 241. We shall therefore consider the proceedings only with regard to the first count, and the pleadings connected with it, so far as they are applicable to this appeal

The words "value received" have been decided to import a good consideration; but there is no decision that the words of such a writing as the one in question do so.

A document in the common form I O U so much money, "is evidence of an acknowledgment of debt, to be received on the account stated." *Curtis* v. *Richards*, 1 M. & G. 46; *Fesenmayer* v. *Adcock*, 16 M. & W. 449. O [owe] contains the acknowledgment, and U [you] is the person to whom it was delivered, and who is presumed to be the person suing upon it in the absence of evidence to the contrary.

The instrument in question expressly names this plaintiff, so that he is the person to sue upon it, if any one can do so. Does it also contain an acknowledgment of debt? for if it do, it will be *prima facie* evidence of an account stated, that is of its having been given upon a statement and settlement of accounts.

The words are "*Good* to Thomas Tyke to the amount of $300 *to be paid* to him, &c." This seems to be an express declaration or acknowledgment of debt, for whatever *good* may mean, *to be paid*, must surely mean something. Suppose "good" had not been there at all, but the instrument had been merely "the amount of $300 *to be paid* to Thos. Tyke, &c.," it can scarcely be doubted that this would have been as strong and as direct an acknowledgment as could well have been made of a debt against the person making it. There can be no difference between "$300 to be paid to Thos. Tyke," and "I O Thos. Tyke $300." A plain I O U so much money is evidence of an account stated, but with the words "to be paid" it becomes a promissory note. *Brooks* v. *Elkins*, 2 M. & W. 74; *Waithman* v. *Elsee*, 1 C. & K. 35. The words then *to be paid* have some meaning, and that is that they create an express promise, and if this instrument had been payable in money instead of in lumber, it would clearly have been a promissory note.

With these words then there can be no doubt that there is not only an acknowledgement of debt, but a promise to pay it in the manner provided for, and I should rather have been inclined to hold that the word *good* would have amounted to an acknowledgment, sufficient to have sustained the account stated declared upon if the instrument had been payable in money. There need be no precise form of words to constitute an acknowledgment of debt or liability. As "I owe you" is an acknowledgment, "due to you" should be so too, and it is so, according to the cases in Hump. Rep., why not also "good to you?" But without resting upon this at all, we think that this instrument does contain an acknowledgment of debt and a promise to pay it, and does import a sufficient consideration of being based upon a previous settlement of accounts to support the promise to pay the amount of it in lumber. It is not necessary that this consideration should expressly appear upon the face of the instrument itself, it will equally answer if it can be implied from it, or evidence entirely beyond it may be given to prove the consideration.

The case of *Davies* v. *Wilkinson*, 10 A. & E. 98, is not altogether unlike this case. The instrument there was in this form:

"I agree to pay C. D., or his order, £695 at four instalments, to be paid on, &c.," [making £600] "the remainder, £95, to go as a set off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. D. to him.

JAMES WILKINSON."

This was of course held not to be a promissory note.

The first count was upon this special agreement, and it alleged an accounting between the plaintiff and defendant of divers moneys due and owing by the defendant to the plaintiff, and then unpaid; and upon that accounting that the defendant was indebted to the plaintiff in the sum of £695, and being so indebted, he, the defendant, in consideration thereof, then agreed, &c., as in the writing above stated.

The second count was upon an account stated.

The defendant's counsel, at the trial, objected that the instrument produced varied from the first count, as it did not shew any such statement of account prior to the agreement, and that it did not support the second count. The objections were renewed in Term. Lord Denman, C. J., said, "it is said that no consideration appears to support the first count: but the promise itself imports a consideration, and he who says 'I promise to pay you £100,' may, without any violent construction, be supposed to say, 'we have settled accounts and I am to pay you £100.' It is objected then that the instrument proved merely shewed a *nudum pactum*, but the words 'I agree to pay,' are a perfect promise, and they import a consideration. It was not necessary that the document put in should be a complete agreement on the face of it, for it is only offered as evidence that such a transaction existed as the document refers to, and undoubtedly it is evidence of that."

Littledale, J., said, "as to the objection that no consideration appears on the document, that is true, but it supports the averment in the declaration that the parties came to an account together; and there can be no doubt that they had come to an account in which £695 was to be paid to the plaintiff. The statement in the writing itself is evidence that there had been an account." Other cases might be added to the same effect, but not quite so applicable.

If then there be no difference between the mode of payment as set out in the agreement just referred to, so much in money and the rest by way of a set off against a particular debt, and in the agreement in hand, in lumber, then the case just cited is a decisive authority in favour of the validity of this instrument, and of the mode in which it has been declared on, and of what it imports; and as we can perceive no difference between an agreement to pay so much money by way of a set off against a particular debt, and an agreement to pay so much in lumber, for they are both agreements not to pay the plaintiff in money, we think the first count of the present declaration sustained both in fact and in law. We have no doubt that the same result could have been established upon the mere basis that this is at least an acknowledgment of debt or liability, like an I O U, and as the acknowledgment in the one case is evidence of an account stated, so it should be in the other also, but it is more satisfactory to find that the question has already been decided by the high authority to which we have alluded.

We think then that the rule ordering the verdict for the plaintiff to be set aside, and a nonsuit to be entered, should be discharged.

Per cur.—Rule discharged.

CROOKS v. DICKSON.

Summons—Enlargement of—Stay of proceedings thereby.

Held, generally speaking, that a summons calling on a party to shew cause, operates as a stay of proceedings after it is returnable, and an enlargement thereof by consent of parties continues the stay.

[C. P., H. T., 27 Vic.]

This was an action of covenant to recover five years' rent of premises in the City of Toronto. The writ was issued on the 25th of February, 1862, and the declaration is dated the 19th of April, 1862. The venue was laid in the county of Grey originally, but was afterwards changed to the county of the City of Toronto. The defendant filed a plea by way of equitable defence, and demurrers arose out of the pleadings which came before the court in Hilary Term last year, Since that time there have been applications to amend the pleadings, and out of one of these applications, and the taking of the verdict before the amended pleadings were filed, this motion arose. It was made by *Crombie* during Michaelmas Term last and enlarged to this Term, when *R. P. Crooks* shewed cause, and *Crombie and Anderson* supported the rule. The rule was to shew cause why the verdict should not be set aside with costs, and a new trial had between the parties on the ground of irregularity, in this, that the record was entered for trial whilst the proceedings in the cause were stayed; or on the ground that the verdict was taken after an order had been made allowing the defendant to add to the pleadings a new rejoinder, and a reasonable time had not elapsed from the making of the order to tax and pay the costs of opposing the application for the order, and to add and serve the rejoinder, or why the verdict should not be set aside and a new trial had between the parties on such terms as to the court might seem meet, on the ground that the verdict was excessive, and on grounds disclosed in papers and affidavits filed.

From the affidavits filed it appeared that notice of trial was given and the record entered for trial at the spring assizes of last year, held in May last, at Owen Sound. A summons which had been obtained for allowing the defendant to amend his pleadings was enlarged, by consent of parties, before the presiding judge at Chambers in Osgoode Hall, until Monday the first day of June, then next, and it was ordered that the venue in the cause be changed from the county of Grey to the county of the City of Toronto, and that the costs of the day, excepting the witnesses fees, should be costs in the cause. The order was dated at Owen Sound, on 13th of May, 1863. The defendant did nothing under the order; and after notice of trial had been given for the last autumn assizes for the city of Toronto, on the 28th of October, a summons to add a rejoinder was taken out and served on plaintiff on the 29th, returnable the next day. This summons was, by consent of both parties, enlarged until Saturday, the 31st of October.

Mr. Crooks, in his affidavit, states that he told the defendant's attorney at the time the enlargement of the summons was spoken of, he would enter the record of trial.

On the 31st of October, Saturday, the summons was argued before Mr. Justice Morrison by the plaintiff, and Mr. Crombie for defendant. The learned judge reserved his decision, and stated that as on the following Monday he was about leaving town, he would hand the order he made to the clerk in Chambers. On Monday, the 2nd of November, the order was obtained by the defendant's attorney, and served on the plaintiff's attorney the same day, by putting it under the door of his office, which was closed.

The order was that the defendant should have leave to plead the rejoinder referred to in the summons, on payment of the costs of opposing the order.

The commission day of the assizes for the county of the City of Toronto was on Thursday, the 29th of October, and it is said the record was entered on that day, after the enlargement of the summons, and whilst the same was pending. The assizes were opened on that day by the learned judge assigned to take them and then they were adjourned until Monday, the second day of November, the day when the order was obtained, and served. On the second and third of November that court was presided over by the Chief Justice of Upper Canada. The record stood thirteen on the list, and the verdict was taken on the afternoon of the third day of November, the day on which the costs of opposing the order were taxed, in the absence of the defendant's attorney and counsel, and before the amended pleading had been filed or served. The damages were assessed at $4339 90.

On Tuesday, the third of November, a clerk of the defendant's attorney called at the office of the plaintiff's attorney, who said he was making up the costs of opposing the order, and they met at Osgoode Hall and the master taxed the costs. The plaintiff's attorney took out an allocatur for the amount of the costs, but the clerk of defendant's attorney was not aware that a copy was served. The costs were taxed at £1 18s. 9d. on the 3rd of November, but were not paid before the verdict was taken, nor have they been paid since.

RICHARDS, C. J.—The defendant's counsel, on the argument, contended, as a matter of strict legal right, that as the plaintiff had enlarged his summons before the record was entered, such enlargement operated as a stay of proceedings, and the subsequent entry of the record and proceedings afterwards were all irregular. As a general proposition a summons operates as a stay of proceedings after it is returnable, and if it is adjourned by consent the stay continues. In the case before us it evidently was not in the contemplation of the parties that the plaintiff should not enter his record, and Mr. Crooks states that he told Mr. Cromoie he would enter the record. In the absence of any contradiction of this statement, or of dissent expressed on the part of the defendant's attorney to Mr. Crooks' doing as he stated he would, we think we should not be carrying the rule too far to hold that the plaintiff was not at liberty to enter the record, particularly as the defendant's attorney stated that he expected to try the case at those assizes, and had no intention of objecting to the record being entered thereat; his only object being to get the plea he had leave to file, placed on the record.

The case then comes to this, that on the day the costs of the amendment were taxed, whilst undoubtedly both parties expected those costs would be paid and the plea filed, the cause was taken as an undefended one. The exact hour of the taxation of the costs is not known. The verdict, from what we hear, was taken between two and four o'clock. The plaintiff's attorney, and the clerk of the defendant's attorney, attended at Osgoode Hall, and had costs taxed. The offices there are not open until ten o'clock and parties are not usually there to do business when the office is open. If two hours are allowed for making out the bill of costs and having the same taxed, and getting the allocatur, it would bring the time down to about noon. Then if the verdict was taken at two o'clock, or even at four, without further notice to the defendant's attorney, whose office was within almost a stone's cast of the court house, it does seem like pressing the matter with unusual haste and sharpness. It is urged that the learned Chief Justice was insisting on business going on, and that in consequence of this pressure the case was taken. Still I think it was due to the apparently liberal manner in which the attornies for the parties were and had been acting towards each other, that some little trouble should have been taken to let the defendant's attorney know the case was coming on. A constable might have been sent to his office to notify him of what was being done, when it was well know he intended to defend the case, particularly when so large an amount was involved.

On the other hand there is no reason to doubt that the defendant's attorney well knew the case was entered for trial, and he ought to have known the presiding judge would have insisted that the business of the court should be proceeded with. He knew that as he had obtained leave to plead on terms of paying costs, the responsibility was cast on him of having these costs taxed and promptly paid, and after the assizes had commenced he ought to have used unusual diligence. There were probably from two to four hours after the costs were taxed, in which he appears to have done nothing towards paying these costs. Under all the circumstances we cannot say he is entirely free from blame.

Looking at the facts we do not think it right to allow this verdict to stand, and therefore the rule will be absolute to set it aside; and as to the costs of the trial and of this application, we think the most reasonable mode of disposing of the matter will be to let them be costs in the cause—the defendant to have until Tuesday next, inclusive, to pay the costs of the amendment already taxed, and to file and serve his added plea without prejudice to plaintiff giving notice of trial to day for the next assizes.

Per cur.—Rule accordingly.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

ANDERSON v. CULVER ET AL.

Term's Notice—Necessity for, when plaintiff's proceedings stayed till security for costs be given—Laches.

A plaintiff residing out of the jurisdiction of the court, in 1862 commenced an action of ejectment for the recovery of lands situate within the jurisdiction of the court Issue was joined before October, 1862. On 23rd of that month, defendant obtained and served an order, staying plaintiff's proceedings till he should furnish security for costs. Plaintiff's proceeding was accordingly stayed till 20th February, 1864, when plaintiff having filed a bond for security for costs, had same allowed, and on 24th of same month served notice of the allowance of the bond together with notice of trial, without having previously given a term's notice of his intention to proceed. *Held*, that the notice of trial was irregular. *Held also*, that an application on the part of an attorney resident in the country, made to set aside a notice of trial served on his Toronto agent as irregular, and made within eight days after such service, is not too late.

(Chambers, March 5, 1864.)

This was an action of ejectment in which issue had been joined before October, 1862. On the 23rd day of that month, an order had been obtained by the defendant for a stay of proceedings till security for costs was given.

On the 17th February, 1864, the plaintiff filed a bond for such security, no proceedings in the meantime having been taken since the 4th of November, 1862, and no term's notice given.

On the 20th February last, the master allowed the bond, and on the 24th notice thereof and notice of trial were served on the defendant's attorney.

Robert A. Harrison, on 1st of March made application to Adam Wilson, J., for a summons calling upon the plaintiff to shew cause why the filing of the bond for security for costs, the notice that it had been filed, the service thereof, the allowance thereof and the notice of trial served on the 24th February last, the service thereof and all proceedings subsequent thereto, or such or one of them as to the presiding judge in Chambers might seem meet, should not

be set aside with costs, upon the ground of irregularity in this, that issue having been joined more than four terms, no term's notice of intention to proceed had been given before the taking of said proceedings or some or one of them.

Mr. Justice Adam Wilson, in the absence of direct authority in support of the summons, refused it. He however gave permission to renew the application.

Accordingly on 2nd March, Mr. Harrison having mentioned what took place before Adam Wilson, J., renewed the application before John Wilson, J., and upon the authority of 1 Chit. Archd. 9 Edn. p. 145, obtained the summons.

C. S. Patterson, for the plaintiff, shewed cause. He contended that since the defendant had got the proceedings stayed, he could not pretend that he was injured by the delay, and that if a term's notice were necessary, the defendant had waived it by not applying to set the proceedings aside within four days after the service of notice for allowance of bond. For his first contention he admitted that he had no express authority. For his second he cited *Willis* v. *Ball*, 1 Dowl. N. S. 303, which was a motion to set aside a notice of declaration served on the 30th October, and the application made on the 4th November following, was held to be too late, although the 31st October was a Sunday.

Robert A. Harrison, in support of the summons, cited *Tyre* v *Wilkes*, 2 U. C. P. R. 265; *The Bishop of Toronto* v. *Cantwell*, 11 U. C. C. P. 371, Archbold's Practice, 9 Edn., vol. 1, p. 145; *Unite* v. *Humphrey et al*, 3 Dowl. P. C. 532. He contended that from reason and analogy, the summons ought to be made absolute. The reason of requiring a term's notice, was to prevent surprise; the not putting in the bond was the plaintiffs own neglect, without which he could not proceed; he voluntarily allowed four terms to elapse, and should be bound to give a term's notice.

JOHN WILSON, J.—I think the summons as to setting aside the notice of trial, must be made absolute. If the plaintiffs were out of the jurisdiction of the court, the defendant had a right to security for costs. To compel this, the court does nothing more than stay proceedings till the security be given. If time runs on, it is caused by the plaintiffs laches, and is not the defendant's act. The giving of security is not technically a proceeding in the cause. It is a something to be done to authorize the plaintiff to proceed, without which he cannot take a step. Here he puts in security, and was in a position to go on according to the practice of the court. But this practice required that if no proceedings had been taken within four terms, the plaintiff was bound to give the defendant a term's notice. In the case of *Minchiner* v. *Martin*, 12 C. B. 455, Cresswell, J., says "In analogy to that case (*Doe Vernon* v. *Roe*, 7 Ad. & E. 14) the plaintiff here might have given security for costs at any time without giving a term's notice, and might also apply to rescind the order for security, though he could not take any other steps." In this view of the present case, aided by this authority, I hold the giving of the notice of trial the first step in the cause taken since the proceedings were stayed; but for the reasons already stated, the plaintiff could not take it without giving the defendant a term's notice of his intention to do so, which he has not done.

As to the point whether this application has been made in time, I have some doubts. This is a cause from the country. The notice of trial was served on the town agent, who had to communicate with his principal. The motion was made within eight days, which I think reasonable, and that the defendant has not waived his right to move.

The summons will be made absolute, so far only, as setting aside the notice of trial, and since the point is new, the costs will be costs in the cause.

Summons absolute. Costs to be costs in the cause.

FOGO v. PYPHER ET AL.

Ejectment—Security for costs—Necessity for prompt application.

In an action of ejectment commenced on 26th February, 1861, appearance entered on 18th March following, where defendant, on 19th of same month, demanded security for costs on the ground that plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial, it was held that an application made by defendant for security for costs, after service of the notice of trial, was too late.

(Chambers, March 7, 1864.)

This was an action of ejectment commenced on the 26th February, 1861. Appearance was entered on the 18th March following. On the 19th March security was demanded on the ground that the plaintiff then resided in Great Britain, and has never since resided within the jurisdiction of this Court. On the 21st March, 1861, notice was served limiting the defences of the several defendants.

No proceedings were taken from that time till the 28th January, 1864, when the plaintiff gave the defendant notice of his intention to proceed after the end of the then next ensuing term, by giving notice of trial. The defendant took no notice of this. The plaintiff, thereupon, on the 20th February, 1864, gave notice of trial for the next assizes, to be held at Whitby.

McLennan, on the 24th day of February, took out a summons calling on the plaintiff to shew cause why he should not give the defendant security for costs.

Kerr shewed cause, and contended that defendant was too late in his application.

Thereupon an affidavit was filed by W. McLellan stating that his belief was and is that it was understood between the attorney for the plaintiff and himself that they would not proceed until they gave security for costs, that, acting on this belief, he did not make the application or think of doing it till after the notice of trial had been given on the 20th of February.

The plaintiff's attorney and all those connected with his office having anything to do in the management of the cause, by affidavits, denied that there ever was any such understanding or any allusion to it, at any time, or any promise or understanding that they were to give security for costs.

JOHN WILSON, J.—It is much to be regretted that gentlemen of the profession do not reduce to writing any arrangement which may be made in a cause by which the ordinary course of proceeding is not to be followed. The result of the want of this precaution in this case is that one gentleman states on oath what a number of others deny, and the Court has no alternative but to treat the matter as if no arrangement whatever had been made.

In ordinary cases application for security for costs must be made before plea pleaded or issue joined. If the defendant knows that the plaintiff is out of the jurisdiction (*Wilson* v. *Minchin*, 1 Dowl. P. C. 299); and if made afterwards it must be made promptly after defendant becomes aware of the fact that plaintiff is out of the jurisdiction of the court (*Wood* v. *Bellisle*, 1 U. C. Cham. Rep. 130).

In actions of ejectment issue is joined, in fact, when the defendant appears and makes his defence; still I apprehend defendant may apply for security for costs provided he apply punctually.* I cannot learn that any rule of practice as to time has been established here.

In *Duncan* v. *Stint*, 5 B. & Ald. 702, it is laid down that when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows the party is out of the jurisdiction.

In *Brown* v. *Wright*, 1 Dowl. P. C. 95, it is said that where a defendant pleads, after it has come to his knowledge, that the plaintiff is abroad, the court will not oblige the defendant to give security for costs.

In *Fry* v. *Wills*, 3 Dowl. P. C. 6, the writ was issued in June. The plaintiff declared in October. The defendant took out a summons for time to plead and then obtained a rule for security for costs. The court said the rule of H. T. 2 Wm. IV. gave the court discretion, and held the defendant entitled to security for costs.

In *Young* v. *Rushworth*, 8 Ad. & E. 479 (note), the plaintiff in October, 1836, became insolvent, and in December got his discharge. Defendants motion for security for costs, in Michaelmas Term, 1837, was held too late.

Gell v. *Curzon*, 4 Ex. 813, was an application for security for costs, not because plaintiff was abroad, but because he was insolvent, and the suit was not being carried on for his benefit.

In *Torrance* v. *Goss*, 2 U. C. Prac. Rep. 55, it was held that if defendant take steps after becoming aware of plaintiff's residence out of the jurisdiction, he waives his right to ask for security.

In *Morgan* v. *Hellems*, 1 U. C. Prac. Rep. 363, a defendant was held too late in moving on 23rd January on an affidavit sworn on 4th January.

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* See *Crowe et al.* v. *Maguire*, 3 U. C. L. J. 205.—[EDS. L. J.]

In *Mainwright* v *Blain*, 2 C M. & R. 740, Parke, B., intimated that security for costs must be moved for as early as possible, and before issue joined, but if moved after, the court must be satisfied that the defendant did not know, before that step in the cause was taken, the circumstances on which he grounds his application.

Here I think the defendant was doubly precluded. First, in not moving within a reasonable time after his demand in 1861; and, secondly, in not moving within the term that next followed the plaintiff's notice of his intention to proceed after the term.

The summons must be discharged.

Summons discharged.

PHILLIPS ET AL v. WINTERS.

Ejectment—Notice limiting defence—Issue—Practice.

Where a defendant limits his defence under Con. Stat. U. C., cap. 27, sec. 12, to part of the lands sought to be recovered, he is entitled to the four days allowed him by the statute, even though this may have the effect of throwing the plaintiff over an assize; and an order will not be granted to plaintiff to amend the issue served by him before the four days have elapsed, without prejudice to his notice of trial.

(Chambers, March 24, 1864.)

The writ in this case was served on the 3rd March, 1864. On Saturday, the 19th March, the defendant appeared. The 21st was the last day for notice of trial for the Cobourg Assizes, and on that day the plaintiff made up and served the issue under sec. 16, (form No. 4) and gave notice of trial. On the 22nd the defendant served notice, limiting his defence to part of the lands claimed.

O'Brien, on the 24th March, asked for a summons for leave to amend the issue served, without prejudice to the notice of trial, by inserting the limitation of the defence to part, or by substituting therefor an issue in form No. 3, under the provisions of sec. 16. He referred to *Cole on Ejectment*, p. 134; *Grimshawe* v. *White et al.* 12 U. C. C. P. 521, was also referred to.

DRAPER, C. J.—I have already considered this point. The defendant is entitled by statute to his four days for limiting his defence, and to eight days for notice of trial, and I cannot take away his right, even though the effect may be to throw the plaintiff over the assizes. There is no authority cited in support of the proposition laid down in *Cole*, and I have found none.

Summons refused.

CHANCERY.

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

CHRISTIE v. DOWKER.

Mortgage—Covenant to pay—Sale, order for deficiency of—Statute of Frauds.

M. being owner of the equity of redemption verbally assented to an arrangement that "In consideration of the said McInnes having promised to give his personal covenant for the payment of the said balance of £300 (due on the mortgage) in three years from 10th February last, with interest to be paid half yearly as a collateral security, I will procure him an extension of time, as aforesaid, on receiving said covenant from him," which was embodied in a memorandum signed by the solicitor of the mortgagee, but without his authority Proceedings were accordingly delayed on the mortgage for three years, on the faith of this promise; and the mortgagee subsequently instituted proceedings in this court to obtain a sale of the premises, and that M. might be ordered to pay any deficiency arising on such sale of the premises. *Held*, there was not any absolute binding agreement to give the time: that as part of the agreement (that as to giving the covenant) was to be performed within a year, but the mortgagee's part embraced a period of three years, (as did also M's in regard to the time for payment,) whether the Statute of Frauds would stand in the way of the plaintiff's recovery. *Quære*, that had M. performed his part of the agreement, the mortgagee could have been compelled to execute his, and that a personal order for payment of the deficiency is only made by the court to avoid circuity of action and in aid of a legal right, but only when that right is clear.

This was a suit seeking to obtain a decree for sale of mortgaged premises, and the usual order for payment of deficiency in the event of the sale not realizing sufficient to pay the amount which should be found due to the plaintiff under the circumstances stated in the head-note and judgment. The cause came on to be heard by way of motion for a decree.

Gwynne, Q. C., for the plaintiff, contended that the defendant McInnes having agreed to execute the covenant to pay off the mortgage, and having, by the forbearance of the mortgagee, obtained the time stipulated for, the court would compel him now to do so—the court under such circumstances, will treat him as having performed his portion of the agreement, citing *Innes* v. *Dunlop*, 8 Term R 595; *Price* v. *Seaman*, 4 B. & C. 525; *White* v. *Parkin*, 12 Ea. 578, *Foster* v. *Allanson*, 2 Term R 479; and *Addison* on Contracts, pp. 21 and 38.

Strong Q. C., for McInnes, resisted the decree asked for, so far as any personal relief against him was concerned, as there was nothing binding in the agreement as to either party until the covenant was executed. He relied also on the Statute of Frauds as being a complete answer to the case made by the bill; the agreement not being to be performed within a year, and the order of court under which relief was here asked only applies to an ordinary case between mortgagor and mortgagee, or, where the right is clear and undisputed. McInnes could not have compelled an extension of time until he had given the covenant; until then the plaintiff was at liberty to proceed, and there is nothing to show that the plaintiff would ever have given the time, although his solicitor had chosen of his own accord, but without his sanction or authority, to undertake that the time would be extended. The fact that the three years have been allowed to elapse without proceedings having been instituted was merely accidental, a forbearance which McInnes could not have claimed or enforced.

Under these circumstances, the only decree the court will make will be the ordinary one for sale or foreclosure, as the plaintiff may elect to take, giving no personal relief as against McInnes.

The other defendants did not appear; as against them the bill was taken *pro confesso*.

VANKOUGHNET, C.—The plaintiff asks for a sale, and that the defendant Donald McInnes, the owner of the equity of redemption by assignment from the mortgagor, may be ordered to pay the deficiency, if any, on the sale, on the ground that he verbally assented to the arrangement contained in the following memorandum of receipt for arrears of interest, and £25 of the principal money secured by the mortgage, signed by the solicitor of the mortgagee, and delivered to McInnes; viz, "In consideration of the said McInnes having promised to give his personal covenant for the payment of the said balance of £300, due on the mortgage, in three years from the 10th February, with interest to be paid half yearly, as a collateral security; I will procure for him an extension of time as aforesaid, on receiving said covenant from him." Mr. Robertson swears that he several times afterwards called upon McInnes, who always promised to execute the covenant, and that on the faith of these promises he delayed taking proceedings on the mortgage until thereby McInnes has in fact had the three years' forbearance.

To this claim upon McInnes personally it is objected:

Firstly, that there was no absolute binding agreement by plaintiff give time, but only an agreement to do so conditional on McInnes to executing a covenant to pay, and that until that was done the plaintiff was at liberty to proceed at any time on the mortgage, and that it was only on obtaining this covenant that Robertson was to procure from the plaintiff the extension of time for three years: that had the plaintiff proceeded at once upon the mortgage, McInnes could not have set up the agreement, which was only to operate when he had done something which has never yet been done, and that the plaintiff might never have given the time, notwithstanding Robertson's undertaking.

Secondly, that the agreement, being for something to be done at a period beyond a year, required under the Statute of Frauds, to be in writing; that McInnes never signed any writing, and it is not proved that Robertson had any right to sign for the plaintiff.

Thirdly, that a personal order, as it is called, for payment of the deficiency is of recent practice, and only made by the court to avoid circuity of action and in aid of legal right, but only when that legal right is clear.

I think I should not make any order in this case, and that the construction put by the defendant upon the memorandum in writing signed by Robertson, and its effect, is correct. It is true McInnes has had the benefit of the three years, but that was because the plaintiff chose to let time run on without procuring the proper undertaking from him.

As regards the Statute of Frauds, McInnes' part of the agreement, as to the giving the covenant, was to be performed within a

year, indeed at once, but the plaintiff's part was to embrace a period of three years, as was also McInnes' in regard to the time for payment, and it would probably be found that the statute stood in the plaintiff's way. Had McInnes performed his part by delivering his covenant, the plaintiff, I apprehend, could have been compelled to execute his. *Donellan* v. *Read*, 3 B. & Ad. 899; *Souch* v. *Strawbridge*, 2 C. B. 808; *Cherry* v. *Heming*, 4 Exch. 631. I do not think it a case in which I should do more than make the ordinary decree, leaving the plaintiff to proceed at law if he thinks he can succeed there.* I give no costs of this contention to either side. McInnes has evaded his engagement, and is only entitled to such consideration as I feel compelled to give him.

CHANCERY CHAMBERS.

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

RHODES v. NEILD.

Production of documents—Affidavits.

A plaintiff filed a bill against his assignee's representative for an account, charging that certain mortgages then in his possession and apparently belonging to the assignee's estate, in reality were part of his estate. On being served with the usual order for production of documents, the plaintiff filed an affidavit, objecting to produce the mortgages, on the grounds that they were held by the assignee the plaintiff's trustee, and that he had a lien on them for moneys expended by him on account of the properties covered by them. The affidavit also described certain other documents in the plaintiff's possession generally. The answer denied, on information and belief, that the mortgages had ever been the property of the plaintiff.

Upon the application of the defendant, an order was granted requiring production of the mortgages, and for a more particular affidavit.

The plaintiff James Rhodes filed a bill against the defendant Thomas W. Neild, who is the administrator of his deceased brother Joseph Rhodes, setting forth an assignment of the plaintiff's property to Joseph Rhodes, in trust for the benefit of the assignor's creditors, praying for an account, and alleging that some mortgages which were in the plaintiff's possession, but in which his name did not appear, belonged either in whole or in part to his estate, and not to the estates of Joseph Rhodes, who appeared therein as a mortgagee. The answer of the administrator denied on information and belief that the plaintiff ever had any interest in the mortgages, and claimed that they were taken for the sole benefit of the parties who appeared as mortgagees therein.

Upon being served with the usual order for the production of documents, the plaintiff filed an affidavit, admitting the possession of the mortgages, but refusing to produce them, upon the alleged grounds that Joseph Rhodes' estate had no beneficial interest therein, and that he had held them as trustee for the plaintiff; that the plaintiffs had at least a lien on them for money advanced on account of the lands comprised in them, and that third parties also were interested therein. He also described numerous documents in his possession generally as "a large number of letters from the said Joseph Rhodes in his life-time and others for him to me, and accounts furnished me of goods sent to Upper Canada for sale."

McGregor, on behalf of the defendant, moved for an order requiring the plaintiff to produce the mortgages, and to file a particular affidavit, properly describing the letters and accounts.

Burns, contrà, resisted the application on the grounds stated in the bill, and in an affidavit of the plaintiff.

SPRAGGE, V. C.—Upon the plaintiff's own shewing the defendant is entitled to production of the mortgages in question. They are two mortgages made by a person named McElderry, one of them to Joseph Rhodes and others. Taking it to be true, as stated by the plaintiff, that McElderry was the plaintiff's debtor, and that the mortgages were taken by Joseph Rhodes as agent and trustee for the plaintiffs, to secure debts due to the plaintiff, upon what ground does the plaintiff seek to protect them from production? It is the plaintiff's case that they relate to the matters in question; he does not show that they relate exclusively to the plaintiff's title, and would not aid the defence. They are in his possession, and he does not say how they came to be so, but in his first affidavit he says he is interested in them in manner set out in the bill, and has at least a lien upon them for a large sum of money, the balance, as I should infer, which he claims upon account between him and his agent Joseph Rhodes. In his further affidavit he claims to have a lien upon them for moneys paid and advanced on the properties therein mentioned, paid and advanced, to whom he does not say, if to McElderry it is beside the question, and if to Joseph Rhodes, it is not in accordance with the bill, and there are not such facts shewn as could make out the plaintiff to be an equitable mortgagee of these mortgages. In fact, from the whole tenor of the bill, it is clear that he occupied no such position. Such position would be inconsistent with the relative position of the parties, so the plaintiff brings himself within no rule of protection.

Any doubt that I have as to the production arises from the allegation in the answer, that the mortgages were taken for debts due to Joseph Rhodes himself, and that the plaintiff never had any interest in them, in which case they have nothing to do with the matters in question in this suit, but the answer is as to belief only, and is by a personal representative. I think I may properly say to the plaintiff that according to the case he himself makes, in regard to the mortgages he is bound to produce them.

The affidavit is also too general in regard to letters, accounts, memoranda, and other papers therein referred to.

The order must be made for a better affidavit, and with costs.

ENGLISH REPORTS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(From the *Law Times* Reports.)

(Present—The Right Hon. Lord CRANWORTH, Lord CHELMSFORD, KNIGHT BRUCE, L. J., and TURNER, L. J.

DILL v. MURPHY.

Parliament—Privileges—Colonial Legislature—Power to commit for contempt—Power to define privileges—Statute—Construction.

A statute of the Imperial Parliament, in establishing a Legislative Assembly in Victoria, enacted that it should be lawful for such Legislature, by an Act, to define the privileges, immunities and powers of the members. The colonial Legislature passed a measure, enacting that the Legislative Assembly and members should hold, enjoy and exercise the like privilege, immunities and powers, and these should be the same as were then held by the Commons House of Parliament in Great Britain, whether such privileges were enjoyed by custom, statute, or otherwise.

Held, that the word "define" was to be read as if it had been "declare," and that the colonial Legislature had sufficiently defined or declared what privileges the members of their Legislature should have, and accordingly the Speaker of the colonial assembly had power to issue his warrant to arrest for contempt of the Legislature.

This was an appeal from a judgment of the Supreme Court of Victoria, on an action brought by the appellant against the respondent for assault and imprisonment.

The appellant and plaintiff below, Mr. George Dill, was the printer and publisher of a newspaper in Melbourne called the *Argus*. One of the respondents, Sir Francis Murphy, was the Speaker of the Legislative Assembly of the colony of Victoria, and the co-respondent, W. G. Palmer, was the Serjeant-at-Arms attending the assembly.

The declaration was, that the defendants assaulted the plaintiff, took him into custody, and caused him to be imprisoned for a long time, and until he paid the sum of 130*l.* to procure his release from such imprisonment. And the plaintiff claims 10,000*l.*

The defendants pleaded three pleas of justification, which were in substance as follows:—

1. The first of these stated in substance that by virtue of the Constitution Statute and of the Colonial Statute, 20 Vict. No. 1, a Parliament of Victoria was sitting at the Parliament House in Melbourne, and a select committee of the Legislative Assembly, duly appointed to inquire into certain matters, was also sitting, and that the defendant Sir F. Murphy was a member and speaker of the said assembly, and that the defendant William George Palmer was the Serjeant-at-Arms attending the said Assembly; and that by force of the statutes aforesaid, the privileges and powers of the said Legislative Assembly were the same as those

which were held, exercised, and enjoyed by the Commons House of the Imperial Parliament at the time of the passing of the said Constitution Statute, and that one of those privileges and powers was that o. ordering the attendance at the bar of the said House of any person whom the said House might consider it necessary to examine in respect of any matter which was there under discussion; and, in the event of the wilful disobedience and contempt of such order after due notice, of sending for such person and bringing him before the House, under the warrant of the Speaker, and in the custody of the Serjeant-at-Arms attending the said House; and that while the said assembly and select committee were so sitting, the appellant published, in the *Argus* newspaper, a libel upon William Frazer, who was then one of the members of the House and of the said select committee, which libel, upon being discussed before the assembly, was adjudged by them to be a scandalous breach of their privileges, and it was considered necessary by them that the appellant should be brought before the assembly in the custody of the Serjeant-at-Arms, and that the Speaker should issue his warrant accordingly; that the warrant was accordingly issued by the defendant Sir Francis Murphy, as the Speaker, to the defendant, William George Palmer, as the Serjeant-at-Arms, and that the Serjeant-at-Arms thereupon arrested the plaintiff and took him into custody, in obedience to the warrant.

2 The second was a similar plea of justification, repeating the statements in the former plea, and then proceeding to allege that, upon the appellant being brought before the assembly, they adjudged and determined that in publishing the alleged libel he had been guilty of a contempt and breach of the privileges of the House, and that he should, for such his offence, be committed to the custody of the Serjeant-at-Arms, and be kept in such custody for one month, and that the Speaker should issue his warrant accordingly. That the Speaker did thereupon issue his warrant, and that the appellant was thereupon taken into custody by the defendant Palmer.

3. The third was a similar plea in a more general form, alleging that the appellant had been guilty of a breach of the privileges of the assembly (without setting out the libel), and consequently that he was imprisoned, under the Speaker's warrant, by the defendant Palmer.

To each of these pleas the appellant demurred, upon the ground that the colonial Legislature possessed no such powers as appeared to have been exercised, and that the powers, privileges and immunities of the legislative council and assembly had not been defined within the meaning of the Constitution statute, passed in 1854 by the colonial council of Victoria, and confirmed by the statute of the Imperial Parliament 18 & 19 Vict. c. 55.

The respondents joined in demurrer.

The Legislative Assembly of Victoria was constituted by an Act set forth in the 1st schedule to the Act of the 18 & 19 Vict. c. 55. By the Act so set forth, it was enacted, among other things (sect. 1), that there should be established in Victoria, instead of the Legislative Council then subsisting, one Legislative Council and one Legislative Assembly, to be severally constituted in the manner thereinafter provided, and that Her Majesty should have power by and with the advice and consent of the said council and assembly, to make laws in and for Victoria in all cases whatsoever; and (sect. 35) that it should be lawful for the Legislature for Victoria, by any Act or Acts, to define the privileges, immunities, and powers to be held, enjoyed and exercised by the council and assembly, and by the members thereof respectively, provided that no such privileges, immunities or powers should exceed those then held, enjoyed and exercised by the Commons House of Parliament or the members thereof. This Act was proclaimed and came into force in Victoria on the 23rd Nov. 1855. It is hereinafter referred to as the Constitution Act.

By an Act passed in the first Parliament, held under the Constitution Act 20th Vict No. 1, it was enacted that the Legislative Council and Legislative Assembly of Victoria respectively, and the committees and members thereof respectively, should hold, enjoy, and exercise such and the like privileges, immunities and powers of, the said council and assembly respectively, and of the committees and members thereof respectively, were thereby defined to be the same as at the time of the passing of the Constitution Act were held, enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the committees and members thereof so far as the same were not inconsistent with the Constitution Act, whether such privileges, immunities or powers were so held, possessed or enjoyed by custom, statute, or otherwise. By the same Act, printed copies of the journals of the House of Commons are made *primâ facie* evidence upon any inquiry touching the privileges, immunities and powers of the said council or assembly, or of any committee or member thereof respectively. This Act received the Royal assent on the 25th Feb. 1857.

The Supreme Court of Victoria, consisting of Stawell, C. J., Williams and Molesworth, JJ., gave judgment for the defendants.

Lush, Q. C., and *Karslake, Q. C.*, (with them *Garth*) for the appellant.—It is not denied that the House of Commons in this country might have validly made such a commitment as this; but the power given by the 35th section of the 18 & 19 Vict. c. 55 had not been properly executed by the Colonial Act. The latter Act ought to have specified what were the powers, privileges and immunities claimed by the colonial Legislature. This is the meaning of the word "define." The Imperial Legislature gave power to the colonial Legislature to define their privileges; but these have not been defined. Before the statute passed, it was well settled that the colonial Legislature did not possess the powers and privileges which belonged to the Houses of Parliament in this country: *Kielly* v. *Carson*, 4 Moo. P. C. 63, which was a case of the Legislative Assembly of Newfoundland committing a person for contemptuous conduct out of doors. And the same point was held in *Fenton* v. *Hampton*, 11 Moo. P. C. 347, a case as to the power of the Speaker of the Legislative Council of Van Diemen's Land. Those cases show that the *lex et consuetudo parliamenti* are no part of the common law, and were not carried to the colony by the English settlers there. Therefore it could only be introduced into the colony by virtue of some statute. The word "define" shows that the Imperial Legislature intended that the colonial Assembly should specify, particularise and mark out what were the powers and limits which were sought. The Imperial Legislature was about to apply a new code to the colony, which the colonists were presumed not to have any knowledge of, and to deprive them of personal liberty, inasmuch as the effect would be to make them liable to imprisonment; therefore it was indispensable that the statute extending this foreign law to the colony should be specific and precise. It was not enough to say, "You shall be subject to all the penalties which belong to subjects of another country." This is not the way to apply any foreign code to a country. [Lord Chelmsford.—Are the privileges of the House of Commons certain or uncertain? For if certain, then *id certum est quod certum reddi potest*—the privileges will be those which are enjoyed by the House of Commons] The House of Commons has no more relation to that colony and its laws than the assembly of any foreign country. [Lord Chelmsford.—The word define is merely to determine. You admit that the colonial assembly was at liberty to have all the privileges of the House of Commons if they had specified all] Yes; but the subjects there had a right to know what they were. [Lord Cranworth.—You say the colonial assembly should proceed by a sort of exhaustive process, and state everything that could happen.] They should have stated everything they claimed. What has been attempted is, by a mere general enactment, to subject the colonists to penalties and forfeitures of personal liberty. It must always be a matter of evidence in each case in the colony, whether or not a foreign body has such and such privileges. [Lord Chelmsford.—Does not the next section of the statute throw light on the subject? It says that the journals of the House of Commons shall be proof of the privileges of the House.] But the journals could tell nothing specific; they gave no definite information. Why should the colonists be bound to ransack the journals of a foreign body in order to ascertain what is or is not the law on each point? [Knight Bruce, L. J.—If the word had been "declare" instead of 'define,' do you think it would have made any difference?] It would. If the Imperial Legislature had meant that the colonial Legislature should have all the power, it would have said so; but this has not been said.

The *Attorney-General* and *Sir Hugh Cairns, Q. C.*, for the respondents, were not called upon.

Lord Cranworth.—We none of us have any doubt on this case, and I think we need not trouble the respondents' counsel on the subject. In the former cases principles of very great importance were involved. To what extent it was competent to the Crown to confer privileges upon legislative bodies, which, undoubtedly, would be inherent in courts of justice, was a question of very great nicety and difficulty. There is no doubt, I apprehend, that the Crown had a perfect right, in constituting a legislative assembly, to confer on that assembly, or rather, without saying a word, there would be conferred upon it, the right of preventing obstructions to its own proceedings; but whether it could confer the same privileges that existed in all their extent in the legislative bodies of this country, was a very important question. That has been argued, and is now set at rest. There is no such power. But, on the other hand, the Legislature might think it very fit that those powers should be conferred, and here, having constituted a legislative body in this colony, the colony passes an Act which, under the provisions of the colonial Act, and the Act passed in this country, is adopted as an Act of this country, whereby it is enacted that "it shall be lawful for the Legislature, by any Act or Acts, to define the privileges, immunities and powers to be held, enjoyed and exercised by the council and assembly, and the members thereof;" and then they have declared that the Legislature shall have all the powers and privileges possessed by the House of Commons; and the sole question here is not one of principle at all, but what is the meaning of this word "define?" That is all we have to say. Now, looking at the context, I cannot entertain the least doubt, and neither of us entertain any doubt, that, although it is perhaps slipshod language, yet it means exactly the same as if the word had been "declare." In truth, to interpret it, as the learned counsel would have us interpret it, would be to put upon it a construction much more alien from its meaning than that which we adopt. They would have it interpreted as if the word had been "enumerate" That could not have been the meaning of the Legislature. You could not possibly call upon anybody to go through a sort of exhaustive process, and name everything which, in any possible contingency, may happen. It would be an absurdity to make such a suggestion It appears to us, therefore, very clearly that "defining" means "declaring," and that in no way can it be declared more conveniently than by reference to the privileges and powers of the House of Commons in this country. It was pressed very much by Mr Lush, and also by Mr Karslake, that this is in truth requiring the Legislature of Australia, or the inhabitants of Australia, to interpret their laws by reference to what, as they conceive, is to be considered a foreign country. I confess I was startled by that, because the *lex et consuetudo parliamenti*, if not in one sense introduced as part of the law in the colony, can hardly be treated as something foreign and unknown to it, as the laws of the legislative assemblies of other countries would be. And if there were any doubt about it, that difficulty to which Mr. Karslake has called our attention, proves the matter beyond all doubt, because it is quite clear they treat of something much more doubtful than the *lex et consuetudo parliamenti*, as being something of which the Legislature of Victoria can have no difficulty in taking cognisance. A provision was naturally and properly made as to how arrangements should be made for passing Bills in the colony It was very probable that, for this purpose, usages might eventually be adopted very different from those which prevail in this country; but then the Legislature goes on to say, that, till new provisions have been made expressly adapted to that object, all the usages as to the passing of bills through both Houses of Parliament in this country shall be adopted and acted upon. It clearly contemplated that there could be no difficulty in Victoria in finding out and knowing what those usages were. Upon the whole, we come to the clear conclusion that "define" must here be read as if it was "declare," and that it was a very reasonable and proper mode of declaring to say that the usage shall be exactly the same as is adopted in the House of Commons in this country. It appears to us, therefore, that the appeal must be dismissed, and of course dismissed with costs.

Judgment affirmed with costs.

UNITED STATES REPORTS.

George W. Jones v. Wm. H. Seward.

From the Legal Intelligencer.

1. Under the constitution of the United States, the President has no power during a rebellion or insurrection, to arrest or imprison or authorize another to arrest or imprison any person, not subject to military law, without some order, writ, precept or process of some civil Court of competent jurisdiction.
2. Those subject to military law are persons in the military service or civilians within the immediate sphere of military operations.
3. Therefore a defendant in an action pending in a State Court for effecting such unconstitutional arrest or imprisonment, cannot under plea of authority from the President, have his cause transferred to the United States Circuit Court, under the 5th section of the Act of Congress of March 3, 1863, entitled "An Act relating to *habeas corpus* and regulating judicial proceedings in certain cases."
4. A civilian outside the military lines charged with traitorous acts is to be tried by a civil tribunal, according to the course and practice of the established law on a presentment or indictment of a grand jury.
5. Although his conduct may affect the operations of a certain portion of the land forces, it is not a military but a civil offence
6. Even the Commander-in-chief of the Army cannot extend martial law beyond the sphere of military operations.

This celebrated case was decided on the motion to transfer the action to the United States Circuit Court, under the act of Congress of March 3, 1863, entitled "An Act relating to *habeas corpus* and regulating judicial proceedings in certain cases."

The plaintiff, who is an ex-Senator, on his return from Bogota, where he occupied the position of U. S. Minister under President Buchanan, on coming to New York from Washington, where he had been to submit his accounts, was arrested and incarcerated in Fort Lafayette.

James T Brady and *W C. Traphagen* appeared in support of the motion, and *John McKeon* and *Mead* in opposition.

The following is the decision and opinion:

Clerke, J.—This is an action in which the plaintiff claims damages for an alleged false imprisonment. The defendant asks for an order of this Court to remove the action, and all proceedings therein, to the next Circuit Court of the United States, to be held in and for the Southern District of the State of New York. The defendant states in his petition for this order, that the action is brought for acts alleged to have been done by him as Secretary of State for the United States of America, under authority derived by him from the President of said United States, in causing and procuring the plaintiff to be arrested and imprisoned, or for some other wrong alleged to have been done to the plaintiff under such authority, during the present rebellion of the so called Confederate States against the Government of the United States of America, and that it, therefore, comes within the Act of Congress passed March, 3, 1863, entitled "An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," providing in the 5th section that if any suit has been or shall be commenced against any officer, civil or military, or any other person for any arrest, imprisonment, trespass or wrong done, or any act omitted to be done during the present rebellion, "by virtue or under color of any authority derived from or exercised by or under the President of the United States or any Act of Congress," the defendant may remove such action into the Circuit Court of the United States for the district where the suit is brought, on complying with certain requirements stated in the act.

Of course, this act, so far as it directs the transfer of cases from the State to the Federal jurisdiction, if it has any constitutional foundation, is founded upon the third article of the Constitution of the United States, defining the extent of the judicial power delegated by the States to the Federal Government, and particularly upon that part of Section 1 of said article, which says that "the judicial power shall extend to all cases in law and equity arising under this Constitution," &c, The defendant in this application maintains that the defence which he intends to set up in this action arises under the Constitution of the United States; the question to be determined being, whether the President of the United States, during a rebellion or insurrection, can arrest or imprison, or authorize another to arrest or imprison any person not subject to military law, without any order, writ, precept, or process of some court of competent jurisdiction. Now, we assume that this question, if a question at all, would arise under the Constitution of the United States; that is, whether the President possesses this power, either in his civil capacity, or

as Commander-in-chief of the Army and Navy of the United States, and can be solved only by consulting and interpreting that instrument. But, to entitle the defendant to this order, and to give the Court of the United States jurisdiction of this action, there must be some appearance or color of substance in it. It must have some speciousness, some seeming of plausibility, and must not be palpably devoid of any ground of doubt. Can it then be a question presenting any appearance of substance or color of doubt, whether the Constitution of the United States of America has invested its chief executive officer with power to arrest or imprison, or to authorise another to arrest or imprison, any person not subject to military law, at any time, or under any exigency, without some order, writ or precept, or process, of some civil court of competent jurisdiction?

1. It cannot, of course, be pretended by the most ardent of advocate of this high Presidential prerogative, that the Constitution confers it in set terms. There is, assuredly, nothing in that instrument, which can be tortured into the conferring of such a power on the President in his civil capacity, and this, it appears to me, plainly disposes of the question; for, it would be asserting the grossest contradiction and strangest anomaly to say, that absolute and unlimited power, equal to any exercised by Czar or Sultan, can be implied from a constitution, which avowedly gives no power to any Department of the government that is not specifically set forth, except simply the consequent right to employ all legal means necessary to the execution of the power.

It may not, however, be out of place, at a time like the present, to glance at the position which some ardent advocates of Presidential unlimited prerogative, in seasons of war, rebellion, or insurrection, have endeavoured to uphold. It is demanded for the President, by these advocates, from the nature and necessities of his office, in times of imminent peril to the very existence of the nation. They have ventured to say, that the authors of this Constitution could never have intended to deny to him in such times all power which may be deemed indispensable for the preservation of the nation, when it is convulsed by civil commotion and threatened with the hostility of foreign powers. But, if there is any thing beyond all controversy in the constitutional history of this nation, it is that the purpose of this Constitution and the provisions which it contains were, for a considerable period before its adoption, anxiously and deliberately discussed and throughly discussed by the people at large and by their delegates in the Convention and, certainly, any man proposing to confer unlimited power on any department of the Government, on any pretext whatever, would not have been deemed sane. With far-seeing caution and the most vigorous and deliberate purpose, a constitution for a National Government was framed, conferring extremely limited powers, concisely and minutely specified at the same time providing ample means for self-preservation, and the vigorous exercise of necessary authority under all emergencies. Its authors and the people of the several States had plainly set before them, while it was under consideration, the example and experience of that nation from which their language, their laws, their social customs and political institutions were mainly derived, and they well knew that the contest which convulsed that nation for four centuries with great alternations of triumph and defeat, vital and pre-eminent immeasurably above all others, related to the power of the Crown over the personal liberty of the subject. No doubt, before constitutional liberty was established in England, the monarch claimed, and often exercised the power of arbitrary arrest and imprisonment; and during the reigns of the Tudors and the Stuarts, it was held by some Judges that "although the King could make no laws but by common consent in Parliament, yet, in time of war, by reason of the necessity of it to guard against dangers that often arise, he useth absolute power, so that his word is law." Indeed it was asserted even in Parliament, on behalf of Elizabeth, that the "Queen inherited an enlarging and a restraining power; by her prerogative, she might set at liberty what was restrained by statute or otherwise, and by her prerogative she might restrain what was otherwise at liberty; that the royal prerogative was not to be canvassed, nor disputed nor examined, and did not even admit of limitation; and that absolute princes, such as the Sovereigns of England, were a species of divinity." It is shown from indisputable authority that at least during the Tudor dynasty, whenever there was any insurrection or public disorder the Crown employed martial law; and it was during that time exercised, not only over the soldiers, but over the whole people. Any one might be punished as a rebel or an aider and abettor of rebellion, whom the Provost-Marshal or Lieutenant of a county, or their deputies, pleased to suspect." This power was employed by Queen Mary in defence of the old theology, and by Queen Elizabeth in defence of the new; and after the suppression of the northern rebellion, which agitated the Kingdom during a portion of the reign of the latter Princess, she severely rebuked the Earl of Essex because she had not heard of his having executed any criminals by martial law.—In 1552, when there was no rebellion or insurrection, King Edward granted a commission of martial law, and empowered the commissioners to execute it in such a manner as should be thought by their discretion most necessary. Hume mentions numerous other instances of the exercise of this despotic power during the reign of Elizabeth. But the more general diffusion of knowledge and the progress of civilization, produced by the revival of learning, the invention of printing, and the discovery of the Western Hemisphere aroused the people to a sense of their debased condition, and the vindication of their ancient rights; and her successor, James I. found his claims of Divine right and unlimited prerogative frequently disputed. It was not, however, until the reign of his perfidious and unfortunate son that any organized resistance was made to these claims. But above every other invidious claim of prerogative, the power of arbitrary imprisonment was the most abhorrent to the nation. In the debates in and out of Parliament, while the committee were engaged in framing the Petition of Right, the inviolability of personal liberty was deemed paramount even to the right to life and property. "To bereave of his life a man not condemned by any legal trial," it was contended "is so egregious an exercise of tyranny that it must at once shock the natural humanity of princes, and convey an alarm through the whole commonwealth. To confiscate a man's fortune, besides being a most atrocious act of violence, exposes the monarch so much to the imputation of avarice and rapacity, that it will seldom be attempted by any civilized government. But confinement, though a less striking, is no less severe a punishment, nor is there any spirit so erect and independent as not to be broken by the long continuance of the silent and inglorious sufferings of a prison." The power of imprisonment, therefore, it was maintained, being the most natural and potent engine of arbitrary power, it was absolutely necessary to remove it from a government which is free and legal. These principles, on which the act known by the name of the Petition of Right, and which has been called the Second Great Charter of the liberties of England, were ratified by the King. He thus solemnly bound himself, among other things, never again to imprison any person except in due course of law, and never again to subject civilians to the jurisdiction of courts martial. How shamefully he violated this solemn covenant, and how ignominiously he forfeited his life and his crown, as the righteous punishment of his perjury, is one of the sadest and gravest and most instructive records of history. His sons and successors, Charles II. and James II, particularly the latter, indifferent to or forgetful of the fate of their father, did not hesitate, when occasion seemed to require, to violate the rights of their subjects, until James, at length, intimidated by the indignation of all classes of his people, struck with terror, saved himself from the death which he deserved by timely flight, and ended his wicked and disgraceful career as a pensioner of France. His abdication ended the long struggle forever in favor of the exemption of the basest and humblest criminal from arbitrary imprisonment under any pretence, and constitutional liberty was *established* in England. In order to place it on principles, impossible to be misunderstood or evaded, the convention issued their declaration of right before the crown was offered to William and Mary. On these conditions it was thankfully accepted. The principles which the convention reiterated were, indeed, as Macaulay says, engraven on the hearts of Englishmen during four hundred years; "That without the consent of the representatives of the nation," he continues, "no legislative act could be passed, no tax imposed, no regular soldiery kept up, that no man could be imprisoned, even for a day, by the arbitrary will of the sovereign; that no subordinate could plead the royal command as justification for violating any right of the humblest subject, were held, both by Whigs and Tories, to be fundamental laws of the realm." But, despotic monarchs, under

some plea of necessity, as we have seen, frequently disregarded those laws.—The Declaration of Right, and the Mutiny Act passed soon after, put an end forever to any pretext on behalf of the Crown, to deprive a civilian of his personal liberty, without some order, writ, precept, or process of some Court of competent civil jurisdiction. It has never been pretended, since the Declaration of Right was proclaimed, and the first Mutiny Act was passed, that any but members of the army and navy were subject to Martial law or the Articles of War. It was conceded by all the counsel in *Grant* v. *Gould* (2 H. B. 69), and reiterated by the Court, that martial law could only be exercised in England, so far as it is authorized by the Mutiny Act and the Articles of War, which have cognizance only over the army and navy. Martial law, in the proper sense of the term does not exist, and never has existed, in England since the Revolution. The Mutiny Act and the Articles of War, like the military code, &c., adopted by Congress, constitute what may more properly be called military law; and, though they provide for courts-marshal for the trial of military offenders, they are totally different from that kind of martial law which prevails in despotic countries, and which legally exists under constitutional governments only within the immediate theatre of war or insurrection. Undoubtedly, on some occasions the writ of *habeas corpus* has been suspended, but never without the consent of Parliament.

Now, is it possible, that all the passages to which I have referred in the Constitional history of England, and all the solemn and salutary warnings which they convey, were not engraven on the minds of the enlightened men, who had the principal share in the formation and adoption of the present Constitution of the United States of America? Can it be supposed for a moment, that any implied power, such as the defendant claims for the Presidential office in the present instance, would have been tolerated by those men. If they intended that a dictatorship should exist under any emergency, they would not leave it to the chief Executive to assume it when he may, in his discretion, declare necessity required it, but would at least provide that this necessity should be declared by Congress, and, as under the Constitution of ancient Rome, that the legislative power alone should select the person who should exercise it. That the President can of his own accord assume dictatorial power, under any pretext, is an extravagant assumption. The proposition cannot be entertained by any Court; no such inquiry can arise under the Constitution of the United States; it does not reach to the proportions or stature of a question.

2. It is, however, maintained, if the President does not possess the power in his civil capacity that he does possess it in his military capacity as Commander-in-chief of the army and navy of the U. S. A commander of an army has, of course, within the sphere of his military operations against an enemy, all power necessary to ensure their success. General Rosecrans had a right, I have no doubt, the other day to destroy all the property which caused any obstacles to his operations against Bragg; and if he discovered any plots to mar those operations, or to give intelligence to the enemy, or to afford them any kind of aid or comfort, he would have a right to try the offenders, whether civilians or soldiers, by a court-martial. But his power does not extend beyond his lines. If a man at Cincinnati has a correspondence with Bragg, giving him intelligence of the plans of Rosecrans, the latter cannot have the offender arrested at Cincinnati, brought within his lines, and tried by a court-martial. This man is, indeed, emphatically a traitor; he is guilty of high treason against the United States of America; but he is to be tried by a civil tribunal, according to the course and practice of the established law, on a presentment or indictment of a grand jury. His case has not arisen in the land or naval forces, or in the militia when in actual service in time of war or public danger (see 5th amendment of the Constitution). Although it indeed affects the operations of a certain portion of the land forces, it is not a military but a civil offence. Neither can even the Commander-in-Chief of the army extend martial law beyond the sphere of military operations If he possessed this power in time of war or insurrection over the whole extent of the nation, whether within the theatre of military operations or not, the political institutions and laws of the land would be entirely at his mercy. A whiskey insurrection in Western Pennsylvania would authorize him to abrogate the law of liberty in Massachusetts or any other State. Martial law would extend, at the mere pleasure of the Commander-in-Chief, over the whole length and breadth of the land. It is beyond controversy, as we have seen, that this power does not vest in Mr. Lincoln as President; but as a military commander he can possess no greater power than if he were not President, and was merely Commander-in-Chief of the Army and Navy.—Suppose the Constitution vested the command in chief of the Army and Navy in some person, other than the President. Could this functionary subvert the Constitution and the laws of the land on the plea of military necessity? Surely not; and if he could not do it, neither can the President, unless the Constitution has empowered him to do it in his civil capacity.

The opinion referred to by the counsel of the defendant, delivered by Chief Justice Taney in *Luther* v. *Borden* (7 Howard 1), so far from sanctioning, makes no question of, this extension of the military power of the President. An actual insurrection existed in the State of Rhode Island, and military measures to suppress this insurrection were in operation there by the intervention of the Federal Government on the application (I forget which) of the Legislature or Executive of that State. That Commonwealth was in a condition of intestine war; and there, as in Western Georgia and in Tennessee now, the officers engaged in the military service "might lawfully arrest any one, who, from the information before them they had reasonable grounds to believe, was engaged in the insurrection."

The formidable power, for which the defendant contends, is plainly not necessary to the safety of the nation, even if the Constitution conferred it when that safety should be endangered. Within the immediate theatre of insurrection or war, the Commander-in-Chief and his subordinates where the exigencies of the occasion make it necessary, we repeat, do possess it; beyond it the ordinary course of proceedings in Courts of justice will be sufficient to punish any persons who furnish information or afford any aid or comfort to the enemy or in any way are guilty of the detestable crime of betraying their country. In sudden emergencies, caused by invasion or insurrection, the power expressly given by the Constitution and the Acts of Congress, to repel the one and suppress the other, are ample and effective; and it requires no exercise of arbitrary power over the sacred rights of personal liberty to accomplish this purpose. It is as manifest as the day, it is beyond all controversy, that these rights, in war or in peace during invasion or domestic violence, even during the hideous rebellion which now confronts us, are, except in the cases which I have stated, inviolable. The President therefore, whether in his civil capacity or as Commander-in-Chief of the Army and Navy of the United States has, unquestionably no power to authorize the act of which the plaintiff complains. The ground upon which this application is made has no color of right. It cannot in my opinion, be entertained as a question in any State or United States Court. The only questions in this action worthy of consideration, and which can be entertained do not arise under the Constitution of the United States, but are fitly within the jurisdiction of this Court.

The motion is denied, without costs.

GENERAL CORRESPONDENCE.

Execution at Common Law on Judge's Order—Practice.

To the Editor of the Upper Canada Law Journal.

Gentlemen,—Is there any decision establishing the legality or illegality of issuing an execution upon a Judge's order for payment of money, without first making it a rule of court? Section 19 of the act respecting Arrest and Imprisonment for Debt, authorises the issuing of writs of *fieri facias* and *venditioni exponas* upon "any decree, or order of the Court of Chancery, or any rule or *order* of the Court Queen's Bench,

or Common Pleas, or any decree, *order*, or rule of a County Court," ordering the payment of any money. The question, then, resolves itself into this: does "any *order* of the Court of Queen's Bench, or Common Pleas, or of a County Court," in this section, mean a Judge's Order, or not? If it does, then there is no necessity to make a Judge's Order a rule of court, in order to issue execution upon it; although that, I believe, is the universal practice in Upper Canada. The wording of the section leaves room for a great deal of doubt. Will you kindly give your opinion on this point in your next issue, as it is a matter of some interest in practice?

Yours, truly,

Kingston, May 13, 1864. A STUDENT.

[The wording of the section to which our correspondent refers, is calculated to cause doubt. We are not, at present, aware of any decision under it, which reaches the point raised. The language of the section is not nearly so free from doubt as that of section 18 of English Stat. 1 & 2 Vic., cap. 110, from which it is supposed to be taken. It is not the practice to issue writs of execution upon Judge's Orders, unless such orders be first made rules of court (See *Greene et al* v. *Wood*, 3 U. C. L. J. 163). Without an express decision, authorizing a contrary practice, we do not think it would be safe to depart from that which hitherto has been universal.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

P. C. FALKLAND ISLANDS COMPANY v. THE QUEEN.

Jurisdiction—Colonial courts—Appeal in criminal cases.

The Crown, by virtue of its prerogative, has authority to review all the decisions of all the Colonial Courts, whether the proceedings be of a civil or of a criminal character, unless that authority has been parted with. But it is only in very peculiar circumstances, such as where the rights of the Crown are concerned, and involving questions of great general importance, and where the proceedings are substantially more of a civil than of a criminal character, that appeals can be allowed in criminal proceedings.

EX. C. ORCHARDS v. ROBERTS.

Notice of action—Direction to jury in action for false imprisonment.

In an action for false imprisonment, the defendant pleaded not guilty by statute. *Held.*—Where the objection is whether a defendant is entitled to notice of action, as having done anything under an act of Parliament, the proper direction for the jury is to ask them whether the defendant really believed that the facts existed, which, if they had existed, would bring the case within the statute and be a justification.

C. P. TIDEY v. MOLLETT.

Contract—Condition precedent—Agreement for a lease.

A. agreed to make certain alterations in a house, and "to complete the whole work necessary by the 14th of June;" B, "in consideration of these conditions being fulfilled" agreed to take the house on the 24th of June for three years, with the option of a lease for seven, fourteen, or twenty-one years.

Held, that the completion of the whole work by the 14th of June was a condition precedent to B's liability to take the house on the 24th.

EX. C. THE SOUTHAMPTON DOCK COMPANY v. HILL.

Dock charges—Southampton Dock Act, 6 Will. IV. c. xxix., s. 149—Ad valorem charge.

The Southampton Dock Company cannot enforce an *ad valorem* charge not sanctioned by the provisions of the Dock Act, 6 Will. 4, c xxix., s. 110, notwithstanding that such charge to be only reasonable for the services rendered.

CHANCERY.

M. R. BROWN v. KENNEDY.

Deed of gift—Undue influence—Counsel and client—Consultation—Rectification.

A deed of conveyance of a reversion by a client to her counsel, which was expressed to be made in consideration of his services, rendered in her cause and of her esteem and regard for him, set aside on the ground of undue influence.

The court will not rectify a voluntary deed, so as to carry out the alleged intention of the parties, unless the parties consent; if any object, the deed must wholly stand or wholly fall.

V. C. K. HAND v. NORTH.

Will—Construction—"Become of the age of twenty-one"—Period of birth and vesting.

A testator by his will gives a share of his property to one of his children, contingent upon her surviving him, and by a codicil implying, though not actually stating, that she was dead, he gives the share which she would have been entitled to, to her two children, "upon their becoming of age." Both survive the testator, and die, one under age.

Held, that the gift to them was a tenancy in common, and that the share of the grandchild, dying under twenty-one, descended as to the realty to the testator's heir, and as to the personalty to the next of kin.

V. C. S. BELL v. BELL.

Practice—Order to revive—15 & 16 Vict., c. 86, s. 62.

Order to revive a creditor's suit made after decree, but before the chief clerk's certificate, upon the application of a person claiming to be a creditor.

V. C. W. BOYES v. BEDALE.

Conflict of laws—Legitimacy—French law—Domicil.

The will of an English testator must be construed according to the meaning of the terms used by the law of England; and, therefore, a child born in France and illegitimate at birth, but legitimised pursuant to French law upon the subsequent marriage of its parents, A. B. (both domiciled in France), is not entitled to a bequest of personal estate to the child of A., contained in the will of an English testator.

L. C.

Re THE SOUTHAMPTON, ISLE OF WIGHT, AND PORTSMOUTH IMPROVED STEAM-BOAT COMPANY (LIMITED). HOPKIN'S CASE.

Bankruptcy—Joint-stock company—Death of Shareholder before winding-up order—Contributory

A commissioner having, in an order settling the list of contributories of a joint-stock company which was being wound up in bankruptcy, placed the name of H on the list, afterwards reheard the case, and, on its being brought to his notice that H. died before the winding-up order, rescinded his former order, and removed the name of H from the list.

Held, That the commissioner had power to rescind his former order, and was justified in so doing.

L. C. M'ANDREW v. BASSET.

Trade mark—Name of place.

Though no exclusive right of property can be acquired in the the public and well known name of a geographical district, such a right may be acquired in the application of such a name to a particular article of manufacture, if the article has acquired a reputation in the market under such name as a trade mark.

REVIEWS.

COMMENTARIES ON THE LAW OF ENGLAND APPLICABLE TO REAL PROPERTY, (by Sir William Blackstone, Knight), ADAPTED TO THE PRESENT STATE OF THE LAW IN UPPER CANADA, by Alexander Leith of Osgoode Hall, barrister-at-law, Toronto. W. C. Chewett & Co., 17 and 19 King street east, Toronto. Price $7.

Mr. Leith, in opening his preface, well remarks, that the same considerations which induced Mr. Stephen some years ago to adapt the well known commentaries of Blackstone to the then existing state of the law of England apply with much greater force in the case of their adaptation to the existing law of Upper Canada. Much of Blackstone is obsolete but much more is law at the present day as it was when written. Mr. Stephen and Mr. Warren, in England, have both endeavored to modernize Blackstone. Mr. Leith has thoroughly adapted the first volume of the work of the great commentator, or that which treats of real property, to the law of Upper Canada. His task was no ordinary one. Since 1792 the laws of England and of Upper Canada have been, to a certain extent, diverging. A thorough knowledge of the law of England as it was in 1792 was necessary to a correct understanding of the law of Upper Canada as it now exists. The *lex non scripta* of both countries is much the same; but the *lex scripta* of the one now widely differs from the *lex scripta* of the other, especially in matters relating to real property.

We know of no man at the bar better fitted than Mr. Leith to point out the differences between the two in such a manner as to instruct the law student and guide the professional man in active practice. He has made the law of real property his especial study. Had he written an original treatise on the real property law of Upper Canada we think he would not have had so much trouble as he appears to have had in the arrangement of the work before us. It is difficult to dovetail ones thoughts into the work of another. Far easier would it be to map out for oneself a plan and to fill it in with freedom of expression unrestrained by the surrounding ideas of another author. But as Blackstone is still without a rival as a popular writer upon the laws of England we can well understand Mr. Leith's desire to be in such good company. The result, so far as the first volume is concerned, is a Canadain Blackstone, equal to the original as touching its style, and more reliable than the original as touching the present state of the law.

This was accomplished by the exclusion from the original text of all that is wholly unapplicable here, by the amendment of all that is altered, and by the insertion of all that was necessary to be added. The latter feature of the work is of greater extent than we anticipated. The chapter on the English laws in force here, the authority for their application, and for Provincial legislation is entirely original. It is a most instructive essay, and as reliable as it is instructive. The writer reviews the Treaty of Paris, the proclamation introducing English law, the Imperial Statute, 14 George III. cap. 83, and other statutes affecting the early government of the Provinces. So his chapter on descent since the abolition of primogeniture in Upper Canada is most instructive. It was written without much aid. The statute has been in force a very short time, is essentially different to the law of descent in England, and has received as yet little attention from the Courts of Upper Canada. Mr. Leith, however, has not failed to draw light from the laws of descent in the State of New York. His exposition of the law is, under the circumstance, not only useful but invaluable. So his chapters on prescription under Con. Stat. of Canada, cap. 88, and on entails under Con. Stat. cap. 83. But, perhaps, the most important chapter in his work is that of title under execution. The writ of *fieri facias* against lands has with us a very wide operation. It is a writ, so far as lands are concerned, wholly unknown in England. It is traceable to the 5 Geo. II. cap. 7. The writer points out some of the difficulties in applying that statute to the case of the sale of a testator's or intestate's lands. He notices the well known decision of *Gardiner* v. *Gardiner*, and refers to it in connection with the recent Provincial Statute, 27 Vic. cap. 15. He then proceeds to consider what interest in lands are affected by a writ of *fieri facias* against lands, and shews what are and what are not saleable under such a writ. He then adverts to the provisions of the Con. Stat. U. C., cap. 87, enabling a mortgagee to purchase the equity of redemption in the mortgaged lands without merging the mortgage debt. The chapter displays much thought, much caution and much learning.

The work contains an Appendix of the leading real property statutes affecting lands in Upper Canada, and concludes with a carefully compiled and most complete index. Indeed the volume as a whole does much credit to its author and speaks well for the progress of the profession in this Province. Canadian legal works are now to be counted in tens if not in hundreds, and this in a colony so young, with a population so small, indicates not merely the respectability and number but the enterprize of the profession. Few, if any, authors of legal works in Upper Canada have made much pecuniarily by the labors of authorship. But we hope the day is now come when such authors will find a prompt and sufficient support from those who either stand in need of or avail themselves of their services.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

WILLIAM N. MILLER, of Galt, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted May 7, 1864.)

JOHN WESLEY BEYNON, of Perth, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada (Gazetted May 7, 1864.)

ALEXANDER MORRIS, of Perth, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 21, 1864)

M. JOSEPH HICKEY, of Ottawa, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 21, 1864.)

ISAAC FRANCIS TOMS, of Goderich, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 21, 1864.)

ISAAC SIMPSON, of the City of Kingston, Esquire, to be a Notary Public for Upper Canada. (Gazetted May 28, 1864.)

CORONERS

SAMUEL WALLACE, Esquire, M D., Associate Coroner, United Counties of Northumberland and Durham (Gazetted May 7, 1864.)

GEORGE B MOTT, Esquire, M D, Associate Coroner, County of Lambton. (Gazetted May 21, 1864.)

EDWIN HENWOOD, of the City of Hamilton, Esquire, M D, to be Associate Coroner for the City of Hamilton, and also for the County of Wentworth. (Gazetted May 28, 1864.)

REGISTRARS.

GEORGE ALEXANDER CUMMING, Esquire, to be Registrar of the City of Kingston (Gazetted May 28, 1864.)

DUNCAN MACDONELL, Esquire, to be Registrar of the County of Glengarry, in the room and stead of Alexander Macdonell, Esquire, deceased. (Gazetted May 21, 1864.)

DUNCAN McDONELL, of Greenfield, Esquire, to be Registrar of the County of Glengarry (Gazetted May 28, 1864.)

TO CORRESPONDENTS.

"A STUDENT," under General Correspondence, p. 167.