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DIARY FOR JULY.

1. Tuesday ..... Long Vacation commences. Last day for County Councils to equalize Rolls of Local Municipality.
6. SUNDAY..... *3rd Sunday after Trinity.*
7. Monday..... County Court and Surrogate Court Term begins. Recorder's Court sits. Heir and Devisee Sittings commence.
12. Saturday ..... County Court and Surrogate Court Term ends.
13. SUNDAY..... *4th Sunday after Trinity.*
14. Monday..... Last day for Judges of Co. Courts to make Return of Appeals from Assessments.
20. SUNDAY..... *5th Sunday after Trinity.*
22. Tuesday..... Heir and Devisee Sitting ends.
27. SUNDAY..... *6th Sunday after Trinity.*
31. Thursday..... Last day for County Clerk to certify Co. Rate to Municipalities in County.

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

JULY, 1862.

SIR J. B. ROBINSON, BART.

In other columns will be found an address, which on Thursday, 12th June last, was presented to Sir J. B. Robinson, Bart., by the Members of the Bar of Upper Canada, and his reply to the same.

The occasion was one of no ordinary interest—that of the retirement from the Court of Queen's Bench of the distinguished Judge who had so long and so faithfully presided in that Court.

Never was a more sincere tribute paid to man than the address which on that occasion was presented to the Chief Justice. It was prompted by a spontaneous and universal feeling of respect for the man, mingled with regret at the occasion which had called it forth. During its delivery the strong feeling of emotion which pervaded both Bench and Bar was manifested by the faltering voice of the gentleman who read it and the moistened eyes of those who heard it read.

On Thursday, 19th June last, the Bar of Upper Canada entertained Sir John at a banquet of great splendour in Osgoode Hall. The tribute was alike worthy of those who gave it, and of him to whom it was given.

Sir J. B. Robinson is no ordinary man; he is one of the few great men of whom Canada can honestly boast. His career has been a long and a brilliant one. His life has been one of ceaseless activity.

He was born on the 26th July, 1791, at Berthier, in Lower Canada. His father and family came to Toronto, then town of York, in 1798. The father, within three weeks after his arrival in the town of York, died. The son, John Beverley, was educated under the Rev. Dr. Strachan, now Protestant Bishop of Toronto, first at the Grammar School in Kingston, and afterwards in Cornwall. When seventeen years old he was admitted a student of the Laws by the Law Society of Upper Canada. He was enrolled a member of the Law Society in Hilary Term, 1808. He studied successively with the late Judge Boulton and Colonel Macdonald, who afterwards, when Aide-de-Camp to General Brock, was killed at Queenston. While a Law Student he was during one session of the Parliament of Upper Canada employed as a clerk in the House of Assembly. Shortly afterwards, when the war of 1812 broke out, he followed Sir Isaac Brock in the expedition which led to the capture of Detroit.

When the war ceased he was called to the bar of Upper Canada at the age of twenty-four. His call was in Hilary Term, 1815. In the same year Mr. Boulton, Attorney General of the Province, was taken prisoner by the French, and during his detention the subject of this sketch was appointed acting Attorney General. During the same year Mr. Boulton was released, and Sir John became Solicitor General. This post he held till 1818, when he became Attorney General in the place of Mr. Boulton, who was raised to a seat on the Bench. At this time Sir John was married. He in the previous year married the estimable lady who is still the partner of his life. For a long time he was Attorney General, and the leading man of his day. He, while Attorney General, prosecuted several newspaper publishers for libel. Collins, one of these, the publisher of the *Freeman*, was condemned to two years imprisonment. The libel was one upon the Attorney General himself. It charged him with having uttered a falsehood in conducting a prosecution, and was otherwise of a very defamatory nature.

In 1829 Mr. Robinson was elevated from the office of Attorney General to that of a seat on the Bench,—Chief Justice of the Queen's Bench, the only Superior Court of common law jurisdiction at that time in Upper Canada. He, notwithstanding, continued to hold his seat in the Legislature till the Union of the Provinces of Upper and Lower Canada in 1840.

He held this exalted position till the present year, when, in consequence of the desire of his family that in the evening of his days he should have some repose, he resigned it and accepted the less arduous office of President of the Court of Error and Appeal, an office which before he filled by virtue of his office of Chief Justice of Upper Canada.

Sir J. B. Robinson, by his dignified and yet affable conduct in the discharge of his judicial duties, by his great

learning and untiring industry, has done much to ensure for the Bench of Upper Canada the great respect which it now commands. His very presence commanded respect, while his good nature and evenness of temper won the hearts of all those whose good fortune it was to practise before him. He is respected by all, admired by all, and beloved by all. All hope that he may yet be spared many years to his family, to his profession, and to his country.

Through life he was most abstemious. His regular habits of life have done much to prolong his days. Though now more than seventy years old his bodily activity is great and his mental activity equally so. His powers of intellect are still unimpaired; his habits of industry are unabated; his love of work is as strong now as in the vigor of his youth. He abhors idleness. The position which he still occupies as that of the Chief Judge of the Chief Court in Upper Canada will supply abundant material for his habits of industry. We hope that a kind Providence will yet spare him many years to grace the position which he so worthily occupies—the bench which he so truly adorns.

ON WHICH SIDE LIES THE TRUTH?

On the 15th January, 1861, the Judges of the English Court of Queen's Bench, according to the contemporaneous reports of that time, on an *ex parte* application, ordered a writ of *habeas corpus* to issue to Canada for the removal of Anderson, the fugitive slave. (*Ex parte* Anderson, 3 L. T. N. S. 622.; 30 L. J. Q. B. 129; 7 Jur. N. S. 122; 8 W. R. 255.)

In March, 1861, we took strong ground against the legality of such a proceeding; and our remarks were copied with approval in some of the London legal periodicals.

On the 11th June, 1861, the Judges of the same Court, according to the report of the *Jurist*, having apparently acted so inconsiderately in *ex parte Anderson*, as to have forgotten what they really did in that case, announced that no writ was ordered, but only that a rule *nisi* for a writ was granted (*Ex parte* Mansergh, 7 Jur. N. S. 826).

In October last, we took the Judges of the English Court to task for this extraordinary announcement—one which, according to the testimony of all the reporters of the time, was utterly at variance with the truth.

In June, 1862, we have before us Part III. of Vol. I. *Best & Smith's Queen's Bench Reports* (in continuance of *Ellis & Blackburn; Ellis, Blackburn & Ellis*, and *Ellis & Ellis*,) containing a report of *ex parte Mansergh*, which, if correct, proves the *Jurist* report, taken on the spot, and published without delay, to be the reverse of the truth.

We append extracts from the *Jurist* and *Best & Smith:*

CROMPTON, J.—1 *Best & Smith*, 409.

"*In re Anderson*, which has been referred, application was made for a *habeas corpus* to Canada; and precedents were adduced so expressly in point that, according to the great principle regulating these prerogative writs, the party had a *prima facie* right to have the writ issued. Besides, if a *habeas corpus* is improperly issued, it may be questioned on the return to the writ. We did *not* grant a rule to show cause in that case, because there was immediate danger to the party."

CROMPTON, J.—7 *Jur. N. S.*, 826.

"It is said that the application is analogous to that in Anderson's case; but it appears to me to bear no analogy to it. Nothing whatever was decided in that case. It was only a *rule to shew cause* that was granted; and it was in no way decided that the writ of *habeas corpus* ought to issue."

BLACKBURN, J.—1 *Best & Smith*, *p.* 411.

"I have said there is no authority for such a proceeding, The nearest is *In re Anderson*, where a *habeas corpus was* sent to Canada; but in that case the writ was granted, because it was necessary to act immediately; and it could afterwards be quashed if erroneous; added to which there were some very strong precedents in favor of granting it."

BLACKBURN, J.—7 *Jur. N. S.* 826.

"The case which approaches nearest to this, is the one alluded to, in which we granted a *rule nisi* to bring up the body of a prisoner in Canada. But that is no authority for granting this application. That was a case of urgency, and the *rule* was granted in order to initiate the proceedings, and, if necessary, to have the matter discussed."

It is not for us to reconcile these reports. It is impossible to do so. One thing is certain, one or the other is grossly wrong. We should like to know what our valued cotemporary of the *Jurist* has to say on the subject. We cannot think the *Jurist* is at fault.

Contradictions of this kind are not calculated to increase the confidence which the profession and the public are wont to impose in Judges, and the reports of their decisions. An explanation is due; and we hope that explanation will be forthcoming, now that attention is once more directed to the subject.

JUDGMENTS.

QUEEN'S BENCH.

Present: MCLEAN, C. J.; BURNS, J.; HAGARTY, J.

June 16, 1862.

Filleter v. *Moodie.*—Plea—Judgment for plaintiff on demurrer, with leave to amend on payment of 5s.

Coulson v. *Gzowski.*—Rule absolute to enter verdict for plaintiff for amount agreed upon.

Ryerse v. *Lyons.*—Judgment for plaintiff on demurrers to all pleas.

Bank U. C. v. *Ruttan.*—Interrogatories cannot, under Consol. Stat. U. C., cap. 22, any more than under C. L. P. Act, 1856, without leave of the Court or a Judge, be delivered either with declaration or plea. Rule discharged with costs.

Irwin v. *Sager.*—Rule absolute for new trial without costs.

Reid v. *Russell.*—Rule absolute for new trial on payment of costs.

School Trustees of Amherstburgh and The Corporation of the Town of Amherstburgh.—Rule absolute for mandamus with costs.

Totten v. *Paris and Ayr R. Co.*—Rule discharged.

Hurrell v. *Simpson.*—Rule discharged.

McKee v. *Calloway.*—Rule absolute, discharging attaching and other orders, on payment of costs.

Reilly v. *Western Assurance Co*—Leave to amend. Rule absolute for new trial, costs to abide the event.

Workman v. *McKinstry.*—Rule discharged.

Sloman v. *Chisholm.*—Rule discharged.

Kirkpatrick v. *Rowsell.*—Rule discharged.

Malloch v. *Derivan.*—Rule absolute to enter verdict for defendant.

Lee v. *Woodside.*—Rule absolute to reduce the verdict.

Town of Barrie and The Northern Railroad Co.—Rule *nisi* discharged with costs.

Commercial Bank v, *Woodruff et al.*—Rule *nisi* to set aside judgments as against executors of Zimmerman but not as to Roblin.

Sarsfield v. *Sarsfield.*—Judgment for demandant for her dower, but without damages.

Paxton v. *Cameron.*—No rule.

Cameron v. *Paxton.*—No rule.

Great Western R. Co. v. *Desjardins Canal Co.*—Rule *nisi* to set aside judgment on terms.

Present: McLEAN, C. J.; BURNS, J.; HAGARTY, J.

June 21, 1862.

Sutherland v. *Nixon.*—Interpleader issue. Question as to sufficiency of description. Verdict to be entered distributively.

Cleaveland v. *Boice.*—Rule *nisi* to set aside verdict for plaintiff, discharged.

Hogg v. *Merrick.*—Rule discharged.

McInnes v. *Jarvis.*—Rule discharged.

The Queen v. *The Grand River Navigation Company.*—Rule discharged.

Fraser v. *Anderson.*—Rule discharged. Leave to appeal if desired.

Kendall v. *Fitzgerald et al.*—Judgment for defendant on demurrer to replication, with leave to apply in Chambers to amend before 1st July.

Davis v. *Mutchmore.*—Rule discharged.

Ham v. *Lasher et al.*—Rule absolute for new trial, costs to abide the event.

Weydell et al. v. *Provincial Insurance Co.*—Judgment for plaintiffs on demurrer to replication to second plea, and for defendants on demurrer to replication to fifth plea.

Brooke v. *McCaul.*—Judgment for defendant.

Clark v. *Morrell.*—Appeal from County Court of Perth. Judgment below reversed. New trial ordered, costs to abide the event.

Nicholson v. *Dillabough.*—Judgment for plaintiff.

Burley and The Corporation of St. Vincent.—Rule absolute to quash by-law with costs.

Weireley v. *Papst.*—Feigned issue directed.

In re Preston and Municipal Corporation of Manvers.—Rule *nisi* to quash by-law discharged with costs.

Jones v. *Todd.*—Rule absolute for new trial, costs to abide the event.

COMMON PLEAS.

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

June 16, 1862.

Carter v. *Titus.*—Appeal allowed.

Watt v. *Feader.*—Judgment for plaintiff.

In re Bullen.—Habeas corpus—No formal, judgment because party already out of custody. *Held*, That an exparte order to commit, under Con. Stat. U. C. cap. 24, sec. 41, is illegal C. J. Richards.—Ex parte order might be made; was not prepared to say a judge could not make such an order.

Lloyd v. *Clark.*—Rule absolute to enter nonsuit.

Smith v. *Spencer*—Rule discharged—leave to plaintiff to amend upon payment of $5.

Fraser v. *Hickman.*—Rule discharged upon terms.

Townsend v. *Elliott*—Postea to plaintiff.

In re Registrar of Carleton.—Rule absolute for mandamus.

Hamilton v. *Holcomb.*—Rule discharged.

Holton v. *McDonald.*—Rule discharged.

Morland v. *Munro.*—Judgment for demurrer and rule discharged.

Ray v. *Blair.*—Rule absolute.

Higgins v. *Farewell.*—Rule for new trial on payment of costs.

Kerr v. *McEwan.*—Judgment for defendant to replication to demurrer to second plea. Third plea held bad.

Bank U. C. v. *Bartlett.*—Plaintiff entitled to judgment on demurrer.

Folmsbee v. *Brown.*—Rule discharged.

Scott v. *Miller.*—Rule discharged

Hugill v. *Merryfield.*—Rule absolute for new trial without costs.

McDonald v. *Van Wyck.*—Rule absolute for new trial, costs to abide the event. Leave to defendant to apply to amend.

Osborne v. *Earnshaw.*—Rule discharged.

Bartells v. *Benson.*—Rule absolute for new trial on payment of costs.

In re Robinson and Burritt.—Rule absolute for mandamus.

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

June 21, 1862.

Davidson v. *Shephard.*—Action for infringement of patent. Demurrer to pleas:—2. Plea good. 4. Plea good. 5. Plea bad. Leave given to reply specially to 2nd plea.

Rymal v. *Ashbury.*—Action on a covenant against heirs at law. Plea—nothing by descent. Replication that ancester died seized of an equity of redemption. Demurrer. Judgment for demurrer.

Barker v. *Davis.*—Judgment for plaintiff.

Perrin v. *Bingham.*—Appeal from decision of County Judge of Brant. Decision of Court below affirmed. Appeal dismissed.

School Trustees v. *Corporation of Caledon.*—Action by School Trustees for money levied by defandants as a Municipal Corporation under Con. Stat. U. C., c. 64, sec. 27, sub sec. 12. Plea, no demand before action. Demurrer. Plea held good.

Fox v. *Macaulay.*—Appeal from decision Judge County Court Prince Edward. Decision affirmed. Appeal dismissed.

Boynton v. *Boyd.*—Appeal from decision of County Judge York and Peel. Decision affirmed. Appeal dismissed.

McAndrew v. *McKenzie.*—Appeal from decision of County Judge Waterloo. Appeal allowed.

Street v. *The County of Simcoe.*—Action for money paid under protest as taxes on unpatented lands. Verdict for plaintiff. Rule *nisi* for N. T. or to reduce verdict. Discharged.

Street v. *The County of Lambton.*—Action for money paid as taxes on unpatented lands. Verdict for defendants. Rule *nisi* for N. T. discharged as payment held to be voluntary.

Farquhason v. *Morrow.*—Rule *nisi* to enter nonsuit made absolute.

Hiscott v. *Murray.*—Question as to sufficiency of description in a Bill of Sale. Rule discharged.

Walker v. *Rodgers.*—Ejectment on receipt for sale of Crown Lands. Leave to enter nonsuit. Rule accordingly. Rule made absolute.

ADDRESS TO SIR J. B. ROBINSON, BART.

TO SIR JOHN BEVERLEY ROBINSON, BARONET, PRESIDENT OF THE COURT OF APPEAL, &c, &c, &c.

We the members of the Bar of Upper Canada at a general meeting assembled, have resolved that this is a fit and proper occasion on which to address your Lordship.

Because the various changes which have recently taken place in the constitution of the Superior Courts of the Western Province have attracted our attention and awakened in our hearts a high sense of the reality of human life, and the commanding influence of Divine Providence over the will of man.

Because the most important of those changes is that caused by your Lordship retiring from the head of the Court of Queen's Bench, where you have presided from early youth to old age, whilst many of your associates of the Bench have passed away, and a departed generation of the Bar has yielded to us the right of succession.

Because we have vainly searched the history of the Bench and the records of the lives of eminent British jurists, and there failed to find one single instance within the memory of man where any Judge has occupied as you have occupied, a place on the Bench as Chief Justice for a period of nearly equal to half the allotted duration of existence.

Because we desire that by the judicial history of this the land of our nativity or our adoption, posterity may learn, as we proudly record the fact, that your Lordship has passed thirty-three years of your life in the discharge of the arduous duties and functions of your high and important office of Chief of the first and oldest Court of the Province.

And because we as a body are inspired by feelings of proud admiration, profound respect, and reverential esteem which we are unable to express.

We venture, therefore, to address your Lordship, and to assure you that as with pleasure we beheld, and shall ever remember your presence, so with pain do we witness and shall ever deplore your departure from the Bench.

We use no language and offer no words of idle flattery, but with candour and pure sincerity we hesitate not to say that by zeal indefatigable, talents of the rarest and highest order, power of perception unequalled, patience, affability of manner, and a constant desire and anxiety to administer justice in its purity, you have never failed to inspire confidence alike in the profession and the suitor, which will ever be held dear in their memories, and have justly earned an everlasting reputation as a jurist, which will serve as an example to future ages, as a stimulant to youthful aspirants, and the pride of your family, your friends and your countrymen.

Whilst thus offering this slight tribute of our estimation and admiration of your public life, we congratulate ourselves and our country that your valuable services are not yet lost to us; that though you retire from the seat from whence your lustre has shone around you, yet you retire not to repose, but retain by special favour of the Crown, the President's Chair of the High Court now assembled.

In conclusion, we humbly invoke the blessings of our Supreme Ruler in your behalf, and pray, that as you deserve, so may you be rewarded by him, and that peace and happiness may attend the remainder of your days.

(Signed) H. ECCLES,
Chairman of the Meeting,
And Treasurer *pro tem* of the Law Society.

Sir J. B. ROBINSON then read the following reply :—

Mr. Treasurer and Gentlemen of the Law Society,

It gives me pleasure to receive this expression of your kind sentiment at the close of my long period of service in a station which has not been without its share of labour and anxiety.

Nearly thirty-three years have passed since I was appointed Chief Justice of the Queen's Bench, and I alone am now living of the three who composed at that time the only Superior Court of Law or Equity in Upper Canada.

I have also to lament the loss of others who during my tenure of office had been associated with me as Judges, who had been among my earliest and best friends—and for whom it might have been hoped that Providence intended a greater length of days.

In the bar, too, I have lived to witness great changes. Of the many who had been admitted by your excellent society to the degree of barrister before my accession to the bench, I think there are not more than six or seven who continue to be engaged in the practice of their profession, while of late years I have had the pleasure of meeting in my circuits through the Province, advocating with ability and zeal the interest of their clients, many gentlemen who were not born when I entered upon the duties, from which, by the kind consideration of the Government, I have been lately relieved.

So true does it seem that the lapse of thirty years, which we usually reckon the term of a generation, is with reason so considered, since, with a few individual exceptions, it commonly brings upon the stage new actors in all the scenes of life.

But within the period I am referring to, how great have been the changes we have witnessed in our judicial system also and in the law itself! A Court of Equity has been introduced where before that time the exercise of equitable powers in any shape had been utterly unknown. And besides this, new legislation following the example of the Imperial Parliament has enabled the common Law courts to grant in effect equitable relief to a considerable extent, in cases pending before them, thus saving to suitors the expense of resorting to a distinct equitable tribunal.

We have seen also established a second court of common law of superior jurisdiction with the same powers and duties as those of the Queen's Bench under the designation, familiar to English ears, of the Court of Common Pleas—which Court, since its foundation, has happily been presided over in succession by two Chief Justices, eminently qualified by their learning, discretion, and diligence, to secure to the Court the confidence of the Bar and of the country.

There are County Courts and Division Courts, with jurisdiction being considerably enlarged and clearly defined, and with their practice settled by written law, and presided over, not as formerly they unavoidably were, by gentlemen uninstructed in the laws, but by Judges, of whom I may venture to say

there are not a few who would be found worthy to be entrusted with higher judicial authority.

Again in the law itself we have seen changes scarcely less material than in the machinery by which it is dispensed.

Much that had been formerly uncertain or indefinite has been settled by sure legislative authority, and much that had been long settled, but in a measure not happily adjusted to the wants and feelings of mankind, has been placed upon a footing more reasonable and just. Many things that were perplexed have been simplified; what was useless has been dispensed with; what was tedious has been abridged; and above all, objections that used to be entertained on account of defects, or irregularities in what was merely matter of form and not of substance, have been discontinued, and such ample authority has been given to the Courts to amend errors in procedure that the rights of parties are now made as much as possible to depend upon the real merits of their case.

In consequence of these improvements, the time of Courts of Justice and the labours and anxious care of the advocate are now in an infinitely less degree than formerly expended upon discussions which I think we all used to feel with somewhat of shame, while we were unwillingly engaged in them, were too much of the nature of vexatio de lana capricia—a quarrel about goats' wool—or, in other words, a strife about nothing.

These are all unquestionably advantages to the suitor, but the benefit of such changes is not confined to them. It is a worthy subject of congratulation that the attention of the student, the practitioner and of the judge, can at the present time be more exclusively given to the grounds and principles of the law than to the intricacies of its practice.

More remarkable, however, than all the others I have spoken of is the alteration we have seen take place within the last twenty years in the circumstances of Upper Canada.

Since 1829 its population, I think I may venture to say, has increased six-fold; and its wealth and commercial enterprise and importance in a greater proportion. Banks, insurance companies, railway companies and other associations for the purposes of trade or manufactures, have multiplied prodigiously. A system of self-government in local matters, through municipal corporations has been formed, with a comprehensive and careful minuteness of detail scarcely to be paralleled, and a scheme for extending education to all classes throughout the Province has been framed by the Legislature, and is carried out and controlled by a multitude of provisions which require great care in the administration to do justice to the benevolent design.

We know to what a number of legal questions the enactments creating these new interests and relations have given rise. So far as the bar is concerned, I have seen with pleasure that their learning, intelligence and industry, and their earnest application of these resources in the service of their clients have been fully equal to the increased demand for professional aid.

Of the Bench it may be permitted me to say that however much their labour and responsibility have been augmented by the causes I have mentioned, still now as before, nothing can be plainer to them than their path of duty, so far, at least, as regards the spirit in which it behoves them to act. Whatever delay may take place upon the cases which individually come before them for argument, it must always be the desire of the judges to determine each, after it has been heard, with as much promptness as is compatible with a satisfactory decision; and whatever opinion they shall really form, they are bound to pronounce it, without fear or favour.

Such is their independent tenure of office that there can be nothing that should make them afraid, and while any interest in the subject of litigation, however trifling, or any relationship however remote to either of the parties, restrains them from taking part in the decision, they are exposed to nothing which can be imagined capable of drawing them from the path of duty.

It is their happy privilege that what they do, is transacted openly, and that in this country they have an opportunity of seeing, and are indeed by law bound to see, that their opinions and the grounds assigned for them, are truly reported.

This protects them against misrepresentation; and they have, besides, the satisfaction of reflecting that when they do err in judgment, except in certain classes of cases, in which the Legislature has chosen to make or to leave their decision final, their error can be corrected in a superior court, by a proceeding as simple and direct in its nature, and as free from the objections of delay and expense, as could well be contrived.

Judges can have no greater advantages than these for shielding them from injurious reflection or suspicions; and speaking as a British subject, I feel that it is characteristic of our time and country, to give credit to the Judge for upright intentions, and to treat their errors as errors of the understanding only, and not of the heart.

I much fear, gentlemen, that you have done more than justice to the success of my efforts while I presided in the Court of Queen's Bench to discharge my duty rightly and with efficiency, though it would give me pain to think that I may not justly take credit for a strong desire to acquit myself to the best of my ability, of duties so important which I had solemnly sworn to perform.

Labour at least, I am conscious, has not been spared.

You know how ably I have been assisted by those who have been taken from the Court, and by those whom I left in it, and we all, I am sure have felt how materially our labours have been lightened by the researches and arguments of a learned and industrious bar.

The leaving a Court in which the whole of the active period of my life has been passed could not fail to be attended with a painful feeling of regret, for I may say that out of my family circle it has constituted my home. But this regret has been softened by the pleasure of seeing my oldest surviving colleague honoured by being placed at the head of the Court, as a just tribute to the ability and integrity which have marked his long course of judicial services. The duties which it will give me pleasure to continue to discharge in the Court of Error and Appeal will associate me as in time past with my brethren of the Bench and of the Bar, as long as I may be blessed with health sufficient for the performance. And may God grant that we "may all bear in mind the account which "we must one day render for the time and talents committed to our charge."

BILL BEFORE THE LEGISLATURE.

An Act respecting Judgment Debtors in Upper Canada,

(Introduced into the Legislative Council by the Hon. Mr. Alexander.)

Whereas it is expedient to confer upon the Superior Courts of Common Law, and the County Courts, in Upper Canada, and the Judges thereof, certain powers in relation to judgment debtors already conferred by law upon the Division Courts there and the Judges thereof; therefore, Her Majesty, &c.:

1. Either of the Superior Courts of Common Law, or any County Court, in Upper Canada, or any Judge of any of the said Courts, may order the time or times and the proportions in which any sum and costs recovered by judgment of the Court shall be paid, reference being had to the day on which the summons was served; and, at the request of the party entitled thereto, he may order the same to be paid into Court.

2. Any party having an unsatisfied judgment or order in either of the Superior Courts of Common Law, or in a County Court, in Upper Canada, for the payment of any debt, damages or costs, may procure from the Court wherein the judgment has been obtained, a summons in the form prescribed by any rule respecting the practice and proceedings of such Court; and such summons may be served either personally upon the person to whom the same is directed, or by leaving a copy thereof at the house of the party to be served, or at his usual or last place of abode, or with some grown person there dwelling, requiring him to appear at a time and place therein expressed, to answer such things as are named therein; and if the defendant appears in pursuance thereof he may be examined upon oath, touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which formed the subject of the action, and as to the means and expectation he then had and as to the property and means he still has, of discharging the said debt, damages or liability, and as to the disposal he has made of any property.

3. The person obtaining such summons, and all witnesses whom the judge thinks requisite, may be examined upon oath touching the enquiries authorized to be made as aforesaid.

4. The examination shall be held in the judge's chambers, unless the judge otherwise directs.

5. The costs of such summons, and of all proceedings thereon, shall be deemed costs in the cause, unless the judge otherwise directs.

6. In case a party has, after his examination, been discharged by the judge, no further summons shall issue out of the same Court at the suit of the same or any other creditor, without an affidavit satisfying the court, or a judge thereof, upon facts not before the judge upon such examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the court, or a judge thereof, that since such examination the party has acquired the means of paying.

7. If the party summoned does not attend as required by the summons, or allege a sufficient reason for not attending, or, 2. If he attends and refuses to be sworn or to declare any of the things aforesaid: or, 3. If he does not make answer touching the same, to the satisfaction of the judge; or, 4. If it appear to the judge, either by the examination of the party or by other evidence (*a*), that the party obtained credit from the plaintiff, or incurred the debt or liability under false pretences, or (*b*) by means of fraud or breach of trust, or (*c*) that he wilfully contracted the debt or liability without having had, at the time, a reasonable expectation of being able to pay or discharge the same, or (*d*) has made, or caused to be made, any gift, delivery, or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or, 5, If it appears, to the satisfaction of the judge, that the party had, when summoned or since the judgment was obtained against him, has had sufficient means and ability to pay the debt, or damages, or costs recovered against him, either altogether or by the instalments which the Court in which the judgment was obtained, or any judge thereof, has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days.

8. A party failing to attend, according to the requirements of any such summons as aforesaid, shall not be liable to be committed to gaol for the default, unless the judge is satisfied that such non-attendance is wilful, or that the party has failed to attend after being twice so summoned; and if, at the hearing, it appears to the judge, upon the examination of the party or otherwise, that he ought not to have been so summoned, or if, at such hearing, the judgment-creditor does not appear, the judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment-creditor in the same manner as any other judgment of the court

9. Whenever any order of commitment as aforesaid has been made, the clerk of the court shall issue, under the seal of the court, a warrant of commitment directed to any bailiff of the court, and such bailiff may, by virtue of such warrant, take the person against whom the order has been made.

10. All constables and other peace officers within their respective jurisdictions, shall aid in the execution of every such warrant; and the gaoler or keeper of the gaol of the county in which such warrant has been issued, shall receive and keep the defendant therein until discharged under the provisions of this Act or otherwise, by due course of law.

11. Any person imprisoned under this Act who has satisfied the debt or demand, or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining such order and all subsequent costs, shall, upon the certificate of such satisfaction, signed by the clerk of the court, or by leave of the judge of the court in which the order of imprisonment was made, be discharged out of custody.

12. The judge before whom such summons is heard may, if he thinks fit, rescind or alter any order for payment previously made against any defendant so summoned before him, and may make any further or other order, either for the payment of the whole of the debt or damages recovered forthwith, or by any instalments, or in any other manner that he thinks reasonable and just.

13. In case the defendant in any suit brought in either of the Superior Courts of Common Law, or in any County Court in Upper Canada, has been personally served with the summons to appear, or personally appears at the trial, and judgment be given against him, the court or judge, at the hearing of the cause, or at any adjournment thereof, may examine the defendant and the

plaintiff, and any other person, touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment.

14. No imprisonment, under this Act, shall extinguish the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the defendant.

15. In all orders for payment of debts, damages or costs made under this Act, due regard shall be had to the proved or admitted income of the defendant, either from official, professional or other sources; and no defendant shall be ordered to pay more than twenty-five per cent. per annum of such income under this Act.

SELECTIONS.

ERROR IN CRIMINAL CASES.

I. Writ of Error Defined.

A writ of error is an original writ, issuing from the supreme judicial court to a court of record, proceeding according to the course of the common law, requiring the record and proceedings of the complaint, indictment or information on which judgment has been actually rendered, to be sent to the supreme judicial court, who are authorized to examine the record on which judgment was given; and on such examination and a consideration of the errors assigned, to affirm or reverse the judgment according to law. *Ex parte Cooke*, 15 Pick. 237 (1834); *Thayer* v. *Commonwealth*, 12 Met. 10, 11 (1846).

A writ of error is a writ grantable *ex debito justitiæ*. *Thayer* v. *Commonwealth*, 12 Met. 10 (1846).

II. Who are Entitled to a Writ of Error.

A writ of error does not lie in a criminal case, on behalf of the commonwealth. *Commonwealth* v. *Cummings*, 3 Cush. 212 (1849).

It is the right and privilege of the defendant to bring a writ of error, and reverse an erroneous judgment; but he may well waive the error, and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offence. *Commonwealth* v. *Loud*, 3 Met. 328 (1841); *Commonwealth* v. *Keith*, 8 Met. 532, 533 (1844).

III. Who may join in a Writ of Error.

Where two are convicted on an indictment jointly charging them with the offence of larceny, and are severally sentenced thereon to longer terms of imprisonment than are warranted by law, they may join in a writ of error to reverse the judgment. *Sumner* v. *Commonwealth*, 3 Cush. 521 (1849).

IV. When a Writ of Error Lies.

Without a judgment, or an award in the nature of a judgment, no writ of error lies. *Ex parte Cooke*, 15 Pick. 237 (1834).

If a warrant of commitment be issued by a court of general jurisdiction, although it be erroneous and not conformable to law, it will stand good, unless examined and reversed by writ of error or otherwise; but if a court of special and limited jurisdiction exceed the authority conferred, and issue a warrant of commitment, the judgment is void, and not merely voidable, and the commitment under it is illegal, and may be inquired into on habeas corpus, and if the commitment is wrong, the party may be discharged. *Jones* v. *Robbins*, 8 Gray, 330 (1857).

It is not a ground of error that a defendant, who has pleaded in chief, was indicted and convicted by the name of J. T., otherwise called T. D.; misnomer being matter of abatement only. *Turns* v. *Commonwealth*, 6 Met. 224 (1843); 1 Allen, 4.

A writ of error lies to reverse a judgment in a criminal case, although the judgment was open to an appeal. *Ex parte Cooke*, 15 Pick. 234 (1834); *Thayer* v. *Commonwealth*, 12 Met. 9 (1846).

A writ of error lies to reverse a sentence of additional punishment erroneously awarded on an information. Riley's case, 2 Pick. 165 (1824); *Ex parte Cooke*, 15 Pick. 234 (1834); *Wilde* v. *Commonwealth*, 2 Met. 408 (1841). See *Herrick* v. *Smith*, 1 Gray, 49 (1854).

Where a sentence of fine and imprisonment has been imposed and the fine paid, and the judgment is erroneous in imposing imprisonment, the supreme judicial court in the exercise of its discretionary power may discharge the prisoner on habeas corpus, although for an error in the judgment of the court below, a writ of error is the ordinary remedy. Feeley's case, 12 Cush. 598 (1853).

Where one of two counts in an indictment is bad, and the defendant is found guilty and sentenced, generally, the presumption of law is, that the court awarded sentence by the law applicable to the offence charged in that count; and a writ of error will not lie to reverse the judgment, if the sentence is warranted by the law applicable to the offence charged in that count. *Brown* v. *Commonwealth*, 8 Mass. 64 (1811); *Jennings* v. *Commonwealth*, 17 Pick. 80 (1835); *Josslyn* v. *Commonwealth*, 6 Met. 236 (1843).

When a defendant is found guilty, generally, on an indictment which charges him, in one count, with entering a dwelling-house in the night time of a certain day, with intent to commit a larceny, and, in another count, with a larceny on the same day in the same dwelling-house, and he is sentenced to a greater punishment than is warranted by law, either for such entry or for mere larceny in a dwelling-house; the court cannot, on a writ of error, presume that one and the same offence only is charged in the indictment. *Carlton* v. *Commonwealth*, 5 Met. 532 (1843), explained in *Crowley* v. *Commonwealth*, 11 Met. 578, 579 (1846).

When an indictment charges, in one count, a breaking and entering a building, with intent to steal, and in another count, a stealing in the same building, on the same day, and the defendant is found guilty generally the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed in error, because the record does not show whether one offence only, or two, were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved. *Crowley* v. *Commonwealth*, 11 Met. 575 (1846); *Kile* v. *Commonwealth*, 11 Met. 581 (1846).

Where a defendant is found guilty, generally, on an indictment which charges him with adultery, on three different days, with a woman of one name, and on a different day, with a woman of another name, and he is sentenced to a greater punishment than is warranted by law for a single act of adultery; the court cannot, on a writ of error, presume that a single offence only was charged in the indictment. *Booth* v. *Commonwealth*, 5 Met. 535 (1843).

V. Alleging Diminution of the Record.

In *Turner* v. *Commonwealth*, 6 Met. 227, 228 (1843), when the case first came before the court, with a return of the record upon the writ of error, upon motion of the attorney-general, founded upon a suggestion of diminution of the record, a writ of certiorari was ordered, though opposed by the counsel for the plaintiff in error, directed to the chief justice of the court of common pleas, requiring the entire record to be certified and returned to the supreme judicial court.*

VI. Second Writ of Error.

An affirmance of a judgment, on a writ of error to which *in nullo est erratum* is pleaded, is a bar to a second writ of error to reverse the same judgment for any error apparent on the record when it was brought before the court on the first writ. *Booth* v. *Commonwealth*, 7 Met. 285 (1843).

But where the error arises from matter subsequent to the former decision, and which did not then exist, a new writ of error may be brought, and such new matter assigned for error. *Booth* v. *Commonwealth*, 7 Met. 286 (1843).

In *Hopkins* v. *Commonwealth*, 3 Met. 460 (1842), a judgment had been rendered on an information for additional punishment, which judgment was founded upon three or more former convictions. The errors assigned, in the first writ of error, to the judgment on information were, in several instances, supposed defects in those former judgments. But it was decided that whilst such former judgments were in force, the court could not take notice of such defects. Then writs of error were brought to reverse those former judgments, and one or more of them was reversed. When these supports of the judgment on the information were thus removed, the latter became erroneous, by such matter subsequent. This matter of error was not in issue on the first writ, and could not have been considered and determined in the judgment of affirmance. See also *Wilde* v. *Commonwealth*, 2 Met. 408 (1841).

VII. The Plea in Nullo est Erratum.

The plea *in nullo est erratum* is in the nature of a demurrer, and puts in issue the validity of the judgment in all matters of law. *Booth* v. *Commonwealth*, 7 Met. 287 (1843); *Haggett* v. *Commonwealth*, 3 Met. 458 (1842); 6 Met. 490; 3 Gray, 512.

New errors may be assigned *viva voce* at the hearing, taking care that the adverse party is not surprised; and if the judgment is erroneous, in the particulars thus indicated, though not in the particulars assigned for error, the judgment will be reversed. *Booth* v. *Commonwealth*, 7 Met. 287 (1843).

VIII. Judgment of Reversal.

When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed. *Christian* v. *Commonwealth*, 5 Met. 530 (1843).

Where a convict brings two writs of error at the same time, one to reverse an original judgment, and the other to reverse a sentence to additional punishment founded on an information, which sets forth such original judgment as one of the grounds of such additional punishment; if the original judgment is reversed, the sentence on the information falls with it, and will also be reversed, if the error assigned be a matter of mere law, apparent on the record, although the original judgment was in full force when the writ of error was brought to reverse the sentence on the information. *Hutchinson* v. *Commonwealth*, 4 Met. 359 (1836).

Formerly, if the court below had pronounced an erroneous sentence, the court of error had no authority, at common law, to pronounce the proper judgment, or remit the record to the court below, but were bound to reverse the judgment and discharge the defendant. *Shepherd* v. *Commonwealth*, 2 Met. 419 (1841); *Christian* v. *Commonwealth*, 5 Met. 530 (1843); *Sumner* v. *Commonwealth*, 3 Cush. 522, 523 (1849); *Jacquins* v. *Commonwealth*, 9 Cush. 279 (1852).

And this rule applied to a case where a sentence had been awarded, to take effect after the expiration of a former sentence, and the prisoner had brought a writ of error to a hearing before the expiration of the former sentence. *Christian* v. *Commonwealth*, 5 Met. 530 (1843).

And it made no difference whether the mistake was in his favor by way of an award of sente less than the statute requisition, or against him by way of a greater. *Wilde* v. *Commonwealth*, 4 Met. 360 (1842); *Rice* v. *Commonwealth*, 12 Met. 247 (1847).

But it is now enacted, that, "when a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." St. 1851, c. 87; Gen. Sts. c. 146, sec. 16;* 9 Cush. 280.

This act is not *ex post facto*, or retrospective in its legislative action. It relates to future proceedings in writs of error in criminal cases, and it is not retroactive in an obnoxious sense, because it relates to writs of error on past judgments. It relates solely to remedies, and a writ of error is purely remedial. In legal effect it directs that writs of error in criminal cases, shall only be brought on certain conditions, one of which is, that, if the error is only in the award of punishment, it shall be set right. *Jacquins* v. *Commonwealth*, 9 Cush. 279 (1852).

Where the attorney-general filed an information, *ex officio*, demanding the whole penalty for the commonwealth, on a statute which directed an offence to be prosecuted by bill, indictment, or information, the penalty to accrue, two thirds to the commonwealth and one-third to the informer, and the penalty was adjudged, two-thirds to the commonwealth and one-third to A. B., as informer, it not appearing on the record that he was the informer, the court reversed the judgment, and entered a new judgment for the commonwealth for the whole. *Howard* v. *Commonwealth*, 13 Mass. 221 (1816).

IX. Service of Writ.

Where a writ of error is brought upon a judgment in a criminal case, under St. 1842, c. 54, the prosecuting officer of the commonwealth is not bound to take notice and act thereon, until fourteen days after a *scire facias* to hear error has been served upon him. *Christian* v. *Commonwealth*, 5 Met. 334 (1842); Gen. Sts. c. 146, sec. 12.

X. Costs of a Writ of Error.

A plaintiff in error, who is discharged on the writ, is entitled to his costs for travel, as an item of the legal costs, to be "borne by the commonwealth," notwithstanding that, during the pendency of the writ of error, he is imprisoned in a house of correction, under the sentence against him. *Britton* v. *Commonwealth*, 1 Cush. 302 (1848). Gen. Sts. c. 146, sec. 17.—*The Monthly Law Reporter for May*, 1862.

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* See 2 Sound. (6th edition) 101 *z*, 101 *aa*. *Dunn* v. *Regina*, 12 Q. B., 1031.

* The Eng. St. 11 & 12 Vic. c. 78, sec. 5, contains similar provisions. See the observations of Lord Campbell, C. J., on this statute, in *Holloway* v. *Regina*, 2 Denison, 287, 17 Q. B. 317 (1851). See also Gen. Stat. U. C. cap. 113, sec. 11 and *Regina* v. *Powell*, 21 U. C. Q. B. 215.

HOLY ORDERS AS DISQUALIFYING FOR THE HOUSE OF COMMONS OR THE BAR.

A Bill for the Relief of Persons in Holy Orders of the United Church of England and Ireland declaring their Dissent therefrom. Prepared and brought in by Mr. BOUVERIE and Mr. EDWARD ELLICE. Ordered by the House of Commons to be printed, 12th March, 1862.

The Clergy Relief Bill, introduced by Mr. Bouverie, has been the subject of an animated discussion in the House of Commons, and will probably receive further criticism in whatever shape it may be returned by the Select Committee, in whose hands it remains for the present, The measure certainly falls short of the necessities of the case with which it professes to deal, as it only relieves those clergymen who are ready to sign a declaration of dissent from the doctrines of the Church, and leaves any who still adhere to her faith and formularies, but who have no taste for the duties of the clerical profession, labouring under the same restrictions and incapacities as at present. We do not propose to inquire into the wisdom (it is wholly unnecessary to observe on the logic) of this shortcoming in the Bill; but it may be useful to ascertain how far the clergy are really incapacitated by law for secular pursuits, and more especially for fulfilling the important duties of legislators and advocates. It will be found, we apprehend, that their exclusion from the House of Commons originated in an enactment which must be condemned by every reasonable man, and that their ineligibility for the Bar (if it really exists) rests on a discreditable precedent.

The restriction by which persons in Holy Orders are rendered incapable of sitting in the House of Commons is one created by Statute 41 Geo. III. c. 62, intituled, "An Act to remove doubts respecting the eligibility of persons in Holy Orders to sit in the House of Commons." The history of this somewhat remarkable Act of Parliament is given in Mr. Hare's able treatise on "The Election of Representatives, Parliamentary and Municipal." Speaking of the Act in question, and the restriction created by it, Mr. Hare says, "The circumstances under which the Statute establishing this restriction was, little more than fifty years ago, carried through Parliament by a minister whom history has not placed in any very elevated position amongst statesmen, are well known. The most attentive perusal of the debates will fail to discover the shadow of a reason for the exclusion. The Bishop of Rochester adverted to what he thought the only objection, viz., 'the means by which candidates were obliged to seek admittance into the Lower House, such as opening houses of entertainment, and truckling to every voter.' (But this would obviously be a difficulty to all scrupulous men.) This prelate, however, also said, 'He did not think the business of the House of Commons was totally unconnected with the study of Divinity; for it was intermixed with the great principles of political justice and morality, and the laws of nature and nations.' The bill was characterized by Lord Thurlow as a bill of disfranchisement. It was, in truth, an attack on the rights of every elector in the kingdom. Lord Eldon, who supported it, like a skilful advocate, ingeniously endeavoured to divert the argument and rest the question upon another issue, by introducing a discourse of great learning to prove the indelibility of Holy Orders,—a point which had nothing whatever to do with the matter in question. The only true explanation of this remarkable and unjustifiable law is that which was given by the immediate object of it. Horne Tooke said, 'Deacons and priests had sat in Parliament for more than a century, but at last one got in who opposed the minister of the day, and then Parliament determined that there should no more be any deacons and priests admitted amongst them.' Nothing, abstractedly, could appear more unreasonable than the exclusion of a set of men whose education and functions necessarily point their attention to the greatest subjects that can occupy the thoughts of men; and whose habits and duties moreover bring them into communication with every phase of society, and especially with the poor, whose interests require the closest, the most attentive, and the most practical consideration.

"In the great questions which arise in Parliament affecting religion and the Church, it would be in the highest degree desirable that one or two ministers of every persuasion should be present, and enabled to take part in their discussion, rather than that all such matters should be left to laymen who have taken out a dilettante degree in Divinity.

"The tone and temper of the Lower House, in dealing with subjects in which the relations between public law and national worship are in controversy, would be in no slight measure improved, if, without lessening all becoming zeal, the presence and example of the Christian minister should, to that zeal, add some portion of charity." Such are the observations of Mr. Hare, disinterestedly made in the course of a treatise on the subject of representation generally.

In Lord Holland's Memoirs of the Whig Party, vol. i., p. 180, we find the following somewhat caustic reference to the Act in question. His lordship says,—"There was scarcely a Parliament since the Revolution in which, *de facto*, a person in priest's or deacon's orders had not sat. A strange compromise between principle and indulgence was recommended by Mr. Addington, and adopted by the House. Mr. Horne Tooke was allowed to sit during that Parliament, but all deacons and priests but himself during that limited period were declared to be ineligible."

Doubtless, when the Clergy possessed their right of Convocation, with all the privileges incident thereto, the privileges not only of debate, but of enacting laws binding on their order, and especially the privilege of taxing themselves, they were excluded from the House of Commons on that ground. All the cases of exclusion proceed on that clear and distinct rule.

For instance, A.D. 1553, Alexander Newell, Prebendary of Westminster, was declared by a Parliamentary Committee incapable of being a *Member of the House of Commons*, "being Prebendary of Westminster, and thereby having voice in Convocation." 1 Jour. p. 26.

Again, in the year 1620, In re John Robson, it was declared that he "ought not to be accepted to serve as a member of this House, by reason he is a minister, and he hath, or may have, a voice in the Convocation House." Parl. MSS. vol. xviii., p. 90.

Also, in 1661, Dr. Cradock having been returned for the Borough of Richmond—which return was disputed—the Committee reported, "That it appeared to them that Dr. Cradock was in Holy Orders, and the opinion of the Committee was, that Dr. Cradock was incapable of being elected a burgess for the borough." The House resolved "to agree with the Committee that Dr. Cradock was a person incapable to be elected, and his election void."—8 Journ. 341, 346. But in this case there had also been a scrutiny, and Dr. Cradock had not the majority of votes, so that the decision on his capability to be elected was at least extra-judicial.

All these cases, however, were decided when the powers of Convocation, so far as they regarded the clergy, were co-ordinate with those of Parliament itself. But, in 1785, long after Convocation had been shorn of its legislative rights by 25 Hen. VIII. c. 19 (except specially licensed by the Crown to exercise them); and more than 120 years after, the clergy, by a private agreement between Archbishop Sheldon and Lord Chancellor Clarendon, had silently waived the privilege of taxing their own body, and permitted themselves to be included in the money bills prepared by the Commons, we find the question of the right of a person in Holy Orders to sit in the House of Commons once more raised in the case of Rushworth,

a Deacon, returned for the borough of Newport. It was determined that he was duly elected. The decision was in no respect *affected by the fact of Rushworth* being merely in Deacon's orders, although he was objected to on the ground of being in Holy Orders. Between the period of 1604, when the clergy waived the privilege just now alluded to, and 1785, the date of Rushworth's election, it is believed, as stated by Lord Holland, that "there was scarcely a Parliament in which *de facto* a person in priest's or deacon's orders had not sat;" and yet sixteen years later, viz., in 1801, the bill which is now under our consideration, became the law of the land. An observation of Mr. Luder in reporting Rushworth's case, vol. ii., p. 282, is so pertinent to the second part of our subject, that we give it as follows:—

"There is a much greater analogy between the two functions of priest and barrister than between the former and that of representative; for anciently the clergy pleaded commonly at the bar of the secular Courts, and were regular advocates: which occasioned the proverbial saying, '*Nullus clericus nisi causidicus.*'"

In corroboration of this state of things we refer to a case in Coke's Second Institutes, 562, 29 edit., more for the curiosity of the case than with a view of laying much stress on a precedent of such remote antiquity,—indictment against a parson for conspiracy, who pleads that he was "*Communis advocatus*," and so justified as attorney to the other. It was found that he was "*Communis advocatus*," and not guilty.

We now proceed to consider the ineligibility of persons in Holy Orders to be called to the Bar. It is somewhat remarkable that the only precedent for such exclusion was created about the same time, and directed against the same obnoxious individual, as was the unjustifiable law upon which we have just now commented. Can any one doubt that they were both the emanations of party spirit and political rancor?

In the 20th volume of Howell's "State Trials," on the Proceedings against John Horne (afterwards John Horne Tooke) for libel, the following note occurs:—

"In Trinity term, 1779, Horne Tooke applied to be called to the Bar, when only three benchers (Sir James Burrow, Mr Baron Maseres, and Mr Wood) voted in his favour, and eight voted against him. Upon this occasion the benchers of the Inner Temple had consulted those of the other three Inns respecting the propriety of calling to the Bar a gentleman in priest's orders (Mr. Horne Tooke had received priest's orders). Eleven benchers of Lincoln's Inn who took the matter into consideration, reported, June 16th, 1779, their unanimous opinion that it was not proper to call to the Bar a person in priest's orders. And a verbal answer, expressing a like opinion, was sent from the benchers of the Middle Temple and of Gray's Inn. See 2 Luder's Rep. of Election cases, p. 281, note.

"Mr. Tooke made his second attempt to be called to the Bar in Trinity term, 1782. At this time Lord Shelburne, afterwards the first Marquis of Lansdowne, was First Lord of the Treasury, and as it was known that he wished well to the application (as did his friend Lord Ashburton) it is probable that a successful issue was expected: the attempt, however, failed. I believe, that in favour of Mr. Tooke voted the Earl of Suffolk, Sir James Burrow, Mr. Baron Maseres, and Messrs. Coffin, Jackson, and Wood; and that on the other side voted Messrs. Annesley, Daniel Barrington, Baron, Barton, Bearcroft (in 1788 Chief Justice of Chester), Coventry, and Hall. In Michaelmas term, 1793, the benchers of the Inner Temple sent to the other law societies an inquiry whether a person in deacon's orders was admissible to the Bar. In the same term, Mr. Tooke's name being again inserted among candidates for admission to the Bar, no bencher moved his call. Particulars concerning the last-mentioned proceedings are to be found in the Order Book of the Inner Temple, in the Black Book of Lincoln's Inn, under dates, December 13th, 1793, June 2nd, July 9th, July 22nd, 1794, and I conjecture among the documents of *the other* societies."

From this account it would appear that there is no inflexible rule against the admission of a person in priest's orders to the Bar, but that a majority of the benchers of any Inn of Court may at any time decide either to call or to refuse, according to the disposition of the Bench, influenced as it may be by the signs or circumstances of the times.

However much each Inn of Court may desire to respect the opinion of the others, it is clear there is no rule binding upon the body, but that every Inn possesses an independent power of action, to admit or reject, according to the disposition of its constituent elements. There is, however, a check upon the arbitrary or capricious exercise of this responsible power. In the case of Hart (Pasch. 20 Geo. III. reported in Dougl. 553) Lord Mansfield laid down that "all power of the Inns of Court concerning admission to the Bar is delegated to them from the Judges, and that in every instance the conduct of those societies is subject to the control of the Judges as visitors. A mandamus will not lie to compel the Masters of the Bench of an Inn of Court to call a candidate to the Bar. From the first traces of the Inns of Court no example can be found of an interposition by the Courts of Westminster Hall proceeding according to the general law of the land; but the judges have acted as in a domestic forum." If a person conceive himself to be aggrieved by the benchers of an Inn of Court in refusing to call him to the Bar, or in disbarring him, it seems that the proper application for redress is a petition of appeal to the twelve (now fifteen) judges.

The only question remaining for consideration is, whether the Canons Ecclesiastical, or any express Act of Parliament, effectually exclude a person in Holy Orders from being called to the Bar, even assuming that the benchers or judges offered no opposition. The only Canon that can be supposed to have this effect is the 76th, which is as follows:—

"No man being admitted a deacon or minister shall, from henceforth, voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, on pain of excommunication. And the churchwardens shall present," &c. Now "*ipso facto*" excommunication has been extinguished by 53 Geo. III. c. 127. See *Mastyn* v. *Escott*, Arches' Court, January 28, 1841.

Excommunication can now only be pronounced by a sentence of an Ecclesiastical Court, and all the civil disabilities attached thereto are abolished by 53 Geo. III. c. 127, sec. 3. An imprisonment, not exceeding six months, may form part of the sentence, but even this cannot take effect unless the sentence be certified by a "Significavit" to the Court of Chancery; and the Ecclesiastical Court is not bound to certify to the Court of Chancery, even though sentence of excommunication be passed, unless called upon to do so by the promoter of the suit. See Rogers on Ecclesiastical Law, p. 512. In re *Hoiles* v. *Scales*, 2 Hag. We might perhaps contend that an honourable calling such as the Bar, itself of a *quasi*-clerical character, is scarcely within the meaning of the Canon, but we reserve our argument on that point till we come to a consideration of any statutable prohibitions on the subject. The Stat. 1 & 2 Vict. c. 106, may be said to embody and consolidate all former Acts prohibiting the clergy from following secular avocations. In the first place, then, this prohibition only relates to such clergy as are either "beneficed," or "licensed, or otherwise allowed to perform the duties of any ecclesiastical office whatever," s. 28. And in the second place, it has reference solely to being "engaged in or carrying on any trade or dealing for gain or profit," s. 29. Now, an honorary pursuit, the remuneration attached to which is purely "*quidam honorarium*," and which gratuity is not recoverable at law, surely cannot, by any force of construction, come within the definition of a "trade or dealing carried on

or engaged in for gain or profit." Moreover, a clergyman who holds no "benefice," neither is "licensed nor allowed by any other authority to perform the duties of any ecclesiastical office," and who, in point of fact, does not perform any ecclesiastical duty, we apprehend does not come within the penal enactments of this statute. The Act contains an exception in favour of partnerships where the number of partners exceeds six; and 4 & 5 Vict. c. 14, simply invalidates contracts where spiritual persons are directors of any such companies.

With respect to the 76th Canon before adverted to, that Canon, as we have seen, threatens with excommunication any "deacon or minister who shall voluntarily relinquish the same, or afterwards use himself in the course of his life as a layman." Now, this surely cannot mean relinquishing the duties of a deacon or minister. If so, then one-third of the clergy are at this moment in pain of excommunication. Neither can it mean voluntarily relinquishing the office of a deacon or minister, for that would be to acknowledge the delibility of Holy Orders; and indeed it has been expressly decided that this cannot be done by any voluntary act of the ordained person. *Barnes* v. *Shore*, 8 Q. B. 640. The Canon can therefore only refer to an apparent relinquishment on the part of the deacon or minister by using himself in the course of his life as a layman. The 75th Canon expressly forbids a clergyman to follow any base or servile calling, leaving it to be fairly inferred that a high and honourable calling such as that of a physician or advocate might be pursued, provided the conditions of the subsequent Canon were not infringed. Now the duty of an advocate has never been deemed inconsistent with the status of a clergyman, as we have seen so proverbially expressed by "*Nullus clericus nisi causidicus.*" Even the most ancient decretals of the Canon Law have never done more than forbid beneficed or stipendiary clergymen from acting as advocates in the temporal courts. Let us refer to their own language.

"Clerici in subdiaconatu, et supra et in ordinibus minoribus, *si stipendiis sustentendur*, coram seculari judice Advocati in negotiis secularibus fieri non præsumant. Nisi propriam causam, vel Ecclesiæ fuerint prosecuti, aut pro miserabilibus forte personis quæ proprias causas administrare non possunt. Sed nec Procuratione villarum aut Jurisdictiones etiam seculares sub aliquibus Principibus et secularibus viris ut Justiciarii eorum fiant, quisquam Clericorum exercere præsumat."* Decr. Greg. 9th Lib. 1, Tit. 37, c. 1.

"Clericus autem qui contra Ecclesiam, *a qua beneficium obtinet*, pro extraneis Advocatus vel Procurator esse præsumat," &c. Ibid, c. 3, A.D. 1230.

There is a further decretal forbidding the clergy to take any part in trials involving capital punishment, upon the ground that they are ministers of Him who "willeth not the *death* of a sinner, but rather that he should turn from his wickedness and *live*."—Council of Oxford, c. 8, Hen. III. A.D. 1222.

But this only shows that so strong is the sense ever entertained by the Church Catholic against the shedding of blood, it has thought fit to forbid its advocate to take part in trials involving capital punishment. All these Legentine decretals do but create exceptions. The rule of Clerical Advocacy is admitted by them, and the very exception proves the rule. And whatever might have been their weight of authority when first enacted, Lord Stowell said, in *Burgess* v. *Burgess*, 1 Hag. Con. 393,—"The older Canons can hardly be considered as carrying with them all their *first authority*." We submit then, that by acting as an advocate a clergyman does not, in an ecclesiastical sense, "voluntarily relinquish the office of a deacon or minister, or use himself in the course of his life as a layman." In other words, he does not do that which is inconsistent with his position as a clergyman. He takes a part in the administration of justice, which is an attribute of the Deity itself. We can easily understand how those sustained by clerical stipends or benefices might well be required to devote their whole time, with the exceptions allowed as above, to the still higher and the multifarious duties of their sacred calling; but beyond this we see no prohibition. In the debate in the Lords, in Horne Tooke's case, the Bishop of Rochester acknowledged that clergymen, by having seats in the House of Commons, would not be necessarily relinquishing their clerical calling and conducting themselves as laymen. His lordship said, "He could by no means subscribe to that despicable puritanical maxim, that a clergyman ought never to exercise himself but in the immediate duties of his calling." It cannot be denied that the clergy in the Middle Ages acted as advocates in the temporal or secular courts. The adoption of the coif, now represented by the small linen frill, surmounted by the black patch or cap on the Serjeants' and Common Law Judges' wigs, originated in a desire to hide the clerical tonsure. The decretals before referred to were the cause of the adoption of the coif by those *Beneficed* clergy who still persisted in acting as advocates, but yet would not appear to do open violence to the law of the Church.

Upon these considerations, we can come to no other conclusion than that there is no statute or common law rendering an *unbeneficed* or *unlicensed* clergyman, or one unauthorized and unoccupied in the performance of any ecclesiastical office, ineligible to be called to the Bar; and even if there be any ecclesiastical law prohibiting such from acting as Advocates, upon the ground that they are thereby "using themselves in the course of their lives as laymen," we have seen that the penalty of excommunication carries with it no civil disability cognizable by the temporal Courts. The punishment of imprisonment is not in the nature of a civil disability, and in practice is now never pronounced.

The ineligibility of the clergy to sit in the House of Commons (for this restriction does not extend to the House of Lords, in which there are at the present moment many clergymen besides the Bishops) was established, as we have seen, by an arbitrary law directed against a particular individual, and passed little more than fifty years ago; and the supposed ineligibility of clergymen to be called to the Bar rests upon no better foundation than an equally arbitrary decision of the Inns of Court directed against the same individual.

We desire to be understood as contending for the rights of those clergymen alone who have virtually renounced, or who have disclaimed all ecclesiastical duty. How far the laws relating to the beneficed and licensed clergy may affect those who enjoy their protection we have not, in the present instance, attempted to inquire.

* In all the Canonical Constitutions received into the realm of England, there is a "saving of the privileges of our Lord the King," which saving (Mr. Johnson says) entirely defeats the constitution. And in some of the constitutions there is a saving for such causes as are allowed by law.

U. C. REPORTS.

COMMON PLEAS.

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

PROUDFOOT v. BUSH.

Taxes—Sale of land for—Redemption—Expiration of the twelve calendar months Held, that the statute allowing twelve calendar months for the redemption of land gives the whole of the day in the subsequent year upon which the sale takes place. When a sale took place upon the 7th of October, 1840, and the money was not paid to redeem until the 8th of October, 1841, *held*, that it was too late. (C. P., H. T., 25 Vic., 1862.)

Ejectment for thirty-nine acres of lot No. 22, 4th concession of Reach. The plaintiff claimed under a sheriff's sale for taxes. The defendant claimed under conveyances deducing title from the grantee of the Crown.

A *prima facie* case entitling the plaintiff to recover as vendee of the sheriff for taxes in arrear was admitted.

The defence was a redemption of the land within the proper time by payment of the necessary sum to the proper treasurer. It appeared that the sale for taxes was made on the 7th day of October, 1840, and the sheriff executed the deed under which the plaintiff claimed on the 8th day of October, 1841. On that day the redemption money was paid to the treasurer and the only question was whether it was in time. The learned judge (Richards, J.) at the trial ruled it was not, and a verdict by his direction was entered for the plaintiff, with leave to the defendant to move to enter a verdict for him if this court should adopt a contrary view.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* to enter a verdict for the defendant on the leave reserved.

In the following term *Spencer* showed cause. He referred to the statutes of Upper Canada, 6 Geo. 4. ch. 7, sec. 17 & 18, Consol. Stats. U. C., ch. 55, sec. 148; *Boulton* v. *Ruttan*, 2 old series, U. C. Rep. 362; *Cooke* v. *Shell*, 5 T. R. 255; *Young* v. *Higgon*, 6 M. & W. 49. *Draper* C. J., referred to *Robinson* v. *Waddington*, 13 Q. B. 753.

M. C. Cameron, contra, cited *Lester* v. *Garland*, 15 Ves. 248; *Webb* v. *Fairmaner*, 3 M. & W. 473; *Cameron* v. *Cameron* 2 U. C. Prac. Rep. 259.

DRAPER, C. J.—The 17th section of the stat. of Upper Canada, 6 Geo. 4, ch. 7, enacts (after some provisions respecting a sale of land for taxes,) that if *within* twelve calendar months from the time of such sale the proprietor of the lot or any one on his behalf shall pay to the treasurer of the district the amount levied by sale of a portion of the same and the expense of such levy together with twenty per cent. in addition to the same, then he shall be entitled to resume possession of the land so sold: and by sec. 18, if *at* the expiration of twelve calendar months from the time of such sale the land so sold shall not be redeemed as aforesaid, then the sheriff for the time being shall, on demand, &c., execute a conveyance in fee simple, &c.

The sale being on the 7th October, 1840, that day must according to the authorities be excluded from the computation of the 12 calendar months *within* which the land might be redeemed. The right of redemption included the whole of the 7th October, of the following year, but unless there can be two eighth days of October within twelve consecutive calendar months, it could not extend beyond the 7th October, 1841. The defendant, or those under whom he claims, had that day on which to redeem—it was *within* twelve calendar months from the time of sale. At the expiration of the twelve calendar months, *i. e.*, at the end of the 7th October, 1841, the right to redeem was gone. Mr. Cameron indeed offered some speculations as to the phrase "twelve calendar months," to the effect that calendar months were not all of the same length, and that the legislature may have meant months of the same number of days as that in the month in which the sale took place, and as this was in October there should be twelve months each of 31 days allowed for redemption, but he cited no authority to lend colour to such a proposition, and urged no other argument than the trite suggestion of leaning against a forfeiture. It would require very heavy leaning not to read "within twelve calendar months," as equivalent to "within twelve consecutive calendar month." The fallacy is too plain to require serious refutation.

I think the plaintiff is entitled to judgment, and that the rule should be discharged with costs.

Per cur.—Rule discharged.

WARD v. THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

Registrar—Offices and vaults for—Duty of county council to provide—Remedy for not so doing—Consol. Stat. U. C., ch. 89.

Consol. Stat. U. C., ch. 89. makes it the duty of the county council to erect fire-proof offices and vaults for the registrar of the county. The defendants having neglected so to do, and the plaintiff, the registrar of the county, having furnished the requisite vaults and offices, sued the county council for the rent of the same On motion for new trial

Held, that the plaintiff was not entitled to provide the requisite offices, &c., and to charge the defendants with the rental thereof, his remedy was to compel the council by the aid of the court to furnish such offices, &c.

(C. P., H. T., 25 Vic., 1862.)

Declaration for money payable by the defendants to the plaintiff for the defendants' use by the plaintiff's permission of offices, vaults, and rooms of the plaintiff, for money paid, interest, and on account stated.

Pleas, never indebted, and Statute of Limitations.

The case was tried at Cobourg, before Richards, J. The plaintiff put in a commission appointing him to be registrar of Durham, dated 10th April, 1847, and a commission appointing him registrar of the East Riding of the county of Durham, dated 2nd December, 1859. He proved that he had provided an office at his own expense for conducting the business of the county registrar under these two commissions, at a rate of £30 per annum.

A verdict was rendered for the plaintiff with leave reserved to the defendants to move to enter a nonsuit.

In Michaelmas Term, *Galt*, Q. C., obtained a rule *nisi* accordingly.

He contended that no implied contract could arise under the registry act; that the defendants never occupied the registry office, nor was the registrar, though a county officer, an officer of the corporation, any more than the sheriff, the clerk of the peace, or even the county judge. The duty of providing a fire-proof office and vault imposed on them, does not give the registrar a right to maintain this action.

In the following term, *J. H. Cameron*, Q. C., showed cause, and argued that the duty imposed on the county council by the statute, impliedly gave the registrar a right to maintain this action.

DRAPER, C. J.—The sections of the Consol. Stat. U. C., ch 89, referred to on the argument, are the following: Sec. 8 For the safe keeping of all books, records, and other papers belonging to the office of registrar, the council in each and every county shall provide at the expense of the county, not exceeding $1,000, ($1,500 by 24 Vic., ch. 42,) safe and proper fire-proof offices and vaults, at the place where the registry office is to be kept, and the registry office shall from *thenceforth* be kept there. Sec. 66. If any registrar does not keep his office in the place appointed in his commission or by proclamation, or "not having a fire-proof office and vaults, neglects or refuses to remove to the office provided for him by the county council, &c., &c. Secs. 68 & 69 make it the duty of the treasurer of the county to provide a proper registry book for each township, city, and town, and on his neglect to do so within thirty days after the application of the registrar therefor, the registrar may provide the same and recover the cost thereof from the municipality of the county.

Looking back at the Stat. 9 Vic., ch. 34, which is consolidated in ch. 89, above referred to, and at the older registry acts, I have no doubt that the provision for the construction of fire-proof offices and vaults was designed for the protection and advantage of those whose muniments of title were to a greater or less extent dependent on the books, records, and other papers kept in the registrar's office, and not for the emolument and benefit of the registrar himself.

The form of the provision in the 19th sec. of 9th Vic, confirms this conclusion. It is "that safe and proper fire-proof offices and vaults shall be provided within eighteen months after the passing of this act in each and every county of the province for the keeping of all books, records, and other papers belonging to the office of registrar, and in case the registrar of any county *shall neglect* to provide such office and vault within the period aforesaid, the district council shall fix upon the most convenient and eligible site for such office within the county, and cause a proper and sufficient office to be provided at the expense of the district," &c, and then if the registrar not having a fire-proof office and vaults shall neglect or refuse to remove to that provided for him he shall be liable to removal.

Before this act (9th Vic.) the registrars had, without exception, provided offices at their own expense.

The Consolidated Act has so far changed these provisions as to make it the absolute duty (instead of its being contingent on the neglect of the registrar) of the county councils to erect such offices, &c., but it still leaves it optional with the registrar, and if he has a fire-proof office and vault he may keep the registry books and papers there, and is not obliged to remove at the will of the county council. But I see no provision obliging the county council to pay him rent. He may with the aid of the courts enforce them to do what the act directs, provide an office, &c., for him at a place of their selection, and having done so must occupy it, for

he will have made his election, but it is another thing for him to provide an office for himself and charge them as using and occupying it with a *quantum vitebat*. They are only permitted to expend $1500 on the office. The charge for rental in the present case far exceeds the rate of interest on that sum which the court can allow and it is only during the last year that more than $1,000 could be expended for this purpose.

I think the rule must be made absolute.

Per cur.—Rule absolute.

Scoble v. Henson.

Covenant—Chattel mortgage given without consideration to defraud creditors—Not void between the covenantor and covenantee.

Declaration on a covenant made by the defendant to the plaintiff whereby he covenanted to pay the plaintiff £37 10s and interest.

Defendant pleaded that the covenant was contained in a chattel mortgage made by him at the plaintiff's request, and to hinder, defeat and defraud his creditors, and without consideration. Upon demurrer, *held*, that a covenant executed as above is only void as against third parties, and not between the parties to it, and that the plaintiff, therefore, was entitled to judgment.

(H. T., 25 Vic., 1862.)

Third count.—For that the defendant by deed bearing date the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, covenanted to pay the plaintiff the sum of thirty-seven pounds ten shillings, with legal interest for the same from the date of the said deed, on or before twelve months from the date of the said deed, but hath not paid the same or any part thereof, or the interest or any part thereof.

And the defendant, for a plea on equitable grounds to the third count of the plaintiff's declaration says:

That the deed in the said count mentioned is a chattel mortgage, which was executed by the defendant to the plaintiff, at the desire, instance, and request of the plaintiff, and to hinder, delay, and defraud the creditors of the said defendant, and without any consideration for the making thereof, whereby the said defendant mortgaged and conveyed the said goods and chattels in the said deed mentioned to the plaintiff, who then accepted the same with intent to hinder, delay, and defraud the creditors of the said defendant from recovering their debts, and to protect the same from seizure by the creditors of the said defendant, and that the said deed was executed for no other purpose or consideration whatever, and that there is now nothing due thereon, and that the same was and is fraudulent and void.

To which plea the plaintiff demurred on the grounds,

1. That the defendant admitted the making of the deed in the said count mentioned, and did not avoid the same.

2. That the defendant was estopped by his deed from disputing the consideration alleged in the deed.

3. That the defendant did not shew that at the time he executed the deed to the plaintiff he (defendant) was a person in insolvent circumstances or unable to pay his debts in full, or one knowing himself to be on the eve of insolvency.

4. That if even the said deed was given under the circumstances stated by the defendant, the same would not be void as against the defendant, but only as against the creditors of the defendant.

5. That the said deed according to the declaration was executed on the twenty-fifth day of November, 1857, and the statute upon which the defendant apparently relies did not come into force till 1859.

R. A. Harrison, for the demurrer, cited *Hawes* v. *Leader*, Cro. Jac 270; *Robinson* v. *McDonnell*, 2 B. & Ald 134; *Bessey* v. *Windham*, 6 Q. B. 166; *Doe Newman* v. *Rusham*, 17 Q. B. 123; *Huggins* v. *Pitt*, 4 Ex. 312; Broom's Legal Maxims, 648.

Douglas, contra, cited *Huggins* v. *Pitt*, 4 Ex. 312.

Draper, C. J.—The third count in the declaration stated that the defendant by deed dated 25th November, 1857, covenanted to pay the plaintiff £37 10s. with legal interest, within twelve months from the date of the deed. The defendant on equitable grounds pleads that the deed is a chattel mortgage, which was executed by the defendant to the plaintiff at the request of the plaintiff, and to hinder, delay, and defraud the creditors of the defendant, and without any consideration for the making thereof, whereby the defendant mortgaged the said goods and chattels in the deed mentioned to the plaintiff, who accepted the same with intent to hinder, delay, and defraud the creditors of the defendant from recovering their debts and to protect such goods, and that the deed was executed for no other purpose, and that there is nothing due thereon. The defendant does not pretend that he was induced to enter into the covenant or to execute the deed which contains it, by any fraud practised on himself; his position, on his own shewing, is that of a party combining with another to defraud his creditors, and in that respect he brings himself within the language of Lord Mansfield, in *Montefiori* v. *Montefiori*, 1 W. Bl. 361: "no man shall set up his own iniquity as a defence any more than as a cause of action." This principle is also recognized in equity, and in *Watts* v. *Brooks*, 3 Ves. 612, the Lord Chancellor says: "A man cannot set up an illegal act of his own in order to avoid his own deed." It may be observed however, that in the latter case the court was only asked to decree an account of transactions which had taken place contrary to the provisions of an Act of Parliament, and not to enforce the contract out of which those transactions arose; and in *Montefiore* v. *Montefiori*, a marriage had taken place upon the faith of the promissory note which the defendant gave to the plaintiff to make his actual fortune appear larger than it really was.

The case of *Hawes* v. *Leader*, Cro. Jac 270, cited by Mr. Harrison, appears to me, however, an express authority in the plaintiff's favour, and it is cited with approval by Holroyd, J., in *Doe* v. *Roberts*, 2 B. & A. 369. The ground of that decision is one which applies equally at law as in equity; that the defendant is not enabled by the statute of Eliz. ch. 5, to set up this defence, for that Act only makes the deed void against creditors, not against the party himself.

Judgment for plaintiff.

Barber v. Daniell.

Fi. fa., endorsement of, for larger amount than due—Damage thereby—Pleading malice—Allegation of.

Defendant being the attorney of several persons who registered a judgment against the plaintiff caused a writ of *fi. fa.* to be issued, endorsed to levy a much larger sum than actually remained due on the said judgment so recovered as aforesaid, the said judgment debtor (the now plaintiff) having paid a large sum on account thereof which he (the plaintiff herein) alleged the defendant herein well knew.

The second count in the declaration set out the above facts but did not shew that any damage resulted to the plaintiff by reason of such endorsement on said writ.

On demurrer, *held*, That the endorsement for a larger amount than was actually due was not *per se* an injury to the plaintiff if not being shewn that more goods were seized than was necessary to satisfy the amount actually due.

2nd. That the declaration should contain an allegation that the acts complained of were done maliciously and without reasonable and probable cause.

(H. T., 25 Vic. 1862.)

The declaration contained two counts, the second of which is demurred to. The statement of the plaintiff's cause of action is that certain persons recovered a judgment against him; that he paid a large part of the amount so recovered, leaving only a small sum due; that the defendant was attorney for the parties who recovered the judgment, and that well knowing the premises, he caused a *fi. fa.* on this judgment to be issued, and wrongfully caused it to be endorsed for the full amount recovered by the judgment, and wrongfully and injuriously delivered the same to the sheriff, and caused him to levy and seize the goods of the plaintiff, whereby the plaintiff was injured in his credit.

Demurrer, because the *fi. fa.* appears to have been rightly placed in the sheriff's hands, and it is not shewn that it was wrongfully proceeded on.

S. M. Jarvis, in support of the declaration, cited *Saxton* v. *Castle*, 6 A. & E. 652; *Leyland* v. *Tancred*, 10 Q. B. 664; *Reid* v. *Ball*, 15 U. C. Q. B. 568.

John Read, contra.

Draper, C. J.—I am of opinion that the count is not sufficient. The judgment was for as large a sum as the execution was issued for, and though part of it was paid, the endorsing for a larger sum than remained due after such payment, thus claiming more than was due, was not an injury *per se* to the plaintiff, and there is nothing to show that in making a seizure for the sum (whatever it was) which remained due, any more goods were seized than was necessary or reasonable to satisfy what was really due. But I think, moreover, that the declaration should have contained a statement as in *Reid* v. *Ball*, 15 U. C. Q. B. 568, that the acts complained of were done maliciously and without reasonable or

probable cause. The case of *Saxton* v. *Castle*, 6 A. & E. 662, confirms this view, and so also does *Tancred* v. *Leyland*, 16 Q. B. 669. There is no sale averred to have taken place, nor has any special damage been alleged to have resulted from the seizure; and as Lord Campbell says in *Churchill* v. *Siggers*, 3 E. & B 937, "The creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due on the judgment."

Per cur.—Judgment for defendant.

BUCHANAN v. THE TOWN OF GALT.

Highway—Levelling thereof—Damage done by—Corporation—Liability of for.

The plaintiff claimed damages from the defendants for a breach of duty in allowing and permitting dirt and rubbish to be thrown or put upon a lane or public highway upon which his premises abutted. It appeared in evidence that the damage complained of was occasioned by the filling in and levelling a hollow in the lane, by means whereof the plaintiff's fence was pressed inwards, the filling in being done by private individuals throwing dirt and rubbish thereon

Held, 1st, that the levelling and filling in of streets by the defendants was a matter for their own discretion or judgment under the Consol Stat. of U. C ch 54 2nd, that the mere act of a wrong-doer in throwing rubbish upon a public highway and thereby causing injury to a private individual, was not a breach of duty for which the defendants would be liable.

(H. T, 25 Vic.)

Declaration stated that the plaintiff was the owner and occupier of a certain close in the town of Galt near to and abutting upon a certain lane or public way in the said town, and divided from the lane by a fence which had been erected by the plaintiff and was then standing, and the plaintiff being so possessed of the close and fence, it was the duty of the defendants to keep the said lane or public way in repair and not to permit the same to be encumbered by earth or rubbish so as to do damage to the said close or fence; yet the defendants permitted the said lane or public way to be and continue out of repair, and put and placed and allowed to be put and placed and continued large quantities of earth and rubbish on the said lane or public way, and upon and against the plaintiff's fence, whereby the said fence was broken down and large quantities of the earth and rubbish were thereby thrown in and upon the said close. *Ad damnum.*

Pleas. Not guilty. 2. Close and fence not the plaintiff's.

The trial took place at Berlin before Burns, J. The plaintiff proved that for a year then past he had been in possession of the close mentioned in the declaration, and his garden bounded the lane on the south; that the lane was originally a low piece to ground in the middle, but the defendants filled up to level the same, and now the level of the plaintiff's garden was three feet lower than the level of the land; as a mere way or road it appeared to be in good condition. One Andrews laid out the lane originally, being then proprietor of the land now in the plaintiff's possession. The filling up was done five or six years before the trial. Rubbish of different kinds had been thrown in there by various persons. By the pressure thus occasioned the plaintiff's fence had been forced inwards over his own lands, and some of the earth and rubbish had found its way into his garden. Particular evidence was given of the nature and extent of the damage

For the defence it was objected that the action would not lie; that the lane was bought and laid out by individuals, and it was not shewn that the defendants had by by-law assumed it, wherefore the duty stated in the declaration was not proved.

That there was no evidence that the lane was out of repair, nor was it proved that the corporation had filled up this lane so as to cause the damage complained of, which seemed rather to result from the acts of private individuals who had deposited rubbish there; and it further appeared that if any wrong was done it was before the plaintiff came into possession; that there was no duty shewn that the defendants should provide support for the fence.

The learned judge directed that there was evidence to support the plaintiff's case, and overruled the objections.

The jury found for the plaintiff—damages 1s.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection in ruling that the plaintiff was entitled to recover, notwithstanding it was not shewn that the defendants had committed any act upon the lane or way, nor that the defendants had assumed it by any by-law, nor that it was opened by by-law, and though it appeared had it been opened by private individuals; and though it appeared that the lane for the purposes of a public way was in repair, and the injury resulted from negligence of construction and not from want of repair, and though it appeared the lane was in the condition it was at the commencement of the suit before and at the time the plaintiff's title accrued, and therefore the action could not be maintained by him. Also, for directing that the plaintiff gave sufficient evidence of title.

In Hilary Term, *J. H. Cameron, Q. C.*, shewed cause. He cited *Lowen* v. *Kaye* 4 B. & C. 3; *Rex* v. *Hatfield*, 4 B. & A. 75; *Peyton* v. *Mayor*, &c., of London, 9 B & C. 725; *Alston* v *Scales*, 9 Bing. 3; *Partridge* v. *Scott*, 3 M. & W. 220; *Jones* v. *Bird*, 5 B. & A. 837. See also *Roberts* v. *Read*, 16 Ea. 215; Mayor of Lyme *Regis* v. *Henley*, 1 Bing. N. C. 222.

M. C. Cameron supported the rule.

DRAPER, C. J.—The duty of the defendants as it is stated in the declaration, appears to be considered to arise from the fact that there was a lane or public way within the limits of the town of Galt, on which lane the plaintiff's close and fence abutted, and the duty itself is alleged to be to keep the lane in repair and *not permit it to be encumbered* so as to do damage to the plaintiff's close and fence, and the breach charges 1st, permitting the lane to be and continue out of repair, and 2nd, placing, and allowing to be placed, large quantities of earth and rubbish upon the lane and against the plaintiff's fence.

The plea of not guilty admits that there was a lane or public way. Whether the alleged duty arises on the facts pleaded is a question of law, but the breach of the duty is put in issue by this plea.

Then, first, was it the defendants' duty not to raise the bed or surface of this lane, so as to fill up a hollow in the centre part of it. So far from this being the case, it was a matter clearly within their lawful authority, and *quoad* its necessity or propriety, the Consol. Stats. U. C., ch. 54, sec. 331, vests the discretion in them.

They would be doubtless liable if they exercised the powers conferred on them maliciously or even negligently; but to the extent of raising the road, and for that purpose placing large quantities of earth, rubbish, &c., thereupon, there was no duty to abstain; they had rather a duty the other way, for they were entrusted with powers to make, improve, alter, &c., roads and streets within the town. So far as the evidence applied only to the placing earth, &c., for this purpose, I fail to perceive any breach of duty on their part.

Neither in my opinion does the evidence shew that this public way was out of repair—using those words in their ordinary and well understood sense—nor that the injury of which the plaintiff complains arises from a want of such repair.

The evidence shews that various persons from time to time have thrown rubbish in this lane since the filling up first spoken of, but it is not proved that they did so either under the direction or even with the permission of the defendants, nor that this has been done so as to create a nuisance or obstruction to the general and public use of the way. It is complained of as causing a private injury contrary to a duty as is charged incumbent on the defendants not to permit this lane to be encumbered by earth or rubbish so as to cause damage to the plaintiff. (See *Metcalfe* v. *Hetherington*, 11 Exch. 257.) But I do not perceive that this duty arises from the premises stated in the declaration, that is, that if a mere wrong-doer throws a load of rubbish on any part of a public highway to the private and particular injury of an individual, the corporation charged with the repair of such highway have thereby committed a breach of duty, and are liable to make compensation.

The case involves several enquiries. Was the lane a public highway which the defendants were bound to keep in repair; Was it out of repair as a public way, and if so, was that want of repair the cause of the injury of which the plaintiff complains? If so the plaintiff would be entitled to recover for his particular damage, while the defendants would also be indictable for the non-repair; but if not, was the lane incumbered by earth and rubbish so as to cause particular injury to the plaintiff? If so, was such earth and rubbish placed there by the defendants or by their permission and under their authority, or was it placed there by mere wrong-doers?

The first of these questions is not in issue, but all the others may be raised on not guilty, and as it does not appear to me the jury have determined any of them, or have been asked to decide upon them in such a way as properly to determine the liability of the defendants, I think there should be a new trial. It will be for the plaintiff to consider whether on this declaration he can recover for such injuries as the evidence shews, which if the defendants are liable at all, must rest rather on the ground of negligence than on the breach of any such duty as the declaration charges.

Per cur.—Rule absolute without costs.

CURTIS v. THE GRAND TRUNK RAILWAY CO.

Railway—Passenger—Ticket—Conductor—Liability of company for acts of.

The plaintiff while travelling between St. M & L. mislaid, and being called upon to produce could not find, his ticket, the conductor after waiting some time stopped the train and turned him off he offering to pay, but the conductor refusing to take his fare. Upon an action brought against the railway company and $300 damages awarded.

Held, that the defendants were responsible for the acts of the officer, duly authorised and styled under the statute "conductor," when not committed in excess of his authority derived from them, and although the damages were considerable, it being the second verdict obtained by the plaintiff, the court would not on that ground disturb the verdict.

(H T, 25 Vic.)

TRESPASS—assaulting the plaintiff and forcibly expelling him from a railway car.

Plea. Not guilty, and that the plaintiff refused to pay his fare, and improperly conducted himself.

The trial took place at London, before Sir J. B Robinson, C J The evidence shewed that the plaintiff dealt in grain, wool, sheepskins, &c.; that on Saturday, 4th August, 1860, he left St Mary's on the defendant's train going towards London. A witness named Cousins saw the plaintiff on the platform at St. Mary's, and saw a ticket in his possession. A similar ticket was produced at the trial by the plaintiff, marked "Stratford to London, 4th August, 1860." This witness was a passenger, and said there were about ten passengers in the car. After the train left St. Marys, the conductor as is usual asked the passengers to shew their tickets. The plaintiff felt for his and did not find it. The conductor passed him and soon returned, while in the meantime the plaintiff had pulled a great many things out of his pockets, without finding his ticket. Some of the passengers were laughing at the collection of stuff the plaintiff pulled out, samples of wool, papers, &c., and the conductor apparently thought they were laughing at him. The plaintiff told the conductor that Cousins knew he had a ticket, and the conductor asked Cousins if he had the plaintiff's ticket. He answered, no; but he knew the plaintiff had a ticket. The conductor got angry, pulled a rope and rang a bell and four or five men came in. Cousins told them not to put the plaintiff out as he had a ticket. The plaintiff at first said "give me time, and if I cant find a ticket I'll pay you," and he repeated this. He then gathered up some of his papers, leaving some on the seat, and resisted them, cathing hold of the seat, but the train being stopped or nearly so, they put him out about half way between St. Mary's and Thorndale, about 2 or 3 o'clock in the afternoon. There was no other train going to London until the following Monday morning. Cousins described the plaintiff as a man very slow in his movements, or as he expressed it, in doing business, and very peculiar in his manner, and said he thought the conductor was perfectly convinced the plaintiff had no ticket and was a kind of loafer worth nothing. The conductor was not acquainted with Cousins as far as appeared. Another witness stated that after the conductor had asked for passengers' tickets, the plaintiff, who had been feeling for his, pulled out papers and other things from his pockets. The conductor helped him to search, and then left him for a short time. The plaintiff continued pulling out papers, letters, newspapers and pieces of wool, till the conductor returned. This witness laughed heartily at the conductor and the oddity of the thing. There was a good deal of laughing and jeering, and the conductor got vexed, apparently thinking the laughter was at him and he asked the plaintiff to shew a ticket or pay his fare, and then rang the bell violently and broke the string, and swore. Several men came in and took the plaintiff by the collar to put him off. The plaintiff held on, saying, "I'll pay you." Some said "Out with him" The papers, &c, were still on the seat and after the plaintiff was put out the conductor threw two hands ful through the window, when the car was moving, and said he would teach him to have his ticket ready, that he would take nobody's money after he had rung the bell. This witness said he thought the plaintiff a little tipsy, but he used no offensive language, and he said he thought the proceeding "hard," and asked the conductor his name that he might report him. Another witness proved that the plaintiff came to his house near Thorndale, apparently very hot and tired that afternoon, and remained all night, and on the following morning went off on foot to London. The plaintiff shewed this witness a ticket from "Stratford to London," telling how he had been put off the train. The plaintiff had a good deal of money in his possession.

A nonsuit was moved for because it was not shewn that the defendants had not ratified what their conductor did, on which the learned Chief Justice gave the defendants leave to move, and because the conductor was justified under 13 and 14 Vic, ch. 51. The jury were directed that the plaintiff could not recover for any special damage, and that the defendants would not be liable for any wanton misconduct of their officer in committing some wrong which he could not suppose came within his sphere of duty—such as throwing out the plaintiff's papers it shewn to be of value—but (subject to the leave reserved) the defendants were otherwise liable for the acts of their servant.

The jury gave the plaintiff a verdict for $300.

In Michaelmas Term, *Bell*, of Belleville, obtained a rule for nonsuit on the leave reserved, or for a new trial on the law and evidence and for excessive damages. He referred to the *Eastern Counties Railway Co.* v. *Broom*, in error, 6 Exch. 314; *Roe* v. *Berkenhead, &c., R. W. Co.*, 7 Exch. 36; *Duke* v. *Great Western R. Co.*, 14 U C., Q B., 369, 377; *Fulton* v. *Grand Trunk R. Co.*, 17 U. C., Q. B., 429.

M. C. Cameron shewed cause, referring to the Consol. Stats. Canada, ch. 66, sec. 106; *Childs* v. *The Great Western Railway Co.*, 6 C. P., U. C., 284; *Maund* v. *The Monmouthshire Canal Co.*, 4 M. & Gr. 452. On the point of excessive damages he referred to *Merest* v. *Harvey*, 5 Taunt. 442.

Bell supported the rule.

DRAPER, C. J.—As to the motion for a new trial, the courts very rarely grant a new trial after two concurring verdicts, though there are cases, such as *Gibson* v. *Muskett*, 4 M. & Gr. 160, where the question being substantially a point of law, a third trial has been granted. I may refer also to the well known case of *Kirby* v. *Lewis*, 1 U. C., Q. B., 285, in our own Queen's Bench reports; but upon the ground of excessive damages, the court, in *Chambers* v. *Robinson*, Str. 692, granted a new trial in an action for malicious prosecution where a verdict was given for £1000, saying it was but reasonable he should try another jury before he was finally charged with that sum. But when a second jury gave the same damages, the court said it was not in their power to grant a third trial, referring to *Clerk* v. *Udall*, Salk. 649. The Court of Common Pleas, however, in *Beardmore* v. *Carrington*, 2 Wils. 249, condemned the giving a new trial on the first application in *Chambers* v. *Robinson*, saying that the reason given was a very bad one, for if it was not it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots, and they add that this case is not law, and that there is not one single case that is law, in all the books to be found where the court has granted a new trial for excessive damages in actions for tort. The principle of this opinion would not be asserted at this day. See *Hewlett* v. *Crutchley*, 5 Taunt. 277. I think the rule for a new trial cannot be made absolute. Then as to the motion for nonsuit, it may be considered in two regards, 1st, as to authority previously given to the conductor by the defendants; 2nd, as to any subsequent ratification.

It would seem almost wholly to have escaped the notice of the plaintiff's counsel, that on the issue of not guilty, such a question as the liability of the defendants, the Grand Trunk Railway Company, for an assault on the plaintiff committed by a third person, could arise. It seems to have been assumed that the railroad and the train and cars belonged to the defendants, and that the conductor was one of their officers and in their employ. No proof was attempted to be given of what instructions the conductor was

guided by, or whether he had received any, or from whom. All that seems to have been referred to was the Railway Clauses Consolidation Act, 14 & 15 Vic. ch. 51, sec. 21, sub-sec 6, "Passengers refusing to pay their fare, may, by the conductor of the train and the servants of the company be, with their baggage, put out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect, first stopping the train," or as expressed in the Consol. Stats. of Canada, ch. 66, 106: "Any passenger, refusing to pay his fare, and his baggage, may, by the conductor of the train and the servants of the company, be put out of the cars at any usual stopping place or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force."

I suppose that a man who produced no ticket but asserted he had paid the fare and had lost his ticket, and therefore declined to pay again, would, though a bystander corroborated his assertion of having had a ticket, be deemed a passenger refusing to pay his fare. "It may seem hard," as is said by the learned Chief Justice in *Duke* v. *Great Western Railway Co.*, 14 U. C., Q B., 384, to a man who has lost his ticket, or perhaps had it stolen from him, that he should have to pay his fare a second time, but it is better and more reasonable that a passenger should now and then have to suffer the consequences of his own want of care, than that a system should be rendered impracticable which seems necessary to the transacting of this important branch of business," and this opinion justifies the conductor in the present case in putting to the plaintiff the alternative of producing a ticket or paying the fare, and as the act incorporating the Grand Trunk Railway Company, as well as that relating to the branch from Stratford to London, are public acts, we may assume, especially in the absence of any intimation that there is another company having a railway between these latter points, that the railway train and cars spoken of at the trial were those of the defendants.

As to the question of previous authority, the law is well summed up in the able judgment of Blackburn, J., in *Goff* v. *The Great Northern Railway Co.*, 7 Jur. N. S 286. The question was as to the liability of that company for the acts of an officer under the English statute, 8 & 9 Vic., ch. 20, by which a penalty was imposed on any person travelling on the railway without having paid his fare with intent to avoid payment thereof, and power was given to all officers and servants on behalf of the company to apprehend such person until he could conveniently be taken before a justice. The learned judge observes: "In the ordinary course of affairs, the company must decide whether they will submit to what they believe to be imposition, or use this summary power for their protection, and as from the nature of the case, the decision, whether a particular message shall be arrested or not, must be made without delay, and as the case may be not of unfrequent occurrence, we think it a reasonable inference that for the conduct of their business the company have on the spot officers with authority to determine without the delay attending on the convening the directors whether the servants of the company shall or shall not on its behalf apprehend a person accused of this offence. We think the company would have a right to blame those officers if they did not on their behalf apprehend the person if it seemed a fit case, and if so the company must be answerable, if, in the exercise of their discretion, those officers on their behalf apprehended an innocent person."

Mutatis mutandis, this applies precisely to the case, and leaves only the question whether the "conductor," whose name is not once mentioned in the evidence, was an officer having such authority from the defendants.

I assume as already stated, that the railway train and car were the defendants. The "conductor" *eo nomine*, is recognized in our statute, and the power to put out is given to him and the servants of the company. He acted as the person having that authority, and was obeyed by others who came to his aid and at his call as their superior. I think this was evidence enough to go to the jury that he was the defendants' officer, and indeed at the trial the objection more raised the question of the liability of the defendants for the act of the conductor, than insinuated a doubt that he was their officer.

As to the question of subsequent ratification, there was, in my opinion, no evidence of it; but in the result at which I have arrived as to the previous authority, this becomes unimportant.

I am not satisfied altogether with the result. I think, carefully considering the whole evidence, the jury might have found, if not that the plaintiff was in the wrong altogether, yet that under the circumstances he was only entitled to very moderate damages. I cannot but think that if a similar question could have arisen between two private persons standing in an equal position a very different verdict would have been given, and that it is a mistaken course, and one fraught with injurious consequences to the administration of pure justice, that large corporations should be heavily mulcted in damages upon the assumption of their ability to pay.

Notwithstanding this feeling, however, I feel no doubt that this rule should be discharged.

Per cur.—Rule discharged.

COMMON LAW CHAMBERS.

HELP v. LUCAS.

Certiorari to remove cause from a Division Court—Prohibition-grounds therefor

Where a certiorari is regularly issued for the removal of a cause from a Division Court after new trial granted, a previous alleged understanding between the parties that the cause should be tried in the Division Court is no ground for interfering with the writ of certiorari

(June 3, 1862.)

Jackson obtained a summons calling on the defendant to shew cause why the order made by the Honourable ARCHIBALD MCLEAN, then one of the Justices but now Chief Justice of the Queen's Bench, for a writ of certiorari to issue to remove this cause from the first Division Court for the County of Lambton into this Court should not be rescinded, and the writ of certiorari issued pursuant thereto and all proceedings had thereon should not be quashed or set aside, and why an order for a writ of procedendo should not be granted in this cause for proceeding with this cause in the Division Court on the grounds following:

1. That the order for the certiorari was applied for and the writ issued in breach of good faith.
2. That the order was granted in ignorance of the facts.
3. That the cause was a fit and proper one to be disposed of in the Division Court
4. On grounds disclosed in affidavits and papers filed.

And why such order should not be made as to costs as to the presiding Judge should seem meet.

Or why such other order should not be made under the circumstances of the case as to presiding Judge should seem fit on grounds aforesaid.

The order for certiorari was issued on 18th January last upon an affidavit of defendant. He stated that on 22nd November, 1861, he was served with a summons issued out of the first Division Court for the County of Lambton, claiming $100 as the price of a horse sold by plaintiff to him, that sometime in May, 1861, plaintiff offered to sell him a horse, which he declined to purchase for cash—that plaintiff agreed to take two promissory notes made by one Richard Eady in favour of defendant, together amounting to $120, as and for the price of the horse, plaintiff giving his due bill to defendant for $20, being the difference between the price agreed upon for the price of the horse and the amount of the notes—that the case was tried at the sittings of the Division Court in Sarnia on 3rd December, 1861, before a jury, when a verdict was given in favour of plaintiff for $100, the plaintiff having been called as a witness on his own behalf and being the only witness on his behalf—that the verdict was on 8th December, 1861, set aside and a new trial granted on condition that he should within ten days from that date deposit the amount of the judgment with the Clerk of the Division Court or give security to his satisfaction for the payment of the same, both parties to be at liberty to give evidence and the trial to be by jury—that he did within ten days give the requisite security—that he had a good defence on the merits and was advised that difficult questions of law would arise on the trial.

Plaintiff in moving to set aside the order for the certiorari filed a certificate from the Division Court Judge to the effect that he had granted a new trial with the intention and with the understanding between the attorneys for plaintiff and defendant that

the cause should be again tried in the Division Court by a jury, and that both parties should be sworn in the cause—that had it not been for the understanding aforesaid he would not have granted a new trial in the cause.

Affidavits were filed in support of and in contradiction of the alleged understanding.

R. A. Harrison showed cause. He objected to the reception of a certificate from the Judge as not being evidence in the cause, but even if admissible contended that defendant at the time of his application had a right to move for a certiorari and that the cause was a proper one to be removed.

Jackson in support of the summons.

HAGARTY, J.—It is not for me to revise the decision of McLEAN, C. J., as to whether or not this was a proper case for removal by certiorari. I must, however, say that I quite coincide with him in thinking that it was a proper case for removal. Plaintiff had a right to make application for its removal notwithstanding the alleged understanding between the parties. No such understanding is in my opinion a sufficient cause for interfering with a writ of certiorari regularly issued. I must discharge the summons with costs.

Summons discharged with costs.

IN RE LEMON & PETERSON, TWO, &c.

Attorney's Bill for Conveyancing—Reference to Taxation

Held that there is no power in Upper Canada, either at Common Law, or by Statute, to refer an Attorney's bill for conveyancing only to taxation. *Contra*, where the bill is either wholly or in part for business done in Court.

(June 16, 1862)

John Read obtained a summons calling on Messrs. Lemon & Peterson, two Attorneys of this Court, to shew cause why their bill, delivered to Dr. Wm. Clark, should not be referred to the master of the Court of Queen's Bench, to be taxed, &c. (in the usual form).

The bill delivered was in the following form:—

"HENRY P. THOMPSON & DR. WM. CLARKE,

1861. *In acct. with* LEMON & PETERSON.

May.	Att'g parties on long interview respecting exchange of properties in Town of Guelph	£0	10 0
	Att'g & Ex'g 8 Deeds & Plans of Lots, Ferguson's Survey, 2s. 6d.; Att'g & Examining Deeds & Plans of Lots, Kingsmill's Survey	0	2 6
	Att'g & Ex'g Deeds of Lot 950, 2s. 6d; Att'g & Ex'g Deeds of Lot 953, 5s.	0	7 6
	Mem. of Pars of same	0	5 0
	Drawing Special Agree't & Copy, Interview & settling terms of same	1	5 0
	Att'g to Ex. Mortg'e of Wright & others, Deeds & Papers, Mem. of Contents, & Advice as to effect of Sale	1	5 0
	Ins. for & Mem of pars. for Assign't of Mortg by Dr. Clarke to Thompson, 10s.; Special Assignment, 20s.	1	10 0
	Mem'l, 7s. 6d.; Att'g Ex'n, 2s. 6d; Aff't, 5s.; Ins. for Sale under Power of Sale, Wright's Mo 5s.	1	0 0
	Drawing Special Notice, 10s.; Comp'n of Am't due, 2s. 6d.; Copy of Notice, 5s	0	17 6
	Aff't, 5s; Letter with to Marcon, St. Catharines, 2s. 6d.; Postg. 9d.; Return signed, 2s. 6d.	0	10 9
	Postg. 1s; Letter of Ins with, and sending Sh'ff Hamilton for service, 5s.	0	6 0
	Postg. 9d; Att'g return, 2s. 6d.; Att'g peruse papers & Aff'ts, 2s. 6d.; P'd Sh'ff's fees, 4s. 9d.	0	10 6
	Postg. 1s.; Ins. for Special Deed, 10s.; Drawing & furnishing copy, 50s: Mem'l, special, 10s.	3	11 0
	Att'g Ex'n Deed, 2s. 6d.; Mem'l, 2s. 6d.; Aff't, 5s. Ins. for Deed, Thompson & Clarke, 5s.	0	15 0
	Drawing Deed, 25s., Mem'l, 7s. 6d.; Att'g Ex'n of Deed, 2s 6d.; Mem'l, 7s. 6d.	2	2 6
	Att'g Ex'n of Deed, 2s 6d.; Mem'l, 2s.6d.; Aff't, 5s. Ins. for Deed of Lots, Marcon to Clarke, 5s.; Dr'g Deed, 25s.	1	10 0
	Mem'l, 7s. 6d.; Att'g Ex'n of Deed, 2s. 6d.; Mem'l, 2s. 6d; Aff't, 5s; Ins. for Discharge Judg't Colenso & Marcon, 2s. 6d; Drawing, 5s.;	0	17 6
	Att'g Ex'n, 2s. 6d.; Aff't, 5s.	0	15 0
	Mem'l & Power of Att'y, Colenso to Lemon, 7s. 6d.; Att'g Execution, 2s 6d.	0	10 0
	Att'g to get Saunders to wit. Mem'l, 2s. 6d., Aff't, 5s.	0	7 6
	Att'g Reg'ry Office with, 2s. 6d; Paid 6s. 3d.	0	8 9
	Letter to Dr. Clarke that documents ready, 2s. 6d.; Bill, 5s.; 2 Copies, 5s.; Letters with, 5s.	0	17 6
		£20	9 6

"Payment is requested.

"LEMON & PETERSON,

"*Solicitors*,

"Guelph."

The application was made on an affidavit of Dr. Clarke verifying a copy of the bill as the bill delivered to him, stating that the same was being sued in the First Division Court of the County of Wellington, denying the retainer, and stating that he had been advised the whole of the charges contained in the bill were unreasonable and excessive.

R. A Harrison shewed cause. He argued—1. That at common law there was no jurisdiction to refer the bill (*Weymouth* v. *Knight*, 3 Bing. N. C. 387. 2. That in England there may be a reference under Eng. Stat. 6 & 7 Vic. c. 73, s. 37, of a bill for conveyancing. 3. That in Upper Canada, where the bill delivered contains some taxable items, the whole may be referred (*In re Jones*, 3 U C. L. J., 167, S. C., Ib. 207; *In re Eccles*. 5 Ib. 279, S. C. 6 Ib 59.) 4. But that where the bill delivered is wholly for conveyancing, and so containing no taxable items, that there is no power to refer. He distinguished the Eng Stat. 6 & 7 Vic cap. 73, s. 37, from our Con. Stat. U. C. cap. 35, ss. 27, 28. The former provides that "no Attorney or Solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for *any* business done, &c;" while the latter uses the words "for (omitting the word 'any') business done by any Attorney or Solicitor *as such*, &c." He argued that our Act does not apply to all business done by a person *being* an Attorney or Solicitor; but only to such business as done by him in his *character of an Attorney or Solicitor*, i. e, business in the Courts. He contended that this view is supported by a reference to s 28 of our Act, which provides only for taxation "by the proper officer of any of the Courts *in which any of the business, charged for in such bill, was done*," omitting a provision for taxation by the Lord Chancellor or Master of the Rolls contained in the corresponding section of the English Act, "in case no part of such business shall have been transacted in any Court of Law or Equity."

John Read, contra, argued—1. That the English Act and ours are substantially the same. 2. That the Attorneys having, as Attorneys, delivered their bill, they were estopped from contending that it is not such a bill as might be referred to taxation. 3. That the reference to taxation may be ordered to the proper officer in the Court of Chancery, He cited *Smith* v. *Davies*, 4 Ex. 40.

BURNS, J.—I think the distinction pointed out between our Act and the English Act is well founded. I have no power to refer this bill to taxation either at common law or under the statute. To what officer can I refer it? What right have I to send it to the Court of Chancery? The officer there might very properly refuse to tax it. I have no power to refer it to the Clerk of the Division Court for taxation; and clearly not to the taxing officer of either of the Superior Courts of Common Law, for no part of the business was done in either of these courts. There is no provision here, as in England, for the reference of bills where no part of the business charged is done in any court. I can find no authority for the reference of a purely conveyancing bill. Perhaps if no bill were delivered before action, that would, if properly raised, be a good defence to an action or suit on the bill; but that cannot give jurisdiction to refer the bill to taxation where the statute is silent on the point. All the cases cited were, that where the business charged for, either wholly or in part, was done in a court. I must discharge this summons—but as the point, so far as I can learn, is new in Upper Canada—without costs.

Summons discharged without costs.

CHANCERY.

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

MARTIN v. REID.

Specific Performance—Variation of Original Contract—Parol Evidence.

A. made a contract with B for the purchase of a lot of land, and both parties signed the contract. Some delay occurred in delivering an abstract, and A.'s Solicitors wrote to B.'s Solicitor, declining to complete the contract unless the abstract was delivered by a certain day. Subsequently, negociations were entered into by the parties for a variation of the terms of payment, and two propositions, in writing, but unsigned, were made by A. for B.'s acceptance. B. accepted one of them, and so informed A. or his Solicitor, but after a little time, on the advice of his (A.'s) Solicitor, declined to carry out the contract as varied, relying upon the former letters. Upon a bill filed by B.,

Held, 1st That the defendant could not rely upon the letters fixing a time for the delivery of the abstract, as by his subsequent dealing with the plaintiff he had waived his right to withdraw from the contract.

2nd That parol evidence could be admitted to connect the unsigned memorandum with the signed contract.

3rd That there was sufficient evidence to show that the proposition of the defendant had been accepted by the plaintiff.

In this case a contract dated the 12th March, 1857, had been made and signed between plaintiff, as vendor, and defendant, as purchaser, of a lot of land in the Township of North Gwillimbury for the sum of £1,250, payable by instalments. Defendant went into possession and made improvements. Various letters passed between the parties in reference to the terms of payment, the defendant asking for further time. The Solicitors of the defendant also commenced a correspondence with Mr. Miller, Solicitor for plaintiff in the transaction, requesting an abstract of title; and on the 18th March, 1859, wrote to plaintiff's Solicitor, stating that unless an abstract was delivered within three weeks from that date, the defendant would consider the contract at an end. A Registrar's certificate of title was furnished, and plaintiff and defendant continued to correspond about the contract and extension of the time for payment. On the 22nd of July, 1859, the defendant came to Toronto, and called upon the plaintiff's Solicitor, and requested him to put in writing the proposals he had to make as to extending the time; he then with plaintiff's Solicitor went to the office of his own Solicitor, who proposed an alteration in the terms and wrote out a proposal for leasing the premises, and also the following:—"The within agreement is this day confirmed between the parties in all respects, except as to the terms of payment of £750, the balance therein mentioned, which it is hereby agreed between the parties shall become due and payable in equal annual instalments of £100 each with interest—the first payment thereof to become due on the 1st January, A. D. 1861, which the within named John Martin hereby agrees to accept. In all other respects the within agreement stand."

This proposal was submitted to the plaintiff who accepted it, and during the following month the plaintiff's Solicitor verbally informed the defendant's Solicitor of the acceptance; and on the 29th September, 1859, plaintiff wrote to the defendant that he had accepted his proposal as to the extension of time. A few other letters passed between the parties, chiefly from plaintiff, requesting defendant to come to town and complete the negociation, but nothing was done until January, 1860, when defendant came to town and stated that he would leave the matter in the hands of his Solicitors; and they, on the 20th January, 1860, wrote to the plaintiff's Solicitor, withdrawing from the contract on the grounds set out in their letter of the 18th March, 1859. The following month the plaintiff filed his bill. After evidence had been taken, the cause was brought on for a hearing.

Hodgins, for plaintiff, cited Fry on Specific Performance, *Clark* v. *Moore*, 1 J. & L., *Dalton* v. *McBride*, 7 Gr. 293; *Ridgeway* v. *Horton*, 3 De. G. M. & G., and 6 H. of Lds. 238.

Freeland, for defendant, relied on letters of March and April, 1859, withdrawing from the contract.

THE CHANCELLOR (Vankoughnet)—In this case the terms of the original agreement are sufficiently specific, and they are only varied as to the terms of payment of the balance of £750 by the proposal of July, 1859, as stated in the memorandum prepared by the defendant's solicitors and handed to plaintiff's solicitor, and subsequently accepted by the plaintiff, and marked as Exhibit B in the cause. I consider that all that had taken place prior to July, 1859, was waived by the negociations at that time, and that defendant then agreed to carry out his original contract with the variation referred to.

This paper B. was in presence of the defendant handed by his solicitor to the plaintiff's solicitor with another paper containing an alternative proposition. I think paper B is with the evidence sufficiently identified as the paper referred to, and mentioned in the letter from the plaintiff to the defendant, of the 29th September, 1859, and therefore is taken out of the operation of the Statute of Frauds. It is quite true that it was contemplated that this memorandum should be formally endorsed on the original agreement and signed, and if it were necessary that this should be done to enforce the plaintiff's rights the court would compel it to be done. This being so, the court can without that formality proceed here to execute it. The only question on my mind is as to an ambiguity on the face of the paper B. in regard to the time from which interest should run. no objection on this score was made at the hearing, probably because it was well understood between the parties that interest was to be payable according to the original contract; and this I think is the fair construction of the paper, which fixing itself no time from which interest is to run, leaves it to be governed by the original agreement, which, except as to the extension of time for payment of the £750, is in all other respects confirmed. The plaintiff is to blame in not having exhibited and made out to the defendant a proper title, as by the original agreement he was bound to do, and his attention was called to it more than once by the defendant's solicitors and abstracts demanded. It is quite true that the defendant's agreement was at an end for default in plaintiff's solicitor not delivering a proper abstract in time; but this was before July, 1859, and after that time the plaintiff was as much bound as before to make out a good title. The memorandum delivered to the defendant's solicitors cannot be considered such an abstract or explanation of the title as must content defendant, who was not bound to hunt up the plaintiff's title deeds or search out the chain of title at the registry office from such imperfect information as the memorandum afforded.

Decree—Specific performance of original agreement as named by Exhibit B. Reference as to title. Reserve further directions and costs.

CHANCERY CHAMBERS.

Reported by A. GRANT, ESQ., *Barrister-at-Law, Reporter to the Court.*

MAUGHAN v. WILKES.

Attachment against a married woman.

A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption.

In this case an order to administer the estate of the late Walter Ewing Buchan had been obtained and carried into the master's office. In proceeding to take the account, the master had issued his warrants requiring the defendants, one of whom was a married woman, to bring certain accounts relating to the estate into his office, which having been disobeyed by her a motion was made by *Freeland*, for an order to commit for contempt.

SPRAGGE, V. C.—This is an application for an order for the commitment of the defendant Anne Wilkes, a married woman, for contempt, for not bringing into the master's office certain accounts directed by the master to be carried into his office, she having, as his certificate states, been duly required so to do. Anne Wilkes is made defendant as administratrix of the estate of Walter Ewing Buchan, deceased; her husband is made a co-defendant.

Upon the application being made, I stated that it was my impression that the application could not be granted, and on a subsequent day I was referred to two cases in support of the application. One of them, *Bunyan* v. *Mortimer*, (6 Mad. 278,) only decides that an attachment cannot issue against a married woman for not answering, without a previous order that she should answer separately from her husband. In the other case, *Otwey* v. *Wing*, and *Wing* v. *Otway*, (12 Sim. 90,) an order was made against a married woman for the payment of money; but upon

the express ground that she as plaintiff constituted herself a single woman for the purposes of the suit, and must take the consequences of disobeying the orders of the court made upon her as plaintiff.

I do not think that these cases warrant the application that is made. According to the English cases the general rule is that the husband is in contempt, and is punishable by attachment for his wife's default. If she fail to answer he is liable to attachment, although he answers himself; and he is only excused upon shewing his inability to get his wife to answer. By the practice of this court, there being no attachment for want of answer, an order for the wife to answer separately goes as of course in a proper case, after the expiration of the time for the husband and wife to answer, in order to the bill being taken *pro confesso* against the wife, and I am informed that in this case such order has been obtained.

An attachment will issue in England against a married woman for not answering after order obtained that she shall answer separately; but it does not seem to me to follow that she is to be treated as a *feme sole* in all subsequent proceedings in this court, because she has allowed the bill to be taken against her *pro confesso*. The order to answer separately has not been obtained by her; but is a proceeding taken by the plaintiff, being the only course by which he can get on in his suit.

The general rule, then, appears to me to be untouched, that the husband shall answer for the wife's default unless he shews some reason for being exempted. She is assumed to be under his control, and he must shew the fact to be otherwise. And this rule will apply much more forcibly in regard to the act, sought to be enforced here, than in regard to an answer, for it may be impossible for a husband to prevail upon his wife to put in an answer upon her oath; and the court would punish a husband for contempt who by threats compels a wife to put in an answer—(*Exp. Halsam*, 2 Atk. 49,) but the preparing and bringing in of accounts would, as a matter of business, more naturally devolve upon the husband than the wife; though of course her oath would be requisite, and he might be able to shew that he was unable to prevail upon her to do what was necessary.

The nearest case that I have found to the present is that of *Scarrow* v. *Walker*, referred to in the last edition of Smith's Practice page 542, where an order for a sergeant-at-arms having been made against a *feme sole*, she married, and an order was made that the husband and wife should put in an examination within one month after personal notice, or in default, that the sergeant-at-arms should go against the husband.

The case of the *Attorney-General* v. *Adams*, (12 Jurist, 637,) is a strong case against the attachments issuing against married women; the woman in that case had not gone by her husband's name; when the subpœna was served she stated that she was unmarried, and throughout the proceedings in the suit she was treated as unmarried; she was attached for want of answer, and committed to prison, and the fact of her marriage was first discovered upon her application to be discharged. Lord *Cottenham* made an order for her discharge, and refused to impose as a condition that no action should be brought.

The distinction that obtains where a decree is made against a married woman is important upon the same point. The general rule is, that decrees are enforced *in personam;* but the case of a decree against a married woman is a recognised exception to the rule.

The case of *Pemberton* v. *McGill* is referred to in a note to the last edition of Smith's Practice (page 275, n. 4, 25 L. J., Ch. 49), where, as I infer, process was ordered against a married woman. The case is thus stated: "A *feme covert* executrix, beneficially interested under a will to her separate use, living apart from her husband, had, without proving the will, possessed herself of the assets, and parted with a portion of them. In a suit by her co-executor she had appeared and answered separately, it was held that she could not by her converture protect herself from answering as to the proceeds of the assets, of which she possessed herself." The order was probably made against the wife in consequence of the fact of her living apart from her husband. Upon the whole, I think the application must be refused.*

* This case was subsequently affirmed in appeal.

Ross v Steele.

Sale under decree—Parties to deed.

A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the court.

In this suit a sale had taken place under the decree of the court, of certain premises mortgaged by the ancestor of the infant defendants, who were made parties to the conveyance by the solicitor of the purchaser, so that it became necessary for the conveyance to be approved by the judge in Chambers, so far as the interests of the infants were concerned; but

Spragge, V. C.—This conveyance is submitted for my approval by reason of the infant heirs of the mortgagor being made parties. The conveyance is to a purchaser at a sale under the order of this court. I have held that the infants are not proper parties under such circumstances, and I find that the same has been held in England in *Re Williams*, (21 L. J., N. S Chy. 437.) I think the mortgagor or his heirs not proper parties to a conveyance to a purchaser at the sale.

Cooney v. Girvin.

Married woman—Motion by—Security for costs.

Where in the course of a cause it becomes necessary for a married woman, a party to the suit, to make an application exclusively on her own behalf, she can do so, only, by her next friend.

This was an application on behalf of the defendant Arabella Girvin, who was made a defendant to this cause with her husband, for an order on the plaintiff to give security to her for such costs as she might incur in defending the suit.

G. D. Boulton, contra, stated a similar application had been refused by his Honor *V. C. Esten;* but

Spragge, V. C.—The application made before my brother *Esten* was made by the wife on behalf of herself and her husband, and was refused on that ground probably, on the authority of *Oldfield* v. *Cobbett*, (3 Beav. 432.) This application is by the wife alone for security for costs. It is objected that she has not applied to answer separately. I should not think that a necessary preliminary, but the rule is, that a motion by a married woman can only be made by her next friend. *Pearse* v. *Cole*, (16 Jurist, 214.) The application must therefore be refused.

Crooks v. Street.

Sale under decree—Paying purchase money into court.

A purchaser of real estate, at a sale under the decree of the court, will not be ordered to pay the amount of his purchase money into court until the title has been accepted or approved of.

In this case a sale by auction of certain real estate had taken place under the decree of the court, at which one James Metcalfe had become the purchaser of a portion of the estate sold, who having neglected to pay in his purchase money after several demands made upon him for that purpose, a motion was made by *Morphy*, for the plaintiff, for an order directing the purchaser to pay the amount of his purchase money into court.

Hawkins, contra

Per Curiam.—This is an application for an order that Metcalfe, the purchaser of a portion of the property sold under the decree in this cause, may pay his purchase money into court.

This sale took place on the first of June, 1859. Ten per cent. was paid at the time of sale, in accordance with the conditions, and the residue was to be paid, and the conveyance executed, on the 22nd of August.

An affidavit has been filled in opposition to the motion, in which the solicitor for the purchaser states that he had applied repeatedly to the plaintiff's solicitor for an abstract of the title, but that up to the 22nd of August no abstract had been delivered; and Mr. Hawkins contends that the motion is irregular inasmuch as the title has neither been accepted nor approved, although he admits that an abstract was delivered a few days before the motion.

The practice upon this point is not so clear as we might have expected to find it; and certainly the course pursued by the plaintiff's solicitor in this case, has been, for some time, the uniform practice of this court. But it would seem nevertheless, the objection is well founded.

It is clearly settled now, although the point appears to have

been doubted in Lord Erskine's time, that purchase money will not be ordered into court, even when the purchaser neglects to attend the motion, unless the title has been either accepted or approved, (2 Daul. Prac. 1 Eng. Ed. p. 919, and cases cited; *Rutter* v *Marriott*, 10 Beav. 33,) and it is equally clear that the vendor's solicitor may move for a reference as to title when the purchaser neglects to take that step on his own behalf. (Sugd. V. & P. 11th ed. p. 71.) The practice is stated by Sir Edward Sugden in this way: "If the purchaser neglect to complete his purchase, the practice is for the seller to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to enquire whether the party can make out a good title, and if he can, to obtain an order upon the purchaser to complete his purchase."

Now as the vendor has a right to an enquiry whether he can make out a good title, but has no right to an order for payment of the purchase money into court until the title has been either accepted or approved, it would seem to follow that the present motion is, under the circumstances, irregular. It cannot be regular to ask that which it would be clearly irregular to grant And the books in ordinary use would seem to shew that view of the practice to be correct, although Mr. Smith would seem to state it differently. In Ayckbourn's Practice it is said, 3rd ed. p. 482, speaking of the order to pay in purchase money, "an order for such purpose, however, cannot be obtained until the purchaser has either accepted the title, or the master, upon a reference as to title, has reported that a good title can be made." And in Jarman's Practice it is said at page 310: "But before this motion can be made he must have accepted the title; or it must have been certified that a good title can be made."

The motion, therefore, must be refused, but, under the circumstances, without costs.

IN RE KENNEDY.

Infants and the statute 12 *Vic., ch.* 72.

In applying for the sale of real estate settled upon infants, the mother, by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life-interest vested in her under the settlement.

This was an application by *Leith* on behalf of Mrs. Ferrie, for an order to sell a portion of the real estate settled upon her children by a former husband.

ESTEN, V. C.—I think I may fairly consider that Mr. Kennedy died insolvent, and that nothing is coming to the children from his estate. I think that Mrs. Ferrie should make an affidavit, or that it should be shewn to my satisfaction that the property she holds is hers absolutely, and that the children have no interest in it. It will then appear that the only property these children have is that mentioned in the petition. Mrs. Ferrie or her husband is not bound to maintain them. I think, therefore, that a proper case will then be presented for a sale of the Mountain property, as the produce of the Hughson-street property is wholly insufficient for the purpose, and the Mountain property being likewise exposed to waste and dilapidation. I should, however, see the settlement. It may be necessary for Mrs. Ferrie to make an appointment in favour of the children. Mrs Ferrie must join in the sale, and must surrender her life-interest for the maintenance and education of the children.

RE MCDONALD.

Infants and the statute 12 *Vic., ch* 72.

In directing the sale of infants' real estates the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit The court will order a sale of a portion of an infant's estate to save the rest when it is made to appear to be for the benefit of the infant.

This was also a petition presented for the purpose of selling a portion of an infant's real estate to pay off a mortgage existing on another portion thereof, known as the Homestead.

ESTEN, V. C.—I think it may fairly be considered within the scope of the act to sell part of the infant's property to save the rest, when it appears to be for the benefit of the infant. In the present case the Homestead, consisting of 70 acres, is exposed to loss by reason of the mortgage to Beattie, who will be entitled to recover on it, I presume, whatever it may be necessary to pay to the government in respect of the 55 acres purchased by him from McDonald, and which appears to be part of the lot C., of which therefore the family appear to retain about 150 acres. The mortgage is evidently intended as an indemnity against the deed for the fifty-five acres not being forthcoming, and if the government would not accept a separate sum for the 55 acres, and the whole lot C. became lost through the default in payment of the government price, no doubt Beattie could recover the whole amount of his mortgage and interest. It may be expedient and for the benefit of the infants that the residue of lot C should be sold in order to prevent the foreclosure or sale of the 70 acres, but it is impossible not to see that the mother who presents this petition is looking rather to the present comfort of herself and her children than to their eventual good. The interest of the infants, however, is the only thing that this court can consider, and in making the enquiries which I am about to direct, the master must bear this fact in mind, namely, that he is not to consider the present comfort of the family so much as the ultimate good of the infants. The evidence is very imperfect, and has not been properly taken, as it ought all to be taken by the master. I shall therefore refer it to the master at Sarnia to enquire and state what property real and personal Angus McDonald possessed at the time of his death, and what has become of it; what debts were due to him, and what debts he owed; to enquire into and state the particulars of the transactions with Beattie, and whether the 55 acres sold to him is not part of lot C mentioned in the petition, as still belonging to the family; and to enquire into and state the condition of the 70 acres and of lot C. respectively, and how much is due on lot C., and the respective values of lot C., or so much of it as still belongs to the family, and of the 70 acres, and how much lot C., or so much as still belongs to the family, would probably produce on a sale; and how much money would be required to procure a patent to be issued for the 55 acres purchased by Beattie, and whether a patent could be procured for such 55 acres without procuring a patent for the whole lot C.; and if the master shall be of opinion that it is expedient, and for the benefit of the infants, that the residue of lot C should be sold in order to exonerate the 70 acres from the mortgage to Beattie, he is to state his reasons; and in making the foregoing enquiry he is to consider only the interest of the infants, and he is not to take into account the comfort or welfare of any person or persons, and he is to examine the infants separately and apart as to their consent to a sale of their interest in lot C., for the purpose before mentioned, and he is to explain the matter to them.

SIMPSON V. THE OTTAWA AND PRESCOTT RAILWAY COMPANY.

Receiver—Appointment of.

A receiver, though an officer of the court, stands in the position of trustee to all interested in the estate or fund. therefore in making the appointment the court will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication.

In this case the receiver of the revenues of the railroad had been ordered, in consequence of the company having made default in payment of the interest due upon certain bonds of the company, and the plaintiffs having submitted the name of a person, his appointment was opposed on affidavits, setting forth that as between himself and the president of the company, a strong feeling of antagonism existed, and although perfectly fit and competent in all other respects, the consequence of his appointment would probably be that the interests of the company would sustain injury by reason of the want of friendly intercourse between the receiver and the persons interested.

The facts are more fully stated in the judgment.

Read and *Strong* for the plaintiff.

McDonald, contra.

SPRAGGE, V. C.—When a receiver is appointed it is on behalf of all interested in the estate or fund which he is appointed to receive; and, therefore, though an officer of the court, he stands in the position of trustee to all.

The case of *Wilkins* v. *Williams*, (3 Ves. 588.) contains a strong expression of opinion by Lord Loughborough in favour of the appointment of a person proposed as receiver by a mortgagee; but

inasmuch as any loss occasioned by a receiver falls upon the mortgagor or his estate, he is clearly interested in the appointment of a proper person, and when the estate is a sufficient security, even more interested than the mortgagee.

With regard to Mr Harris, the gentleman proposed in this case by the plaintiffs, his fitness as a man of integrity and business habits is not impeached. The objection is, that he and Mr. Bell, the president of the railway company, are upon a footing if not of hostility, still of unfriendliness towards each other, such as would probably operate to the prejudice of the company if he were appointed receiver. Mr. Harris, upon his examination, denies that he has any feeling of antagonism towards Mr. Bell, as president of the railway company, or individually. Upon being asked, however, if he had ever written anonymously in the newspapers against Mr Bell, in any capacity, he denies having written against him as president of the railway company, or respecting the management of the railway, but he declined to answer further, on the ground that it was not a proper matter for cross-examination upon his affidavit. Upon being further asked if he had written letters published in the Montreal *Gazette*, reflecting upon Mr. Bell in any capacity, he says: "I cannot answer without seeing the letters, if there are any such."

It is further suggested, that some ill-feeling exists on the part of Mr. Harris, arising out of the removal of the railway account from the Montreal Bank, of which Mr. Harris was and is the agent at Ottawa; and which Mr. Harris says in his examination, were removed in spite of a pledge given to the contrary. Political differences, Mr. Bell having been a candidate for the representation of Ottawa, are also referred to, but they do not appear to have been of such such a nature as to make Mr. Harris objectionable on that score.

Now upon this application it is not necessary that I should adjudicate between Mr. Harris and Mr. Bell as if they were parties to a suit, or that I should find upon legal evidence whether Mr. Harris did write against Mr Bell in the papers, as it is suggested that he did. Mr. Harris is proposed as a trustee, and in the discharge of his duties, will, I apprehend, necessarily have to communicate with the president of the company upon its business affairs, how much or how little I am unable to say; but if, as is sworn, the road stands in need of considerable repairs, it must almost necessarily become a matter of discussion between the receiver and the president as to what is necessary, and how it should be done, and the proceedings necessary in this court in relation thereto, and so probably in relation to repairs from time to time; new rails, new rolling stock, and the like.

If the motion was as to the appointment of a trustee to an estate upon which were mines, or a colliery, in which discussions as to conducting the business of the estate would necessarily arise between the trustee and the owner of the estate, such trustee being appointed for the protection of annuitant or other creditor, would the court hold such objections as are set up in this case sufficient reasons against the appointment of such trustee?

I think it would; the court would think it desirable that the trustee and the owner of the estate should be mutually free from unpleasant feeling. It is not wise, *unnecessarily*, when two have to work together, to appoint as one of them a person between whom and the other there exists a feeling of unfriendliness, and as to such feeling on the part of Mr. Harris, I give full credit to his disclaimer of entertaining any feeling of antagonism against Mr. Bell, but cannot read his evidence without coming to the conclusion that he regards him unfavourably—I should say with suspicion and dislike—and I must add, that I think the inference is not a violent one, that he has written against him in the newspapers: he himself says he cannot tell without seeing the letters if any there are.

Apart from this feeling, the existence of which I must ignore, I have no doubt that Mr. Harris would be a perfectly fit and competent person for the proposed office, and I decline to appoint him simply because I think it inexpedient under the circumstances.

There is no reason why some person entirely unexceptionable should not be appointed; the plaintiff should be at liberty to propose some such person, and I think that a preference should be given to the person named by him, if no valid objection exists against him.

It is not suggested that there would be any difficulty in finding such a person, and I think it would not be a sound exercise of discretion to place parties who have to act together in a false position, and that without any necessity for so doing.

In Re Freeman, Craigie, and Proudfoot, Solicitors.

Costs—Taxation of.

Where a solicitor offered to make a deduction from his bill, the court held that the master should not charge the solicitors with the costs of taxation, unless the bill had been reduced one-sixth by taxation independently of the voluntary deduction.

This was an application to vary the terms of an order made for the taxation of a solicitor's bill of costs against his client, under the circumstances stated in the judgment.

McDonald for the solicitors.

Roaf, contra.

Esten, V. C.—I do not think any of the grounds on which this order is impugned are tenable, except that it does not include all matters. The solicitors, however, waived this objection, and both parties proceeded under the order to a considerable extent: after which some difficulty arising in the master's office, and it being thought expedient to obtain a fresh order, they could not agree upon its terms. I cannot very well understand the contention with respect to the amount of the bill of costs. I think, however, that the solicitors were right in requiring the entire bill to be subjected to taxation; and then in making the promised deduction; but I think the master should not have charged them with the costs of taxation, unless the bill had been reduced one-sixth by taxation independently of the voluntary deduction. The solicitors were not warranted, I think, in introducing the words limiting the time within which the report was to be obtained; and they could, I think, have been held to their agreement, as evidenced by the correspondence; but Mr Davis, in his letter of the 18th of February, intimates that if Mr. Proudfoot insisted upon the introduction of the words objected to the agreement might be rescinded; and Mr. Proudfoot replies with a letter, which amounts, I think, to an acceptance of that offer, and thus the agreement, which had been acted upon to such an extent, was rescinded, and the parties remitted to their original rights, and the solicitors entited *stricto jure* to discharge the order; but under the peculiar circumstances, I think I ought not to discharge it, the client undertaking to pay to the solicitors all that is due to them in respect of other matters, and not to require the removal of the books from the office of the solicitors. I award no costs to either party.

In Re Foster.

Consolidated Statutes U. C, ch. 86—Partition—Notifying incumbrancers.

Partition, where ordered, is to be made by the real representative.

The question whether partition or sale should be ordered is proper to be referred to the real representative, who is to make sale if ordered.

The court may order a sale in the first instance, if it see fit.

The court will use its own machinery for carrying the purposes of the act into effect.

This was an application by petition for partitition under the act 20 Vic., ch 65, Consolidated Statutes of Upper Canada, chapter, 86. *R. Martin* for the petitioners.

Esten, V. C.—All necessary parties are present, and therefore the petition may be allowed in terms of the act of parliament, and judgment of partition pronounced upon it. The order should define the estates of the different parties. I think some evidence should be offered as to the family of Hugh Foster, so as to shew who were his co-heirs. There is not even an affidavit in verification of the petition. The real representative is to make the partition, if one be ordered. It would seem to be proper, if desirable, to refer the question of partition or sale to the real representative. (See sec. 21.) The real representative is to make the sale if it be ordered. No power of sale is expressly given except upon the report of the real representative; but it would appear that the court can order a sale in the first instance, or upon the report of the real representative, if, on an order for partition, he should think a partition unadvisable, and should so report to the court. I am not at present satisfied that a sale is necessary; and I think some evidence should be adduced on that head. Suppose a sale to be ordered, the next step is to make incumbrancers parties.

(See sec. 27) The court will use its own machinery for carrying the purposes of the act into effect, so far as possible consistently with the express directions of the act, of which the provisions are somewhat singular, and do not appear to have been necessary or to have effected any improvement in the practice so far as courts of equity are concerned. With regard to the mistake in the conveyance to the infant H. C Foster, I do not see how it is to be rectified. A bill would be necessary, and it is difficult to understand how a mere volunteer could maintain such a bill. It is clear that no consent could be given for the infant Elizabeth Bowes. Probably some method may be discovered by which this lot may be secured for the infant H C. Foster, in furtherance of the intention of the father. The only person to be considered is the infant Elizabeth Bowes, and her interests may be sufficiently protected.

BLAIN V. TERRYBERRY.

Opening publication—Foreign commission.

Where it was considered conducive to the ends of justice, publication was opened, and leave given to examine further witnesses, and to issue a foreign commission on payment of costs and upon the terms of examining the witnesses in Canada, at the next examination term, and the witnesses residing out of Canada, at the same term, or by foreign commission in the meantime, if the latter, the commission to be returned and depositions disclosed two weeks before the examination term it appearing not to be owing to the negligence of the party applying to at the evidence had not been taken before.

This was an application by *Scott* for the plaintiff to open publication after the examination of witnesses before the court at Hamilton.

The circumstances under which the application was made appear in the head-note and judgment.

Wilson, contra.

SPRAGGE, V. C.—I have read the affidavits upon which this application is founded, and the depositions taken, and upon the whole think that it will probably be conducive to the ends of justice that the application should be granted.

I think it was not through the negligence of the plaintiff that the witnesses, whose evidence it is now desired to take, were not examined at the same time as the other witnesses; and, when the evidence was about to be taken, the plaintiff's counsel intimated that there were witnesses resident abroad whose attendance he had been unable to procure, and that he should apply for leave to examine them. The issue was upon the defendant Terryberry, and his counsel intimated no desire to postpone the examination of his witnesses, but preferred to proceed, and witnesses on both sides were examined, the learned counsel feeling probably as I incline to think is the case, that he would not suffer any serious disadvantage from the disclosure of his evidence.

The application should be granted upon payment of the costs of this application, and of a counsel for attending examination of witnesses—which I fix at £3 10s.—and upon the terms of the witnesses residing out of Canada being examined either at the same examination term, or by foreign commission in the meantime; if by foreign commission, the commission to be returned and the depositions disclosed at least two weeks before the examination term. The commissioners to be appointed in the usual manner.

MALLOCH V. PINHEY.

Opening publication.

The court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings and one of the defendants.

This was an application by *Strong* to open publication, on the grounds disclosed in the affidavit of the defendant Charles Hamnett Pinhey, setting forth, that since the examination of witnesses before the court in Ottawa, he had discovered that one Cuthbert, through whom plaintiff claimed title, had had a conversation with one of the defendants, the effect of which had a material bearing upon the points in issue, and tending to support the defence of the defendant.

Fitzgerald, contra.

VANKOUGHNET, C.—At the time of the application I thought the motion should be refused, but before finally disposing of it, have consulted my brother *Esten*, before whom the evidence in the cause was taken, and my interview with him has only confirmed me in my first opinion.

The defendants seek to open publication in order to prove a conversation between Cuthbert, who is named in the pleadings, and one of the defendants. The attention of the defendants to Cuthbert's connexion with the premises is called expressly by a statement in the bill which alleges that Pinhey, the testator, with the consent of McVeigh, and as his agent, in 1842 or 1843, agreed to sell these premises to Cuthbert. Now surely it would have occurred to any one diligent in the maintenance of his supposed rights, to have taken the trouble to refer to Cuthbert, and enquire of him how this transaction occurred, and what parts respectively McVeigh and Pinhey took in it. The not doing so seems to me negligence, to counteract which publication should not be opened; a thing never lightly to be done, to let in evidence, which would not be conclusive, if of much effect at all upon the case. If the conversation occurred, and the admission made after the mortgage to the plaintiff was executed, it is very doubtful whether it could affect his position thereunder. If made before, it would be of little importance, as there was then no court of equity in which the defendant McVeigh could assert any right. The court never encourages applications of this nature; and under the circumstances stated, I think the motion must be discharged with costs.

ENGLISH CASES.

PRIVY COUNCIL.

(Present—The Right Hon. Lord CHELMSFORD, KNIGHT BRUCE, L.J., TURNER, L J., and Sir J. T. COLERIDGE)

BOSWELL V. KILBORN.

Sale—Tender of goods—Refusal to accept—Action for non-acceptance—Damages—Form of action—Action for goods bargained and sold.

B. agreed to buy five tons of hops of good quality from K., to be delivered by K. K. sent a large quantity, far exceeding five tons, and B., after inspection, refused to receive any of them, as being of bad quality. K. never tendered the specific quantity of five tons, and took the whole parcel away, and then sued B for the price of five tons:

Held (reversing the judgment of the Court of Q. B. of Lower Canada), that, as the five tons had never been separated from the parcel and there was no complete delivery, B could not sue for the price but could merely recover damages for non-acceptance, and the measure of such damages was the difference between the contract price and the market price at the time when the contract was broken. (March 5, 1862.)

This was an appeal from a judgment of the Q B. of Lower Canada, reversing a judgment of the Superior Court of Lower Canada.

An action was brought by the resp. for breach of a contract by the app. to deliver 5 tons of hops.

The resp. were hop merchants, and they agreed in writing to deliver for three years, viz. 1855, 1856, 1857, five tons weight of hops each year, the hops to be good and merchantable, and of the growth of each respective year, to be paid for at the rate of one shilling, Halifax currency, per pound on delivery. The hops to be delivered free in Quebec. The declaration, after setting out the contract and the amount due for hops deliverable in 1856, averred that the plts. were ready to deliver five tons of good merchantable hops of the year 1856, and requested the deft. to accept and pay for the same, but he refused, whereby the plts. lost the benefit of the sale, and were put to expense in carting away and warehousing the hops, and the plts. claimed the full contract price of the hops. The deft. pleaded that the hops were worthless, and by another pleading known as "*defense au fond en fait*" put in issue all the material averments in the declaration.

At the trial it was proved that the plts. carted and sent to deft.'s brewery eighty-two bales of hops, which far exceeded in quantity five tons, and plts. tendered of this quantity five tons, but deft., after inspecting, refused them and never accepted them, and the whole eighty-two bales were removed by the plts. and stored. No particular five tons were ever separated or set apart from the mass. Contradictory evidence was given as to quality of the hops.

The Superior Court dismissed the action on the ground, that, as the declaration did not contain a proper allegation of tender of the hops, there could be no claim for the price of the hops, as goods bargained and sold. From this judgment the plts. appealed to the Court of Q B. of Lower Canada.

The deft. in his appeal before the Q. B. contended, amongst other things, that as the contract was only an executory contract,

and no specific or particular five tons of hops had been set apart or distinguished from the bulk, no property in any of the hops passed to him, and therefore he was not liable to an action for the full contract price; and further, that in point of law, the true measure of damages, if he was liable at all in the action, was the difference between the contract price and the market price at the time of the alleged breach; and that, as the plts. in the action had adduced no evidence of such market price, and had gone only for the whole contract price as for a debt, there was no evidence of any damage, and consequently, no sufficient materials before the court upon which they could give a judgment in favor of the plts.; he also contended that the weight of the evidence was in his favour, as showing that the hops were not according to the contract.

The court of Q. B., on the 14th December, 1858, gave judgment in the said appeal, and after reversing and annulling the said judgment of the said Superior Court, proceeded to give the judgment which they considered the court below ought to have rendered, and thereby they adjudged that the present app., the deft. in the action, should pay to the the present resps. the plts. in the action, the sum of 560*l.* of current money of the province, being the full contract price of the hops, together with interest on the said sum from the 3rd of January, 1857, and costs of suit as well in that court as in the court below; and they further adjudged that, upon such payment, the deft. should give to the plts. a delivery order for five tons of the said hops. The grounds upon which the said judgment proceeded, were as follows: That, as the plts. had sent to the deft's brewery eight tons of hops, and then tendered the same to him for his acceptance of five tons; and that as the deft. had refused to accept them on the ground that they were unmerchantable, when he ought to have accepted them, it appearing to the court, by the evidence, that they were according to the contract; and that as the plts., upon the deft.'s refusal to accept the hops, had stored the whole in bulk; and as the plts. had done all they were bound to do; and as it was by the deft.'s own act that the specific five tons were not set apart and distinguished from the bulk; and as he had neglected to set five tons apart when it was in his power to have done so—the five tons, although not distinguished from the bulk, were, when so stored by the plts, at the deft.'s risk, and the property therein had passed to the deft.; and that as the plts. were entitled to specific performance of the contract; and that no objection had been made by the deft. to the form of the declaration; and that the only defence taken by him was as to the quality of the hops; and that as there was, in the opinion of that court, no necessity for further allegations of tender in the declaration than those contained therein; and that it was the duty of the deft. to have gone to the store, and have claimed the hops; they considered the judgment of the court below erroneous, and proceeded to reverse the same as aforesaid.

From this judgment the plts. now appealed.

M. Smith, *Q. C.*, and *W. Williams*, for the app., contended that as the contract sued on was an executory contract, and no specific hops were bought or sold, and no property passed to the app., it followed that he could only be liable to pay damages, and not the full price, and the damages consisted of the difference between the contract price and the market price at the time the contract was broken: (*Bush* v. *Davis*, 2 M. & S. 403; *Cunliffe* v. *Harrison*, 6 Ex. 903; Pothier, Contrat de Vente; Dalloz Repertoire de Legislation, c. 3, sect. 1.)

Manistry Q. C. and *Holland* for the respondents.

Judgment was delivered by

Lord Chelmsford.—This is an appeal from the judgment of the Court of Q. B. of Lower Canada, reversing a judgment of the Superior Court of that province given in favour of the apps. in an action for not accepting and paying for a parcel of five tons of hops under the following contract signed by the respective parties:—"Quebec, 6th March, 1855. Messrs. Kilborn and Murrell sell, and Joseph K. Boswell contracts for delivery to them for the following three years, viz. 1855, 1856, and 1857, five tons weight of hops, to be good and merchantable, and of the growth of each respective year, to be paid for at the rate of 1*s.* Halifax currency per lb. on delivery. Hops to be delivered free in Quebec." The declaration in the action, after stating the terms of the contract and the amount due to the plts. for the hops deliverable in 1856, proceeded to aver that the plts. were ready and willing, and tendered and offered to deliver five tons weight of good and merchantable hops, the growth of 1856, and requested the deft. to accept and pay for the same, yet that the deft. refused to accept of or pay for the said hops, whereby the plts. not only lost the benefit of the sale, but were put to great expense and trouble in carting away and stowing the hops in a warehouse, and in other respects the whole to the damage of 600*l.* currency, for which sum they prayed judgment, together with interest and costs. The deft. pleaded that the hops tendered by the plts. in fulfilment of the contract were bad and unmerchantable, and unfit to be used in his business; and as he also pleaded what is called a defence *au fonds en fait*, the effect of which was to put in issue all the material averments in the declaration.

It appeared in evidence that the plaintiffs having in their possession a quantity of hops of the growth of 1856, sent to the defendant's brewery a portion of them, consisting of eighty-two bales, which greatly exceeded the weight of five tons. The deft. desired that the hops should be unloaded from the sleighs in which they were brought, in order that he might inspect them; and the hops were accordingly taken out of the sleighs and placed in the deft.'s brewery, the plts. agreeing to take the hops away again if the deft. should not accept them. After the examination of a few of the bales, and a tender of the hops in two separate lots, one containing fifty-three bales, and one twenty-nine bales, but without any tender of the specific quantity of five tons, and without anything having been done by the plts. to distinguish that quantity from the rest of the bales, the deft. refused to accept the hops, and they were conveyed away by the plts. and deposited by them in a storehouse in the town of Quebec. There the hops were examined by persons on behalf of the respective parties, for the purpose of ascertaining their quality, and the plts. again offered to deliver five tons of hops to the deft., but down to the time of the commencement of the action, they had never weighed or set apart five tons of hops, so as to separate and distinguish them from the larger quantity deposited in the storehouse. A great number of witnessess were called on both sides to prove that the hops were, or were not of the quality stipulated for by the contract. But, unfortunately, this very long and expensive inquiry has become entirely fruitless, from the course which the cause afterwards took.

The learned judge of the Superior court treated the action as one brought to enforce the performance of the contract by compelling the defendant to take to the hops and pay the price; and as the plts. did not by their declaration offer to deliver to the deft. the quantity of hops in pursuance of the agreement, and as the tenders alleged in the declaration were not followed by a request that they might be judicially declared to have been good and valid, he dismissed the action with costs, reserving to the plts. the right of appeal. This judgment, however, was reversed by the Court of Q. B, the Chief Justice dissenting from the reasons on which it was founded, and the other judges declining to enter into them, considering them as objections which the judge had no right to raise, the parties themselves having waived them. The Court therefore proceeded to pronounce its own judgment, that the deft. should, within fifteen days from the service upon him of a copy of the judgment, pay to the plts. the sum of 560*l.* currency (being the contract price of the hops) with interest, and that upon payment the plts. should give to the deft. a delivery note upon the occupier of the store where the hops were deposited for the delivery to the deft. of five tons weight, to wit, fifty bales of the hops which had been tendered and stored, and that upon default of payment within fifteen days, and upon leaving with the prothonotary of the court the delivery order or duplicate, one for the deft. and the other to remain of record, execution should issue against the defendant.

Even if this judgment were properly adapted to the form of action chosen by the plaintiffs, it would be open to great objection. By the contract, delivery is to precede payment; by the judgment, payment is to be made, not merely before, but without any delivery. The deft. is adjudged to pay within fifteen days after service of a copy of the judgment; if he does not, the plts., by merely depositing with the officer of the court the delivery order in duplicate, would be entitled to sue out execution. And, supposing the deft. should pay the money and obtain the delivery

order, the plts. would have discharged themselves of every duty imposed on them by the judgment, and yet the deft. might be unable to obtain the hops in accordance with the contract, in consequence of the storekeeper having a lien upon them, or by the loss or deterioration of the hops, while they were at the risk of the vendor. But the app. contends that, looking to the form of action, the judgment is one which it was not competent to the court to pronounce. He says that the action is brought, not to compel the performance of the contract, but for damages for breach of the contract by the defs. in not accepting the hops, and that the proper measure of damages in such an action is the difference between the contract price and the market price at the time of the refusal to perform the contract.

If this question were to be decided by English Law, there could be no doubt as to the extent of the defendants liability under the circumstances of the case. Where there is a sale by weight or measure, and (to use Lord Ellenborough's language in *Bush* v. *Paris*, 2 M. & S. 403) "any acts are to be done to regulate the identity and individuality of the thing to be delivered, it is not in a state fit for immediate delivery;" and no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. The necessity of separating and distinguishing the article sold from a large quantity in order to constitute a complete delivery, cannot be more strongly exemplified than in the case of *Cunliffe* v. *Harrison*, 6 Ex. 903, which was cited in the course of the argument for the appellant.

But the resps. contend that, whatever may be the law of England on this subject, the case is to be tried by the old French law, in which the principles to be applied are different; and that by that law a vendor in some cases may recover the full price agreed upon where there has been no complete delivery of the subject according to the terms of the contract. Their lordships have been referred, in support of this view, to the civil law, and also to the writings of various jurists, and particularly to the treatise of Pothier, "Du Contrat du Vente," which contains all the learning upon the subject. A very few passages from this treatise will show that there is no material difference between the English law and the old French law with respect to the completion of contracts. Pothier, in his treatise, partie iv., fol. 309, states with his usual clearness when a contract is to be regarded as perfect, and when it is imperfect. He says: "Ordinairement le contrat de vente est censé avoir reçu sa perfection aussitôt que les parties sont convenues du prix pour lequel la chose serait vendue. Cette règle a lieu lorsque la vent est d'un corps certain est qu'elle est pure et simple. Si la vente est de ces choses qui consistent *in quantitate* et qui se vendent au poids, au nombre, au à la mesure, comme si l'on a vendu dix muids de blé de celui que est dans un tel grenier, dix milliers pesont de sucre, un cent de carps, &c., la vente n'est point comptée car jusxu'à ce temps, *nondum apparet quid venerit*." So far the law is tolerably clear; but upon the question whether, when goods are sold by number, weight, or measure, the property is transferred to the buyer immediately, or only after the goods have been counted, weighed, or measured, there is some difference of opinion. Dalloz, in his "Repertoire de Législation de Doctrine et de Jurisprudence," tit. "Vente," ch. 3, sect. 1, ranges the jurists upon the opposite sides of the question, and suggests a distinction to reconcile the difference between them. He puts a case where the seller says to the buyer "I agree to sell you so many gallons of wine in such a cellar . so much a gallon." Here (he says) is not only a sale by measure, but also a sale of an undeterminate thing; therefore such a sale does not operate as an immediate transfer of the property. And he adds, "tout le mond est d'accord sur ce point." But where the vendor says "I agree to sell you all the wine in this cellar at so much a gallon," here the doubt arises. In this latter case the thing is ascertained, and it may be said there is no reason why the property should not pass immediately to the buyer. But even in such a case Dalloz states his concurrence with the opinion of Troplong, that until the measurement the wine remains at the risk of the seller. It is true (he says) the thing is ascertained, but the price is not; the price is, like the thing itself, an essential element of the sale, and the ascertainment of the price is not less necessary than the identification of the thing is to the completion of the contract. The delivery of the thing, and its being at the risk of the buyer, appear to be convertible terms, and it seems clear from all the authorities, that upon a sale by weight or measure, until the thing is ascertained by weighing or measuring, it remains at the risk of the seller. Pothier, in the same section (309) which has been already referred to, says, "It is only after measuring, &c., that the thing sold is at the risk of the buyer." "Car les risques ne peuvent tomber que sur quelque chose de déterminé." It is difficult to understand how the vender can have any claim to receive the price of the thing contracted for until he has separated it for the use of the buyer. Until it is ascertained and identified, it may be properly said to have no existence. And yet there is one short passage in Pothier (sect. 309) which is opposed to all his reasoning in the same section, upon which the resps. rely as establishing the propriety of the judgment in their favour. The passage is this: "Il est vrai que dès avant la mesure, le poids, le compte, et dès l'instant du contrat les engagements qui en naissent existent. L'acheteur a dès lors action contre le vendeur pour se faire livrer la chose vendue, comme le vendeur a action pour le paiement du fruit en offrant de le livrer." One may fairly ask, to deliver what? The contract does not give the thing existence; it depends upon the vendor himself whether it shall ever exist. When there is a condition precedent to his right to the price unperformed by him, it is difficult to understand how he can recover the price upon the mere offer to perform. The C. J. treats the present case as one where the vender has executed his contract and has done all that depends upon him to entitle him to an action *ex venditio* against the vendee, and he goes on to say that, from the moment the vendor has offered to deliver the thing sold, and has put the vendee in a position to receive it, the thing is at the risk of the vendee. But how was the vendee in a position to receive the hops in this case? He could not go to the store and help himself out of the bulk to the proper quantity. And as to the hops being at the risk of the vendee, the C. J. is here directly opposed to the authority of Pothier, in the passage which has just been mentioned. It must always be borne in mind that by the terms of the contract the delivery in this case was to be made by the vendors, and therefore that an actual delivery by them, or acts done by them which were equivalent to a delivery, were a necessary preliminary to their being entitled to the price. This the court appears to have overlooked, for in their judgment they say that "it was fully in the app.'s power to have set apart, distinguished and taken away five tons weight of good and merchantable hops from among the said bales," thereby attributing to the app. the performance of acts which by the contract belonged to the resps. The judgment therefore proceeds upon false grounds, even if it was competent for the court to give a different kind of relief to that which the plts claimed in their declaration. The plts. demand damages for breach of the contract on the refusal of the deft. to accept the hops tendered to him. The court has converted the proceeding into a suit to enforce the performance of the contract, which they order or intend to order, by their judgment to be carried out. This, the resps contend, they had a right to do, and they referred to a passage in 4 Guyot's Repertoire, *verbo* "Conclusions," p. 351, which the court was said to have acted upon in a former case, that "le juge peut rejeter, accorder, ou modifier les conclusions prises par les parties." Whether the power thus described can be pushed to the extent of enabling the court to change the nature of the action, and to administer relief entirely different from that which is sought by the plts., may be extremely questionable. But, if such a power exists, it can hardly be exercised with propriety in a case where a party has the choice between two remedies. Assuming that the plts. might have instituted a suit to enforce the performance of the contract, it cannot be doubted that they were at liberty to waive this form of proceeding, and to bring their action to recover damages for breach of contract. And when they have deliberately preferred the latter remedy, it ought not to be in the power of the court to force upon them the other to which they made no claim. Their action is form and in substance a demand for damages merely for the breach of the contract in not accepting the hops. In such an action, it was not disputed that the plts could not recover the price of the hops, but only the difference between the contract

price and the market price at the time of the breach of the agreement

Their lordships, therefore, are of opinion that the judgment of the Court of Q B is erroneous, and ought to be reversed. This—if nothing more were said—would have the effect of setting up the judgment of the Superior Court. But this judgment cannot be supported. They will therefore recommedd to her Majesty that both the judgment of the Court of Q B. and of the Superior Court should be set aside, and that a new trial should be had between the parties. If under the defence *au fonds en fait*, the plts. will be compelled to prove the averment that they tendered and offered to deliver the hops, and will not be at liberty to show that the deft. waived a perfect tender, their lordships think that before the next trial the plts. ought to be permitted to amend their declaration by averring an offer by them to deliver the hops, and a waiver by the deft., which it is probable a jury will have no difficulty in finding in their favour; and this will clear the way to the determination of the real question at issue between the parties, viz., the merchantable quality of the hops. Their lordships think that the costs of the appeal ought to be paid by the resps, and that the costs of the rule in the courts below should abide the event of the new trial.

Reversed with costs.

Apps.' solicitors, *Simpson*, *Roberts* and *Simpson*.
Resps.' solicitors, *Dawes* and *Sons*.

UNITED STATES LAW REPORTS.

SUPREME COURT OF PENNSYLVANIA.

From the Legal Intelligencer.

SCHETTIGER v. HOPPLE, *et al.*

1. Although in law a deed estops the grantor from denying that he had title in the land conveyed, or that he did not mean to convey it, in equity and good conscience it ought to operate so far as to express the intention and understanding of the parties.
2. Courts of equity have power to reform written instruments at the instance of either plaintiffs or defendants, on the ground of fraud or mistake upon parol evidence, where no statutory provision intervenes
3. A court of law may construe and enforce a written instrument as it stands, or may set it aside altogether if there be adequate cause, but it cannot compel alterations to be made.
4. The statute of frauds and perjuries does not stand in the way of the reformation of a written instrument by parol, upon the ground of fraud or mistake, although the effect would be to pass an estate by parol for the statute must be so construed as to prevent frauds, and not to promote them
5. Before a Chancellor can reform a written instrument by parol evidence, on the ground of mistake, he must be satisfied that the mistake is on both sides.
6. In an attempt to reform a written instrument by parol on the ground of mistake, it is for the jury to find what was proved, but it is for the court to say whether the facts found stablish such a mutual misunderstanding as would make it a fraud to hold the parties to their writing.

Error to the Court of Common Pleas of Cambria County.

Ejectment by *Phillip Schettiger* against *Clemens Hopple* and *Henry Hopple*.

The facts of the case fully appear in the opinion of the court, delivered by

WOODWARD, J.—The only question on this record is, whether parol evidence was admissible to prove that fourteen acres of land were included by mistake in the deeds under which the plaintiff claims; and, instead of attempting to educe from the multitudinous and jarring authorities on the subject of parol evidence, to vary written instruments, a rule that would be applicable to the question, I propose to treat it upon its elementary principles.

The plaintiff holds the legal title to the land in controversy, by virtue of two several deeds of the defendants, duly executed and delivered at different times, both of which describe the land conveyed by metes and bounds which confessedly include the fourteen acres. Ejectment by him, therefore, is strictly an action at law. The defendants have no legal title. And, at law, Henry Hopple, the immediate grantor of the plaintiff, is estopped by his deed from denying that he had title to the fourteen acres, or that he meant to convey it to the plaintiff. In like manner Clemens is estopped from denying the title he conveyed to Henry.

But in equity and good conscience those deeds ought to operate only so far as they express the intention and understanding of the parties; and if, indeed, the fourteen acres were not bought and sold, but were included in the deeds by mistake, the defendants claim that the deeds should be reformed so as to conform to the intention of the parties. In other words, they are plaintiffs in Chancery seeking a decree that the fourteen acres be reconveyed to them because included in their deeds by mistake Notwithstanding the former action and the common law form of the present action, this is the proper light in which to regard the case—as upon all bind answer, in which the defendants on this record would be plaintiffs, and the present plaintiff defendant—they alleging the mistake under oath, and he under oath denying it If then, the principle that a *plaintiff* cannot go into parol evidence for the purpose of obtaining a specific performance of a written agreement with a variation, though a defendant may resist it, were applied here, it would exclude the evidence on this ground at once, and dismiss the plaintiff's bill. But this principle, though settled in many English cases, was successfully denied by Chancellor Kent, in *Gillespie* v. *Moore*, 2 Johns. Ch. R 598. He declared what every one must feel to be true, that there would be a most deplorable failure of justice if mistakes could only be shewn and corrected when set up by a defendant to rebut an equity. Ever since that case, which was decided in 1817, it has been a conceded jurisdiction of courts of equity in the United States to reform written instruments, at the instance of either plaintiffs or defendants, on the ground of fraud or mistake, upon parol evidence, where no statutory provision intervened. It is obviously an appropriate branch of equity. A court of law may construe and enforce the instrument as it stands, or may set it aside altogether if there be adequate cause; but it cannot compel alterations to be made, and an avoidance of the entire instrument would be in most cases a nullification, and not an affirmance of what was really meant; Adams' Equity, 406.

How then would a Chancellor regard this defence if presented in the form of a bill for the re-execution and correction of the deeds?

In the first place the statute of frauds and perjuries would not stand in his way, for, though the effect would be to pass an estate by parol, yet the statute must be so construed as to prevent frauds, and not to promote them. And this would apply where mistake and not fraud was the ground of the relief sought; for though a mistake does not necessarily include a fraud; yet to set up and use a written instrument for a different purpose from that for which it was made, would be as inequitable as to take advantage of an instrument fraudulently obtained.

But the Chancellor would have to be satisfied that the mistake was on both sides—for if it be by one party only, the altered instrument will not express the intention of both. A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific execution, but it cannot be a ground for altering its terms; Adams' Eq. 411.

And what is the kind of proof a Chancellor would require? Chancellor Kent, after reviewing all the leading English cases, says, in *Gillespie* v. *Moore*, that the cases concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, does it satisfy the mind of the court. He quotes Lord Hardwicke as saying it must be proper proof, and the strongest possible proof; and Lord Thurlow's remark, that it must be strong, irrefragable proof, the difficulty of which was so great that there was no instance of its prevailing against a party insisting that there was no mistake.

We can get an adequate idea of the degree of certainty to which the parol proof must rise, only by considering the value of the testimony afforded by deeds solemnly executed between the parties. The rule in courts of law, as already intimated, is that the written instrument contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. And let it be remembered that the only purposes for which deeds were invented, and by the statute of frauds a writing signed was rendered necessary in regard to land, were to secure evidence of contracts certain as to subject matter and interest. They become, when executed, the *agreed evidence* of the intent of the parties to what is conveyed, for what estate, and under what conditions of covenants. Donat, cited in Best. on Ev. 239.

All that precedes their execution is presumed to have been abandoned by the parties, except in the solitary instance of a deed which, by the very terms of a contract is intended as a partial

execution, as in the case of *Girard* v. *McCulloch*, 4 W. C. C. R. 292. If a man, says Glanville, acknowledge the seal attached to a deed to be his own seal, he is bound to warrant the terms of the deed, and in all respects to observe the compact expressed in the deed as contained in it without question. To overcome evidence of such dignity and worth, parol proof ought to come as near to absolute demonstration as any moral proposition can be brought, and hence Chancellors everywhere, while asserting jurisdiction to reform deeds, have demanded a clearness and fulness of proof to justify the exercise of so extraordinary a power, which in practice have amounted to an almost total abnegation of the power itself.

It is one of the peculiarities of the present case that there are two deeds to be reformed. On the 7th April, 1853, Clemens Hopple and wife conveyed to Henry Hopple two pieces of land, containing together about one hundred and seventy-five acres, and including the fourteen acres in dispute. This is the first deed in which the mistake is alleged to exist.

Henry Hopple had purchased thirty adjoining acres of Henry Keogh, and obtained his deed therefor, on the 22nd June, 1848, and at the same time the above deed, Clemens to Henry, was executed; there was endorsed on the deed from Keogh to Henry, the agreement between Clemens and Henry, which, without date or signature, is furnished to us in the defendant's paper book. It is said that this is an agreement of exchange where the fourteen acres were secured to Clemens, though included in his deed to Henry. I should be sorry to doubt that the object of this agreement was just what is claimed for it, because a doubt would imply some comprehension of its meaning, and I confess its terms are unintelligible. Be it however what it is claimed to be, a reconveyance of the fourteen acres to Clemens, it proves no mistake in the deed, and if it did, how is Schettiger to be affected by it? He was not privy to the agreement, it was not recorded, and he had no notice of it. I say it does not prove a mistake in the deed, but the very reverse. On the same day that a grantor conveys one hundred and seventy-nine acres of land to another, the grantee executes a reconveyance of fourteen acres to the grantor. Does that prove a mistake in the deed? Quite the contrary. Both parties must have known that the fourteen acres had passed by the deed, else why the reconveyance? And if both knew that the fourteen acres passed there was no mistake.

But now as to the witnesses, Bender and Baker. Bender was present at the execution of the deed of Clemens to Henry, and witnessed it. "I don't recollect anything said when the deed was executed. Don't mind anything said of the fourteen acres at that time. I wrote the agreement on back of the Keogh deed. The agreement and deed from Clemens and Henry were executed at the same time and place. Squire Luther and I were present. I know the fourteen acres. It was agreed, as it states here, that the old man was to have the fourteen acres, more or less. I was not present when the deed was written. It was said there that day that the old man was to have that land: that was the agreement." This evidence was objected to as irrelevant, and considering that the question at issue was mistake or no mistake in the deed, it was most truly irrelevant. Laying out of view the confusion and inconsistency of the statements of the witness, what more do they amount to than proof of a conveyance and re-conveyance? The witness proves the deeds executed between the father and son, and describes what he understood to be their effect. The question of mistake rests then just where it rested before—on the deeds—and this testimony goes for nothing. The deeds that day executed, interpreted as this witness interprets them, excludes the conclusion of a mistake. The testimony of Baker, was, if possible, still more irrelevant. He tells us how Clemens acquired the land he conveyed to Henry, and how the latter got the thirty acres of Keogh, and then says, "they both agreed that Henry should keep the fifty acres, and Clemens should have the thirty acres and the fourteen acres for himself, and he never sold it to Henry, but kept it for himself." When this agreement was made, whether before or after the deeds, we are not informed, but the witness was not present at the execution of the deeds—does not speak of or allude to them, and of course, proves no mistake in them or either of them.

Such was the evidence of mistake on which the defendants relied. Let us notice in what circumstances of the parties it was offered, and permitted to prevail.

Henry Hopple having obtained his father's deed on the 7th of April, 1853, as before stated, entered into an article of agreement, on the 12th of September, 1853, for the sale of the same one hundred and seventy acres to Philip Schettiger, and agreed to make "a good and indisputable title therefor, on the 1st April, 1854." Accordingly, on the 1st of April, 1854, he and his wife executed their deed to Schettiger for the land, in consideration of $2,500. Schettiger went into possession and farmed the fourteen acres—some witnesses think under Clemens Hopple, as they saw him haul grain to the old man's barn. Browne says Schettiger told him he farmed the fourteen acres on shares for the old man. Other witnesses say he refused to give the old man a share of the grain—inquired about the lines, and claimed to have bought all the land that was described in his deed. The only witness who was present at the execution of the deed says, Henry sold the one hundred and seventy acres and allowance. "Nothing mentioned about the fourteen acres at the time the article was drawn. There was no reservation at all. Schettiger was to get what was in the original old deed—that was what was said, and nothing said of any reservation." Now, where in all this was that clear and overwhelming evidence of mistake on which a Chancellor would base a decree of re-execution? The testimony of Bender and Baker related to the deed between the father and son, and failed to establish any mistake in that. If Schettiger farmed the fourteen acres under the old man, after the purchase from Henry, it may have been because of an unexpired lease—or of a misunderstanding as to lines and boundaries, or to avoid present dispute, or for other reasons. As evidence of mistake running through two deeds and an article of agreement—instruments executed with great deliberation, and at intervals of several months—it is not worthy of a moment's consideration. It has been said in Pennsylvania that what occurs at and immediately before the execution of papers may be proved by parol to establish a mistake; but all the evidence on the record that would come within that rule proves here that there was no mistake. The defence does not rest on the muddy agreement that was endorsed on Keogh's deed. If it did, it would be necessary to interpret that instrument, and to bring home notice of it to Schettiger. But the case was put on the alleged mistake, and in respect to that there was a mis-trial throughout.

The evidence relied on was entirely inadequate to establish the mistake, and the jurisdiction invoked being a chancery jurisdiction it was to be exercised by the court instead of a jury. The question, said Chancellor Kent, in all such cases, is whether the proof is satisfactory to the court. That question was not met at all in this case. If the evidence is conflicting it is for the jury to determine what is proved, but it is for the court to say whether the facts found establish such a mutual mistake as would make it a fraud to hold the parties to their writing. And by means of special verdicts the court can always reach the real question in such a manner as to deal with it on its appropriate principles. In this case the discretion of the Chancellor could have been safely exercised without a special verdict, by rejecting the inadequate evidence offered, and directing a verdict for the plaintiff.

The judgment is reversed, and a *venire de novo* awarded.

MONTHLY REPERTORY.

CHANCERY

V. C. W. RAWLINSON v. MOSS. *June 21.*

Practice—Solicitor and client—Right of lien where Solicitor discharges client—who to bear cost of Schedule of Papers delivered over on change of Solicitor.

Where a Solicitor discharges his client the client is entitled to the convenient use of his papers in pending business, notwithstanding any lien of the Solicitor.

Where a firm of Solicitors dissolves partnership that is a discharge of the client by the Solicitors.

If a client, on discharging his *Solicitor, receives his papers*, giving a receipt for them, at whose expense must the Schedule of Papers necessary for such receipt be prepared—*quere?*

Where a client selected one member of an old firm as his Solicitor, and it appeared that the delivery of papers was for the convenience of that Solicitor, it was *held* that, as between him and his late partners, the Schedule of Papers must be prepared at his expense.

Q. B. COMMON LAW. *May* 3.

GARTON AND ANOTHER v. THE BRISTOL AND EXETER RAILWAY CO.

Carriers—Liability—Railway Company—Reasonable conditions.

By the 6th William IV., c. 36 (local and personal), the defendants were authorized to fix the sum to be charged for the conveyance of small parcels not exceeding 500 lbs. weight, such sum not to exceed a reasonable charge for the same.

By the 8th and 9th Vic., c 155 (local and personal), it is provided that it shall not be lawful for defendants to charge in respect of certain articles specified therein, or other articles of merchandise, more than the sum therein fixed in respect of such articles.

Held, that the words "other articles of merchandise" mean articles *ejusdem generis* with those in the section specified, and that the latter statute did not repeal the former.

Q. B. CUSACK v. ROBINSON. *May* 9.

Sale of goods—Statute of frauds—Evidence of receipt and acceptance.

Where specific goods of above the value of £10 were sold, and were by the vendee's direction delivered by the plaintiff at a certain wharf named by the vendee,

Held, in an action brought to recover the price of the goods, that the special contract might be proved without any memorandum in writing, as there was evidence of an acceptance and an actual receipt of the goods.

The acceptance, to satisfy the statute, need not follow or be contemporaneous with the goods, but may precede it.

B. C. *May* 8, 11.

SHIELDS v. THE GREAT NORTHERN RAILWAY CO.

Railway Company—County Court—Jurisdiction—Place of carrying on business.

Where a railway company had their principal office in London for the regulation and guidance of their undertaking in the various places through which their Railway passed and a station at A.,

Held, that they carried on business in London and not at A., within the meaning of 9 & 10 Victoria, c. 95, s. 60.

Ex. SWINFEN v. BACON. *May* 14, 15.

Landlord and tenant—Double value—Wilful holding over.

A. was tenant from year to year to B.; B. subsequently died, and devised his estate to C., from whom A. afterwards took a new lease. The heir-at-law of B. disputed the devise to C., and proceeded to recover the estates, but did not succeed. Notice to quit was given by C. to A., who held over. There was reasonable ground for belief, and A. did in fact believe, that he had a *bonâ fide* ground for refusing to quit.

Held, that such holding over under the circumstances was not "wilful" within 4 Geo. II., c. 21, s. 1, so as to entitle the landlord to double value. Such holding over must be contumacious. Where it is *bonâ fide* the statute does not apply.

Judgment of the Exchequer affirmed.

Q. B. HOLLAND v. RUSSELL. *May* 30.

Money paid to an agent under mistake of fact—Termination of liability of agent to refund by settlement of accounts with his principal.

When money has been paid to an agent under a mistake of fact and the agent has either paid it over or settled his account with his principal, and is guilty of no fraud in the matter, he is not liable to refund the money.

Ex. ADAMS v GREAT WESTERN RAILWAY CO. *Nov.* 16.

Jury—Perverse verdict—What does not amount to.

A verdict is not perverse when it is not contrary to the direction of the Judge on a matter of law, even though it be against the advice or opinion of the Judge on some matter rightly left to the jury; and as in cases of contract (except where the law gives a measure of damage) the amount of the damages is for the jury, their verdict cannot be disturbed on account of their having given an amount of substantial damages where the Judge was of opinion that they should only have given nominal damages, the amount not being excessive.

Ex. ANGELL v. FELLGATE. *Nov.* 16.

Practice—Compulsory reference—Matter of account.

An action for breach of an agreement to keep premises in repair, money being paid into Court, is a fit subject for compulsory reference under the Common Law Procedure Act, 1854, as involving in part "matter of account."

Ex. BROWN v. CLIFTON. *Nov.* 21.

Practice—Venue—Changing.

When a Judge at Chambers has made an order to change the venue, on a special affidavit shewing a *prima facie* case, the proper course is not to move to set it aside, but to apply at Chambers on a counter affidavit for an order to bring back the venue.

C. P. HOEY v. FELTON. *Nov.* 16, 18.

False imprisonment—Special damage—Rejection of evidence as too remote.

Where, in an action for false imprisonment, the plaintiff sought to prove special damage by tendering evidence to shew that, if he had not been imprisoned, he might have kept an appointment, whereby he would have obtained a situation; on regaining his liberty he was unwell, and therefore did not keep his appointment, but went on the following day, when he was too late to obtain the situation. This evidence was rejected by the Judge who tried the cause; and on a motion for a new trial on the ground of improper rejection of evidence, it was

Held, that the learned Judge was correct in his decision, as the evidence of damage was too remote.

Ex. IN RE ———. *Nov.* 21.

Attorney acting without authority—Liability of to answer an affidavit.

The Court will not grant a Rule calling on an Attorney to answer the matters in an affidavit on the grounds of his having acted without authority, when there is any doubt whether he may not have done so erroneously, and not fraudulently.

Ex. MASH v. ASH. *Nov.* 21.

Practice—Rules—Affidavits.

A Rule not drawn up as on reading affidavits, if any were read on moving, is irregular, and will be discharged.

C. P. SEARLE v. LINDSAY AND OTHERS. *Nov.* 22.

Master and servant—Liability of master—Negligence of fellow-servant.

The plaintiff was employed as third engineer on board of a ship owned by the defendants. The defendants had employed a competent head engineer, by whose neglect to put a part of the machinery in a safe condition for working it, the plaintiff was injured.

Held, that the relation of fellow-servants existed between the head engineer and the plaintiff; and that as the defendants, their masters, had not been guilty of want of due and proper care in providing proper machinery or in employing competent servants, they were not liable for the injury done to the plaintiff.

Q. B. OGDEN v. GRAHAM. *Nov.* 27.

Charter party—Construction—Safe port—Meaning of term.

By the terms of a charter party a ship was to proceed to a certain place, and thence to a safe port, to be named by the defendant. The defendant named a port at a place where, there being a rebellion, the ship could not enter without a permit, which could not be obtained.

Held, that the place named was not a safe port.

Ex. CASWELL v. GROATT. *Nov.* 22.

Arbitration—Award—Setting aside.

Where an arbitrator has awarded less than £20 to the plaintiff, and has certified under the County Court Acts that the case was fit to be tried in the Superior Courts, but has omitted to certify to give the plaintiff costs on the superior scale, under the rules as to taxation of costs, the Court will not send back the award to him merely on an affidavit of belief that he intended to give the latter a certificate; nor will the Court look at any statement on his part as to what his intention was.

Ex. POTTER v. FAULKNER. *Nov.* 26, 27.

Master and servant—Volunteer service—Injury by fellow-servant—Negligence.

B's servants were occupied in loading bales of cotton out of B's warehouse into B's waggon. A voluntarily assisted B's servants. By the negligence of B's servants A was injured.

Held, affirming the judgment of the Queen's Bench, that A had no cause of action against B.

Under the circumstances above mentioned, a volunteer servant is in no better position than if he were the regular hired servant of the master.

Ex. ROSE v. REDFERN. *Nov.* 22.

Arbitration—Award—Setting aside—Direction as to costs.

It is no ground for setting aside, or sending back, an award, that the arbitrator has fixed the cost of his own award (the amount not being shown to be excessive), nor that he has said nothing as to the plaintiff's costs, the plain inference being that he meant the plaintiff to pay his own costs.

Ex. BISSILL v. WILLIAMSON. *Nov.* 11.

County court, action in—Pendency of action in superior court on the same question—Staying of proceedings.

Plaintiff commenced an action of ejectment in one of the superior courts, and, while it was pending, entered a plaint in respect of the same matter in the county court. Defendant pleaded in defence, the action in the superior court, whereupon the Judge called for and obtained an undertaking from plaintiff to discontinue the action in the court above; and notwithstanding that the undertaking was objected to by defendant, disallowed the plea, and ordered the defendant to give up possession.

Held, on appeal to this court, that the Judge was right in so doing.

C. P. FRASER AND OTHERS v. PENDLEBURY. *Nov.* 7.

Money had and received—Involuntary payment—Duress—Estoppel.

A mortgagee agreed to assign her interest on payment of principal, interest and costs.

An excessive claim being made for costs by the mortgagee, who refused to execute the transfer unless the sum was paid, the assignee, with the sanction of the mortgagor, paid the sum claimed under protest.

Held, that the mortgagor might recover the excess in an action for money had and received as a payment made involuntarily under undue pressure.

Held, also, that the mortgagor was not estopped from setting up his claim by the recital in the assignment, that the whole sum paid was due for principal, interest and costs; because a recital, although an estoppel to the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the deed.

Ex. *Nov.* 18.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY, *Appellants*, v. BARTLETT, *Respondent.*

Consignor and consignee—Acceptance of goods by consignee—Liability.

The consignee of goods may, at any time, dispense with the mode of delivery adopted by the consignor; and the contract between the consignor and the carriers is to deliver at the consignee's, unless the consignee shall otherwise order. Therefore, where a railway company, instead of delivering wheat to a consignee, kept it at one of their stations at the request of the consignee, and injury resulted from the wheat remaining too long tied up in bags.

Held, that the company were not liable in an action by the consignor for the loss sustained.

Ex. MADEN AND WIFE v. CATANACH. *Nov.* 11.

Trial—Witness—Incompetence—Absence of religious belief.

A plaintiff offering to give evidence, was sworn on the *voir dire*, and stated that she did not believe in God, or in a future state of rewards and punishments, nor in the religious obligation of an oath, but that she was bound by her own conscience to speak the truth.

Held, that her evidence was rightly rejected.

Quere, whether there was any authority to interrogate the witness as to her religious belief?

Ex. ALLSOP AND OTHERS v. DAY AND OTHERS. *Nov.* 11.

Bills of Sale Act (17 & 18 *Vic. c.* 36)—*Registration under—Receipt and inventory not a bill of sale.*

The trustees of a married woman purchased, under the terms of the settlement, the household furniture and effects belonging to her husband. The receipt was in these terms: "Received of J. D. and C. J., the trustees under the deed of settlement, for the benefit of my wife, the sum of £93 6s. 6d. for the purchase of my household goods and effects contained in the enclosed inventory and valuation as purchased this day by J. D. and C. J. as trustees named in the deed of settlement, and empowered so to purchase by such deed: the date of such deed is Nov. 5, 1858. G. French."

The goods remained in the house of French, and he and his wife continued to live together. The goods were afterwards seized under a writ of *fi. fa.*, at the suit of the plaintiffs, when the defendants, who were the trustees under the settlement, claimed them.

Held, that the receipt and inventory together did not amount to a bill of sale; that the document did not require to be registered under the Bill of Sales Act; and that therefore the defendants were entitled to the goods at the time of the seizure.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

HERBERT STONE McDONALD, of Gananoque, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 14, 1862.)

JOHN TEMPLETON, of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 14, 1862.)

GEORGE DUNSFORD, of the Town of Peterboro', Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 14, 1862.)

WILLIAM PATRICK, of Clifton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted June 21, 1862.)

AUGUSTUS ROCHE, of Port Hope, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 21, 1862.)

CLERKS OF COUNTY COURTS.

CHARLES RICE, Esquire, to be Clerk of the County Court in and for the United Counties of Lanark and Renfrew.—(Gazetted June 14, 1862.)

CORONERS.

GEORGE L. PATTS, Esquire, Associate Coroner County of Victoria.—(Gazetted June 21, 1862.)