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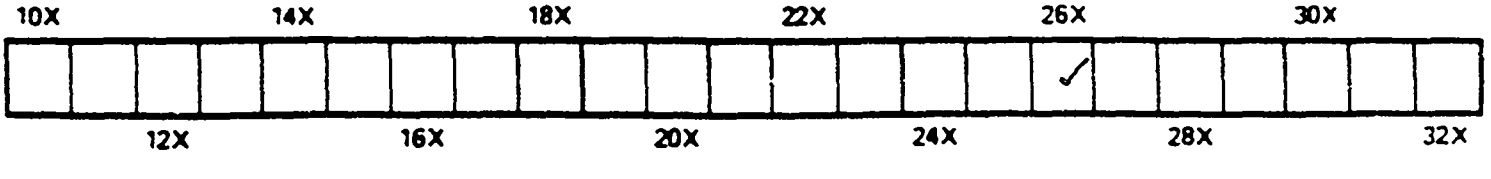

DIARY FOR SEPTEMBER.

3. Saturday... Trinity Term ends.
4. SUNDAY... 11*th Sunday after Trinity.*
6. Tuesday ... { Chancery Ex. Term, Toronto and Cobourg, commences. / Last day for notice of Ex. Chatham and Kingston.
7. Wednesday Chancery Ex. Term, Goderich, commences.
10. Saturday . Chancery Ex. Term, Cobourg and Goderich, ends.
11. SUNDAY .. 12*th Sunday after Trinity.*
12. Monday..... Last day for serving of Writ for Toronto Fall Assizes.
13. Tuesday ... Quarter Sessions in each County and County Court Sittings.
17. Saturday... Chancery Examination Term, Toronto, ends.
18. SUNDAY... 13*th Sunday after Trinity.*
20. Tuesday ... { Chancery Ex. Term, Chatham and Kingston, commences. / Last day for notice Ex. Hamilton and Ottawa.
22. Thursday... Last day for declaring for Toronto Fall Assizes.
24. Saturday... Chancery Ex. Term, Chatham and Kingston, ends.
25. SUNDAY... 14*th Sunday after Trinity.*
27. Tuesday ... Ch'y Ex. Term, Brockville, com. Last d. for not. of Ex. [Cornwall. Barrie and

The Upper Canada Law Journal.

SEPTEMBER, 1859.

In this number we commence our new method of addressing copies of the *Law Journal* to subscribers. By this method subscribers will see at a glance the amount of their indebtedness, the charge in all cases being to the end of the *current* year, thus

W. E. Johnson, $10,—59,

signifies that W. E. J. owes $10 to the end of the year 1859. Where no amount appears there is nothing due, and the subscription is paid to the end of the year signified. We hope that by this plan all mistakes shall be avoided, and the heavy amount of arrearage considerably lessened.

THE LAW OF REGISTERED JUDGMENTS IN UPPER CANADA.

Mr. Williams, in his interesting and practical work on Real Property, has remarked that "the attainment of the ample power which is now possessed over real property, has been the work of a long period of time; that a common purchase deed of a piece of freehold land cannot be explained without going back to the reign of Henry VIII. (Statute of Uses, 27 Hen. VIII. cap. 10), or an ordinary settlement of land, without resource to the laws of Edward I. (Statute *De Donis*, 13 Ed. I. cap. 1)." The same is also true of the attainment of the ample power now possessed by judgment creditors, in enforcing their judgments against the interests of their debtors in real estate. This liability to what may be called an involuntary alienation, appears in the early periods of English history to have been binding on the heir of a deceased owner of lands, to pay such of the debts of his ancestor as such ancestor's goods and chattels were not sufficient to satisfy; and although from the reign of Edward I., it was held that the heir was not responsible for any debts of his ancestor except those to the king, or where by deed of such ancestor he was specially bound to answer for such, yet, when the power of testamentary alienation was granted, a debtor who had thus bound his heirs could defeat this liability by devising his estate to some other person than his heir, and then neither heir nor devisee was bound. Such was the case until the act 3 & 4 W. & M. cap. 14, made void all devises by will as against specialty creditors, to whom the heirs were bound. But the creditor who had taken legal proceedings and obtained a judgment during the lifetime of his debtor, had, by the old rule of the common law, no resource whatever against the lands of the debtor, by means of an execution. The statute of Westminster the Second (13 Ed. I. cap. 18), however, gave the judgment creditor the right to have one-half of them extended or delivered to him under a writ of *elegit*, as follows: "When debt is recovered or acknowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *fieri facias* unto the sheriff for to levy the debt off the lands; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one-half of his land, until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of *novel disseisin*, and after by a writ of *re disseisin* if need be."

Under this statute it was held (and these rules of decision will be hereafter adverted to), that if at the time of the judgment the debtor had lands, and afterwards sold them, the creditor could, nevertheless, under the writ, take a moiety of the lands out of the hands of the purchaser (*Sir John De Moleyn's case*, Year Bk., 30 Ed. III. 24 *a*); and also even take a moiety of any lands purchased by the debtor after the date of the judgment, and then sold again.

The question as to whether this writ of *elegit* was applicable to Upper Canada, was incidentally raised in the case of *Doe dem. Henderson* v. *Burtch* (2 O. S. Rep. 514), where it was held that a judgment was not a lien upon lands for the purpose of an *elegit*, so as to avoid the effect of a writ of *fi. fa.* against lands issued on another judgment, subsequently entered, but placed in the sheriff's hands prior to the *elegit* And in reference to the writ, the learned Chief Justice remarked, "It is not necessary, in such a case, to determine whether an *elegit* can be resorted to in this country, to the prejudice of the remedy of other creditors, upon 5 Geo. II. cap. 7, whose satisfaction from the sale of the land would be indefinitely postponed if a prior plaintiff could hold them until he was satisfied out of the annual profits." In the case of *Doe dem. Dempsey v. Boulton* (9 U. C. Q. B. 535), Robinson, C. J., referring to the same writ, said, "The Legislature cannot be supposed to have framed the provision for registering judgments (9 Vic. cap. 34, sec. 13), with a view to process of execution by *elegit*, which they knew was never resorted to in this Province, being considered to be superseded by the 5th

Geo. II. cap. 7, which gives the same process of execution against lands as against goods." Since then we have not heard of a case in which a writ of *elegit* has been issued in Upper Canada, and we may therefore consider such a writ not in force here.

Under various enactments, the following are declared to be binding on lands, when the proper certificates thereof are registered in the county in which the debtor's lands lie.

1. Judgments of any Court of Record in Upper Canada. (9 Vic. cap. 34, sec. 13, and 13 & 14 Vic. cap. 63, sec. 2.)

2. Decrees or orders of the Court of Chancery, ordering the payment of money.—(20 Vic. cap. 56, sec. 10.)

3. Judgments (*Qu.*, also decrees and orders of the Equity side) of any County Court.—(19 & 20 Vic. cap. 90, sec. 7.)

4. Judgments of Division Courts, for sums above £10, to be obtained after fourteen days from the day of giving judgment.—(13 & 14 Vic. cap. 53, sec. 58.) See *Doe dem. McIntosh v. McDonell*, 4 O. S. Rep. 195.

The remedies of judgment creditors, by which they may have execution against their debtors' interest in real estate, depend altogether on statutes, and are as follows:

1.—5 Geo. II. cap. 7, sec. 4.—Houses, lands, negroes, (slavery being prohibited by 33 Geo. III. cap. 7, this term is inapplicable in Upper Canada), and other hereditaments and real estate, shall be liable to the debts of their owners, in the like manner as real estate is by the law of England liable to the satisfaction of debts due by bond or specialty, and shall be subject to the like remedies, proceedings and processes, in any court of law or equity, as personal estate, for the satisfaction of debts. By the act 43 Geo. III. cap. 1, it is provided that lands shall not be included in the same writ with goods and chattels, and that the writ against lands shall not issue until after the return of the writ against goods, and that the sheriff shall not sell the lands within less than twelve months from the day on which the writ is delivered to him. Under this statute it was held that lands were bound from the delivery of the writ to the sheriff (*Doe dem. McIntosh v. McDonell*, Trin. Term, 5 & 6 Wm. IV., and *Auldjo v. Hollister*, East. Term, 2 Vic.). A different rule now prevails, by virtue of the registry laws and decisions of the courts.

2.—9 Vic. cap. 35, s. 13.—On registering a certificate of judgment in the Registry office of the county wherein lands of the judgment debtor lie, such judgment shall affect and bind all the lands of such judgment debtor therein from the date of recording the same, *in like manner as the docketing of judgments in England affects and binds lands*, or, as the later statute (13 & 14 Vic. cap. 63, sec. 1) has it: in like manner as a judgment of any of her Majesty's superior courts at Westminster would, when duly docketed, have bound lands before the practise of docketing had been discontinued in England. This latter was the interpretation given in 1849 to the 9 Vic. by the Court of Queen's Bench, in *Doe dem. Dougall v. Fanning* (8 U.C.Q.B. 166), where it was held that the mistaken reference to the docketing of judgments in England should be considered as a mere false illustration of what was plainly provided for before. The same rule was laid down in *Doe dem. Dempsey v. Boulton* (9 U. C. Q. B. 535).

3.—12 Vic. cap. 71, sec. 13.—Any estate, right, title or interest in lands, which (under 14 & 15 Vic. cap. 7, sec. 5) may be disposed of by deed—viz., a contingent, an executory, or a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest be or be not ascertained; also a right of entry, whether immediate or future, or whether vested or contingent, into or upon any tenements or hereditaments of any tenure—shall be bound by judgments of any Court of Record (and decrees or orders of the Court of Chancery), and shall be liable to seizure and sale under any writ of execution against the party entitled to the same, in like manner and on like conditions as lands of such party are now by law liable to seizure and sale under execution.

4.—12 Vic. cap. 73.—Under a *fi. fa.* lands, the sheriff may seize, sell and convey, in like manner as other real estate, all the legal and equitable estate and the equity of redemption of mortgagors; and by virtue of such sale the purchaser shall stand in the position of the mortgagor.

5.—13 & 14 Vic. cap. 63.—Every judgment entered up subsequent to the 1st January 1851 (and every decree or order for the payment of money), when registered in any county, shall affect and bind all the lands of the debtor in such county (as docketing), &c., and shall operate as a charge upon and shall affect all lands in such county, of or to which the debtor was, at the time of registering such judgment, or which, at any time afterwards, he became seized, possessed or entitled for any estate or inheritance whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such debtor had, at the time of registering such judgment or at any time afterwards, any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding upon such debtor, and against all persons claiming under him; and against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or any other interest in or out of said lands; and every creditor so registering his judgment shall have such and the same remedies in a Court of Equity against the lands so charged, as he would be entitled to in

case the debtor had power to charge said lands, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest. And all such judgments shall be valid and effectual according to the priority of registering (sec. 2).

After any grant from the Crown, every deed, &c., executed after the 1st January 1851, whereby lands shall be affected in law or equity, shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, and against a subsequent judgment creditor, or creditor under a decree or order, who shall have registered his judgment, decree or order, unless such deed be registered before the deed, mortgage or judgment under which such subsequent purchaser, mortgagee or judgment or decretal creditor claims.

Every deed executed, and judgment recovered, since the 1st January 1851, when registered, shall be deemed effectual both in law and equity according to the priority of the time of registering such memorial or certificate (sec. 4).

And the registry of any deed, conveyance, will or judgment, under 9 Vic. cap. 34, and 13 & 14 Vic. cap 63, affecting lands and tenements, shall in equity constitute notice of such to all persons claiming any interest in such lands and tenements after such registry (sec. 7). See *Moffatt* v. *March* (3 Gr. Ch. 623).

6.—18 Vic. cap. 127.—No judgment, decree or order shall create a lien or charge upon any lands, or upon any interest in lands liable to seizure and sale on an execution against lands, until such judgment, decree or order has been registered in the Registry office of the county in which such lands are situate.

7.—20 Vic. cap. 57, sec. 19.—Every judgment, decree or order registered against lands, shall, in three years after such registration, cease to be a lien or charge on said lands, unless re-registered.

Now, in the acts above given, there are several provisions which will be found to clash with each other, some of which are noted by the Statute Commissioners on pages 904 and 905 of the edition of the Consolidated Statutes laid before Parliament. They are as follows:

The act 9 Vic. cap. 34, sec. 13 (proviso), in effect says that an *unregistered* judgment shall take effect against a prior registered judgment (*i. e.*, bind lands), when the party who has such prior registered judgment neglects for one year after the entry of such judgment to put his execution against lands in the hands of the sheriff.

The act 13 & 14 Vic. cap. 63, sec. 2, provides that judgments shall be taken to be valid and effectual to charge and bind lands according to the *priority of registration;* and the act 18 Vic. cap. 127, sec. 1, declares that no judgment shall create a lien or charge upon lands, or upon interests in such lands liable to seizure and sale on execution, *until registered* in the Registry office of the county in which such lands are situated.

Now, as a rule of law cannot be held to have two opposite interpretations; and as a later statute may repeal a former without express words, and as this later enactment is, we think, explicit, that a judgment can bind lands only when registered, it must be held that under its operation the proviso in the 13th section of 9 Vic. c. 34, is repealed. Indeed not only have we the authority of these statutes on the point, but the Court of Queen's Bench, in *Doe dem. Dempsey* v. *Boulton* (9 U. C. Q. B. 535), held that judgments registered here, bind lands not by relation to the time of entry of judgment, but *from the time of registration,* as did judgments docketed in England (when docketing was required) bind from the time of docketing, and not from the entry of the judgment; and that such registered judgments bind, not with reference to remedy by *elegit,* but for the purpose of a sale under a *fi. fa.* lands. The Court of Chancery, in *Bethune* v. *Caulcutt* (1 Gr. Ch. 81), held similarly—that judgments bind only from the time of their registration. The question, however, of the effect of the proviso in the 9th Vic. came up for consideration, in 1853, in the case of *Moffatt v. March* (3 Gr. Ch. 623), and it was held that it was intended to apply to conflicts between unregistered and registered judgments; that, being entirely negative in its provisions, it gave no new efficacy to an unregistered judgment, but on the contrary deprived it of a priority which it was assumed it would have had, and postponed it unless the creditor, who was subsequent in point of time, but prior in point of registration, has neglected to sue out his writ upon his judgment for a year after its entry. But it cannot be held that a sheriff's sale under such "unregistered" judgment could now cut out the prior registered judgment. In the first place, such judgment must be registered before the sale can properly take place; and in the next place, such sale would be only of the debtor's interest in the lands, of course subject to whatever incumbrances were registered prior to the judgment on which the *fi. fa.* lands issued.

Another legislative clashing may be discovered in the wording of the 2nd and 3rd sections of the 13 & 14 Vic. cap. 63. The 2nd section provides that a judgment, when registered, shall operate as a charge upon all lands, &c., in the county, of or to which the debtor *is then, or may become thereafter,* seized, possessed or entitled for *any estate or interest* at law or in equity, or over which *he had then or at any time afterwards* a disposing power; and such charge shall be equivalent to the debtor's having, by writing under his hand, agreed to charge such lands with the amount of such judgment. And in reference to this "disposing power,"

it will be seen from the decisions to which we shall hereafter refer, that the vendor may exercise it until the registry of a conveyance of his interest in the lands. The 3rd section in effect says, that the registered deed shall be *prima facie* evidence of title in the party whose name appears in the last registered deed.

The difficulty which arises is this: will a judgment, registered against a party whose name appears in the last registered deed of a lot of land, and who, before such registration of judgment, had conveyed away all his interest to another, bind that land so as to cut out the deed of the last purchaser? According to the 2nd section, the answer should be in the negative, for under it the judgment is to bind whatever interest the debtor has in the land *at the time of registering* such judgment; and having conveyed away all his interest before such registration, there remains no estate or interest to be bound. But by the 3rd section, the registration being *prima facie* evidence of title, it would seem that the judgment would bind; for the unregistered conveyance to a purchaser is there declared to be "fraudulent and void against the subsequent judgment creditor, who has registered his judgment." The 2nd section is in harmony with the common law by which a vendor's subsequent dealing with property, when he had parted with his estate in it, was declared of no effect; while by the 3rd section, a vendor may make as many conveyances as he pleased, and if the last obtained registration before the others, it conveyed the estate. On this point we may quote the words of Esten, V. C., in *Waters* v. *Shade* (2 Gr. Ch. 457): "In the case of a sale and conveyance of land first to one person, and then to another who first registers his conveyance, the estate of the grantor at the time of the execution of the second conveyance has not been converted into a mere right—he has no right at all—and the second conveyance is *per se* wholly void, but made good by the Registry Act, which is a great innovation upon the common law, and which avoids the prior conveyance as, in the contemplation of the law, fraudulent against the subsequent purchaser; the consequence of which is, that at the time of the execution of the second conveyance, the grantor is in the event deemed to have had the absolute fee simple of the estate." So also Draper, C. J., in *Bruyere* v. *Knox* (8 U. C. C. P. 520 & *post* 211): "When the owner in fee simple conveys his lands in fee to a purchaser for valuable consideration, he ceases to have any right, title or estate whatever; and consequently at the common law, any attempt on his part to make a subsequent sale or other disposition of them, would be nugatory and void. Nevertheless, the Registry acts do enable that owner to make a second conveyance for valuable consideration to another purchaser; and if such second conveyance obtains priority of registration as against those claiming under it, the first conveyance is fraudulent and void."

According to these, then, we must consider that the statute 13 & 14 Vic. cap. 63, has to some extent modified the law as laid down in *Doe dem. Spafford* v. *Breakenridge* (1 U. C. C. P. 492), which was, that the registration of a deed from a person having a fraudulent title, would not give priority over a deed from a person having a good title.

But if the second (but prior registered) conveyance is executed *without a valuable consideration*, it confers no title upon the grantee, as against the *bona fide* purchaser for value; yet, as it remains on record as a cloud upon the title, the Court of Chancery will decree its removal, as the Registry Act operates in favor only of purchasers for valuable consideration, *Ross* v. *Harvey* (3 Gr. Ch. 649). But if by a mistake in a registered deed, a portion of the property intended to be conveyed is omitted, and a judgment is afterwards registered against the vendor, such judgment shall not fasten upon the portion unconveyed by mistake. *McMaster* v. *Phipps* (5 Gr. Ch. 253). But *quære* as to notice.

But do the same rules apply to judgments, so as to make a registered judgment equivalent to a conveyance by a vendor of his estate? To decide this, we must first determine what is the nature of the charge created by a registered judgment. The act declares it to have the effect of an instrument in writing by the debtor, charging his lands with the amount of the debt and costs; and Lord Chancellor Sugden, in *Rolleston* v. *Morton* (1 D. & W. 195), referring to a similar provision in the English and Irish acts 1 & 2 Vic. and 3 & 4 Vic., says, "The act of Parliament is perfectly clear and free from all ambiguity and doubt. That which formerly, by force of the statute of Westminster, was a general charge upon lands, now, by force of the express directions of the act, becomes a specific lien—a specific incumbrance: words cannot be more express." So in our own Court of Chancery, in *McMaster* v. *Phipps* (5 Gr. Ch. 253), the Chancellor, in giving judgment, after stating that the statute 13 & 14 Vic. settles the priority between conflicting deeds and instruments which admit of registration, went on to say: "Previous to this statute, purchasers and judgment creditors stood upon an entirely different footing. A judgment creditor had, by virtue of his judgment, a general lien, or *quasi* lien, upon the estate of his debtor; but that lien was confined, and in reason it should have been confined, to property in which the debtor had a beneficial as well as legal interest. Now it must be admitted that this state of the law has been altered to a considerable extent by the recent statute. For some purpose, *judgments are treated as conveyances;* and when registered deeds and judgments come into com

petition, the Legislature has declared that they are to take effect according to the date of registration, and *an unregistered conveyance is void against a subsequent registered judgment.* If that be the effect of the statute—and I am inclined to think it is—then it goes much beyond the English act from which it was borrowed, and it enables a judgment creditor to realize his debt from property in which the debtor had no beneficial interest." The learned Vice-Chancellors, however, seem to have differed from his lordship; for, in this case, Esten, V. C., held that the Registry Act had not essentially altered the character of a judgment creditor as a purchaser for valuable consideration, having equal equity with a specific purchaser or incumbrancer; that he is still a general incumbrancer, not having equal equity with a specific claimant. Spragge, V. C., was of opinion that the statute did not place registered judgments upon the same footing as registered conveyances, and adds, "The policy and justice of the registry laws, as between purchasers, do not apply to judgment creditors. There is reason for preferring a purchaser for value [*qu.*, second] who has registered without notice, to one [*qu.*, first] who has a conveyance which he has neglected to register; because, finding no conveyance from his grantor registered, he has reason to believe that no such conveyance exists; but there is no reason for satisfying a judgment debt by the sale of lands which do not belong to the judgment debtor." These opinions seem to have been subsequently modified; and, indeed, we doubt if the reasoning of the learned Vice-Chancellors could be sustained on appeal. The Court of Common Pleas, in *Bregden* v. *Collins* (7 U.C.C.P. 61), has held that the effect of a registered judgment entered after the 1st January 1851, is substantially equivalent to a charge in writing of his lands by the judgment debtor; and that the 3rd section of the act 13 & 14 Vic. places *judgments* and deeds on the same footing as to priority. But we cannot say that the question, whether a judgment creditor is a purchaser for value within the meaning of the 27th Eliz. cap. 4, secs. 2 & 5, so as to have a voluntary conveyance set aside in his favor, is settled, notwithstanding that our Court of Chancery, in *Gillespie* v. *Van Egmondt* (6 Gr. Ch. 533), has followed the decision in *Beaven* v. *Lord Oxford* (2 Jur. N. S. 121); for the English acts, containing no provisions corresponding to the 3rd section of our act 13 & 14 Vic., cannot be held to establish a rule of decision which shall be applicable to Canada. The decision, however, is in harmony with the doctrine laid down by the Chancellor in *McMaster* v. *Phipps* (5 Gr. Ch. 253), that although judgments were treated by the act as conveyances, there was nothing in that act which placed a judgment creditor on the same footing as a purchaser.

Now, if deeds and judgments are placed upon the same footing, and if, where several conveyances for valuable consideration are executed by a vendor, the last of which, by being first registered, conveys a legal title, and thus by the act of registration so altering the common law as to make that legal which before was fraudulent and void, and that fraudulent and void which before was legal; what are the relative effects of judgments recovered against a vendor *before* a sale, and those recovered *after* a sale, but registered against the vendor's lands *after* the execution of the deed, and *before* its registration?

We do not know of a case where the question has come up, of judgments registered against a purchaser who has not registered his conveyance being binding upon such purchaser's interest in the land conveyed. Can he be rendered liable for two sets of registered judgments—his own and his vendor's? We doubt if the Legislature intended such. If not, for which set of registered judgments is he to be rendered liable? To say, as has been said by some of our judges, that the *date* of the unregistered conveyance shall be the period up to which judgments shall bind the vendor-debtor's interest, would open a door for the fraud which the Legislature intended the Registry acts to prevent; for the deed could be dated back, so as to cut out a judgment, and in many cases deeds are not executed on the day they bear date. On the other hand, to say, as other of our judges have said, that the vendor's judgment shall attach where the purchaser neglects to register his conveyance, would be to work a hardship on the purchaser, but nevertheless a hardship to which by his own laches he must be held to have subjected himself; for the Legislature has clearly intended a penalty for those who neglect to avail themselves of the means of protection which it has provided.

This latter interpretation, notwithstanding the hardship, is, we think, the most reasonable one; and although our judges have not been unanimous in opinion on the point, we may with some right, assume it to be an established rule of interpretation, that judgments bind lands the same as deeds, and have priority according to the time of registration, and that *an unregistered conveyance is void against a subsequent registered judgment.* All the judges who have expressed their views upon the Registry acts, agree that where a vendor executes several conveyances, for valuable consideration, of his estate, the one first registered, though it was the last executed, will convey the estate. From the analogy held by several distinguished judges to exist between deeds and judgments, under the act as well as from the reason of the law and its intentions against fraud, it seems proper that the same rule, which is thus held to apply to deeds, should indiscriminately apply to deeds and judgments. The difficulty, however, is created by the words of the 2nd section of the 13 & 14 Vic., which

declare the registered judgment to be a charge upon the *lands then or thereafter acquired by the debtor.*

Such being the most reasonable opinion of the intention of the act, we have to consider whether the time of *signing judgment* can be held as authorizing a limitation of the rule that judgments bind lands until the *registration* of the conveyance of the debtor's interest in them to a purchaser. The case of *Doe dem. Brennan* v. *O'Neil* (4 U. C. Q. B. 8), was of a judgment recovered after the conveyance. The plaintiff claimed under a sheriff's deed, made to him on the 20th June 1846, upon a sale on an execution against the lands of one John O'Neil. The defendant claimed under a deed from the said John O'Neil, dated 3rd February 1842, but which he had neglected to register. It was held that the plaintiff, having registered his deed before the defendant, was therefore entitled to the land. This, however, was before the Registry Act 13 & 14 Vic. A later case (unreported), and one which comes under that act, was the case of the *Bank of Montreal* v. *Stevens*, which was decided in the Court of Chancery in November, 1858. The case was this: The Bank obtained judgment in Michaelmas Term 1854, and registered it, on the 25th November of the same year, against the lands of A. It appeared, however, that on the 2nd February 1854, A, the judgment debtor, conveyed certain of his lands to B, who did not register his conveyance until the 16th January 1855; that on the 4th November 1854, A, the judgment debtor, also assigned a mortgage, which he held on certain other property, to C, who did not register his assignment until the 10th August 1855. The court decreed both deed and assignment to be fraudulent and void as against the registered judgment of the plaintiffs, and ordered a sale of the land conveyed by deed to B; and in case of the proceeds of such sale being insufficient, that the plaintiffs were to receive the residue out of the lands comprised in the mortgage. And on this point, of satisfying a judgment, we may here mention a case of *Lindsay* v. *Hewitt*, decided in Chancery last month, where it was held that a judgment creditor filing his bill to satisfy his judgment, may take a decree to sell all lands which the debtor is then, or may thereafter become, the owner of, until his judgment is satisfied.

These cases are, we think, clear in establishing the rule that judgments obtained and registered *after* the execution of a conveyance of the debtor's interest in lands, will bind those lands *until* such conveyance be registered. But can it be said that the other rule is as clearly established—that judgments obtained *before* the conveyance, and registered *after* its execution, but *before* its registration, shall also bind lands? We refer of course to conveyances executed, and judgments obtained, since the 1st January 1851, for it has been established by the decisions in *Broqden* v. *Collins* (7 U. C. C. P. 61) and *Gilmour* v. *Cameron* (6 Gr. Ch. 290), that the Registry Act 13 & 14 Vic. does not apply to deeds and judgments which bear date prior to the 1st January, 1851,—so therefore the remarks we may make on this branch of our subject will not apply to such.

The 3rd section of the act says that every deed, &c., executed after the 1st January, 1851, shall be fraudulent and void against a *subsequent* judgment creditor, who shall have registered his judgment before the registration of such deed. Here is a term which gives a very important meaning to this section of the act. The word *subsequent* must, we think, be held to have the ordinary common-sense meaning of later in point of date; and we must confess that there is a seeming propriety in making later judgments bind, as fraud might enable parties to date back their deeds, the proof of which would be very difficult to establish. But no such danger can arise as to the dates of certificates of judgments given and dated by independent and unbiased officers of the courts. The only danger that could, we think, arise would be the dating of deeds in advance; but that is a danger which can only occur when the judgment creditor stands by and neglects to register his judgment; and whenever he does so, he has only himself to blame for his delay. The word upon which we thus lay stress, cannot, we think, refer to judgments registered *subsequent to the act, for if so the word would be redundant,* as all judgments to bind must of course be so registered; and the expression used is against such an interpretation, or to its being held to refer to judgments subsequent to the 1st January, 1851; for all its provisions apply to such: the passage being, every *deed, &c., executed after the* 1st January, 1851, shall be fraudulent and void against a subsequent judgment creditor (*i. e.*, in date) who shall have registered a certificate of his judgment. If then the wording of the statute, notwithstanding the 4th section, which declares that registration shall be *deemed good and effectual in law and equity, according to* the priority of registering, bears such a construction, we must hold that the Legislature intended to make a distinction between those obtained *prior* and those obtained *subsequent* to the execution of the deed. Of course the rule may perhaps be modified in courts of equity where the purchaser has express notice of the judgment; for few conveyancers will allow the party for whom they act, to perfect a conveyance, by signing, sealing and delivering it, without proper searches in the Registry and sheriff's offices of the county in which the lands lie.

In connection with the above we may mention the case of *Thirkell* v. *Patterson*, just decided in the Court of Queen's Bench, the substance of which is as follows:—One T. obtained a judgment in a division court against C., and upon execution issued, it was returned "no goods."

On the 16th May, T. registered his judgment against C.'s lands. On the 15th May, C. had conveyed away his lands to H. by deed; but the deed was not registered until the 17th May, the day *after* the registration of the judgment. A *fi. fa.* lands was shortly afterwards placed in the sheriff's hands, under which C.'s lands were sold to T. Ejectment was then brought by T.; but the court held that he registered his judgment against no estate or interest of C. in lands, and that at all events, not being a "subsequent" judgment creditor to the execution of the deed to H., his judgment could not cut out the deed.

We have allowed these remarks to extend much beyond the length originally intended; but the subject is one of great and growing importance, and full and complete information in regard to it is essential to all parties who are interested in real estate, whether as creditors or debtors, vendors or purchasers, independently of its interest to the members of the profession. Under these impressions we have written, and in the hope that the information we have sought to convey will lead to a more thorough understanding of the subject. We leave the discussion for the present, intending on a future occasion to refer to the interests in real estate which may be bound by registered judgments.

GARDINER v. GARDINER.

We perceive the article on this subject in our August number has induced a champion, under the *nom de plume* of "Aliquis," and through the medium of the *Globe* newspaper, to enter the lists and contend, firstly, that no matter how erroneous the doctrine promulgated by *Gardiner* v. *Gardiner*, and that class of cases, may be, it cannot now be set right by any Court of Appeal.

Secondly, that if it could be reversed, it will not, because it is perfectly correct.

His arguments in support of his first position are, that all our arguments were advanced and disregarded in *Gardiner v. Gardiner*, although urged by very able counsel; that neither that case nor any subsequent one was appealed from; that a number of titles depend on them, and the consequences of reversal would be injurious to many. Upon mature reflection, we are inclined to doubt that injury would result therefrom to many, and to believe the happiest results would follow instead; as the Legislature will then (although perhaps they will not before) immediately pass a statute remedying the past and regulating the future upon some intelligible principle; but even if they would not, such circumstances, although perhaps sufficient in cases where the question of error or no error is so evenly poised as to tremble in the balance, to incline the court to the one side in preference to the other, are quite insufficient to deter the judges of the Canadian or English Court of Appeal from expressing their convictions, and doubly insufficient to compel them, while they knew *Gardiner* v. *Gardiner* to be contrary to all legal principles, to declare on their honor and oath of office they believed it to be in strict accordance with such principles. Such a result can hardly, we think, be anticipated by any one who will read the judgment of Chief Justice Draper in *Sickles* v. *Asseltine*, 10 Q. B. U. C 207, and of the Chancellor in *Crooks* v. *Crooks*, 4 Chy. Rep. U. C., 618, 619, or who has heard the unreported case of *Irvine* v. *Chrysler*,* in the same court, afterwards decided, where *Gardiner* v. *Gardiner*, though cited and strongly urged, was disregarded, and the real representatives compelled to be added, before the real property of the deceased debtor could be applied to payment of his mortgage debt, although the personal representatives were before the court and a decree made against deceased.

In support of his second position, "Aliquis" argues in substance, that because the imperial statute 5 Geo. II. ch. 7, sec. 4 (which, he does not dispute we clearly showed in our former article, left the lands assets in the hands of the heirs and devisees, and which, if *Castrique* v. *Page*, 22 L. J. C. P., 17 Jur. 345, and *Marriage* v. *Reif*, 27 L. J. Ex. 189, in error, be law, only gives to all the creditors of deceased similar remedies to those which at that time the specialty creditors of deceased land owners in England had, which no one can deny then were, and were only, by creditors' bill in chancery against the real representatives, or at common law by action against the heirs, or on the statutes 29 Car. II. c. 10, ss. 10 & 11, and 3 W. & M. c. 14, against the devisees and alienees) was itself first introduced by the imperial statute 14 Geo. III. ch. 83, sec. 18, into Upper Canada, then a portion of the Province of Quebec, and governed by the French feudal law, according to which the creditors had no resort to the lands of the deceased; therefore such 5 Geo. II. ch. 7, must be construed only to have been introduced in a mutilated state, shorn of all those branches of English law which by express words and direct reference it embraced and incorporated with itself, and shorn even of every analogy to that system of jurisprudence of which it is merely an offshoot; and also that those portions of English law so shorn off, although absolutely necessary to make the act intelligible, must be further construed to remain by implication still excluded,

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* *Paine v. Chapman*, 7 Grant, Chy. U. C. Rep. 179, reported since this article was written, agreeing with the cases of *Crooks* v. *Crooks* and *Irvine* v. *Chrysler*, above mentioned, also in effect directly overrules *Gardiner* v. *Gardiner*, by deciding that where a claim is to be enforced by a creditor of the deceased debtor against his lands alone, the personal representative is not a proper party, and the real representatives alone are the proper parties defendant.

notwithstanding the express words of admission of the statute 32 Geo. III. ch. 1, sec. 3, which enacts that thenceforth, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same;" and then, treating these assumptions as axioms, he proceeds in the same strain of argument to insist, that because when so construed or ignored, the words of the second branch of the fourth section of the 5 Geo. II. ch. 7, have no meaning whatever, and consequently do not supply any machinery by which the act can be worked, it therefore became legal and proper to devise and supply the machinery which *Gardiner* v. *Gardiner* declares to be the only suitable one. It cannot be denied that this line of argument is excessively elaborate and ingenious, yet, as it is not supported by any case or legal authority, and appears to us opposed to the generally received notions of legal construction, it fails to alter our previous opinions, fortified as they are by the authorities we have already cited, by those we hereafter cite, and also by his own admission, that although there is no case in our courts in point, yet in every case in which the point was alluded to, the judges took it for granted that the statute 3 W. & M. ch. 14, is in force in Upper Canada.

The following are also additional reasons why we do not believe the doctrine promulgated by *Gardiner* v. *Gardiner* and that class of cases to be law, viz., the English Act 3 & 4 Wm. IV. ch. 104, and 5 Geo. II. ch. 7, have now placed the laws of England and Upper Canada, affecting the lands of deceased debtors, upon the same footing, with two exceptions: the first exception is that the English Act only applies where the deceased debtor has not willed his lands to pay his debts, while the statutes affecting Upper Canada apply whether the debtor's lands are devised or not: the second exception is, that in England such lands, as to the mere simple contract debts of the deceased, are "assets" only in equity, but not at common law; while in Canada they are "assets," both as to simple contract and specialty debts, in the common law courts as well as in equity; distinctions which cannot affect the present dispute as to whether the heir and devisees ought to be sued either alone or with the executors, before being deprived of their lands, or have some opportunity to pay their ancestors' or testators' debts, and keep his lands. Yet in England, *Spikernell* v. *Hotham*, 9 Hare, 73, coinciding with *Irvine* v. *Chrysler*, in the Upper Canada Chancery, decides that to a creditor's bill seeking payment out of the real as well as personal estate of the deceased, the heir at law is a necessary party: while Mitford's Chy. Pleading, 4th ed., by George Jeremy, pages 166 and 167, *Richardson* v. *Horton*, 7 Beav. 112, *Speckman* v. *Simball*, 8 Sim. 253, and *Pimm* v. *Insall*, 14 Jur. 358, not only accord so far, but show that if our construction of the statute be, as we contend it is, correct, the creditors, by filing a creditor's bill in chancery, can "obtain payment out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not liable; although the heir or devisee remains personally liable to the extent of the value of the land descended." *This, it appears to us,* not only answers the only remaining assumption of "Aliquis" upon which he founds his argument, when he says, "I think it quite clear that all the debts of the deceased, indeed all his liabilities for causes of action surviving him, form a general charge on his real estate;" but also appears to afford all the relief, to any creditor who chooses to avail himself of it, for which "Aliquis" is contending.

Perhaps the most extraordinary circumstance connected with the extraordinary case we are considering, is the fact, that while the class of extrajudicial persons to which "Aliquis" belongs, make it a point of faith to believe, irrespective of reason, that because *Gardiner* v. *Gardiner* was in fact decided by a legal tribunal, it cannot possibly be decided otherwise than in strict accordance with law, and that it is legal heresy to doubt it—some of the judges of the court which decided it, but who had no part in its decision, are able to see the impossibility of defending the case, to its full extent at least, and are candid enough not to disguise the sentiment. Take, for instance, *Levisconte* v. *Dorland*, 17 Q. B. U. C. 437, published since our first article, which is a solemn decision that on the death of the deceased debtor, his land passes to his heirs and devisees, and never for any purpose whatever to his executors or administrators; and turn to the decision of Judge Burns, page 442, where, commenting on *Gardiner* v. *Gardiner*, he says, "it has always struck me that the preferable mode of getting at the lands through such a judgment, would have been to have permitted the plaintiff to enter a suggestion on the roll as an answer to the plea of *plene administravit*, instead of a replication calling upon the plaintiff to rejoin:" in other words he considered that what is called the replication was in truth and substance only an informal suggestion of lands upon the roll, and such undoubtedly is the true ground upon which it rests, and upon which, if capable of defence, it must be defended. But even viewed thus, only some mere formal objections are avoided, the material objections remain: for, in the first place, as we have in this and our former article shewn and proved by authorities, the Statute 5 Geo. II., ch. 7, sect. 4, does not affect the lands of the debtor, whether dead or alive, by charging his unsued-for debts upon such lands to the same extent as if they had been sued for, and plaintiff had recovered and registered a judgment for such debts against

deceased in his life time, or to any extent whatever. And even if we were so far to beg the question as to assume contrary to law that the statute had that effect, still, as the real representatives were not parties to the incurring of the debts by deceased, *sci. fa.* on the statute, as upon a judgment, or a bill in equity to foreclose or sell, would have to be sued out against, and served upon, the heirs, to make them parties before they could be deprived of their property, which it is, as the freehold cannot be in abeyance, 2 Wils. 165: or if it be denied that the property in the lands of deceased is, as regards the creditors of deceased, in his heirs or devisees, as it has been denied to be in his executors or administrators, and the fee simple be asserted to be in abeyance; it cannot be charged till it comes *in esse*, so as to be certainly charged or aliened, 1 Inst. 378; and like a title of honor while in abeyance, is in the disposition of the crown; suing the administrator as executor is useless—Tomlin's Law Dict. "Abeyance"—therefore the remedy ought to be by petition of right to the Crown. Or suppose we shut our eyes, and, refusing to see those difficulties, conclude that judgment against the executor is correct, still it is well known a suggestion is not applicable to any case, except where the party to be affected by it is one of the original parties to the record upon which the execution which is to affect him or his property is to issue; if he be not, although he may ultimately be as much bound by such judgment by force of some statute, as if he were, yet he must be made a party to it by *sci. fa.* first, and after that you can affect him and his property as if he were an original defendant.—*Permer* v. *Bruce*, 1 Salk. 319; *Clowes* v. *Prethrell*, 10 M. & W. 506; *Rainsford* v. *Bosanquet*, 2 Q. B. 972, in Error. And if we were still further to beg the question, by assuming contrary to law that, a suggestion upon the roll was the proper mode, although the heirs and devisees never were parties to the action or judgment against the executor or administrator, even then, as the fact of the plaintiff being a subject, the fact of a debt being due to him by deceased, and the question what is the precise amount of such debt if due, are not matters of law which the court can determine by inspection of the 5 Geo. II. ch. 7, but must be decided by a jury; leave to enter such suggestion could only be obtained on rule nisi served upon, and cause shown by, the heirs and devisees, or the opportunity of showing cause given them if they pleased: and when after decision of the court that such suggestion should be entered on the roll, and afterwards in fact should be entered on the roll, then the heirs and devisees would have the right to plead or to demur to it.—2 Arch. Pract. 1468, 9th ed.; *Watson* v. *Quilter*, 11 M. & W., 767 to 772; *Peterson* v. *Davis*, 6 C. B. 235, 252.

After being compelled to dissent from the views of "Aliquis" to the extent we have done, it affords us no small pleasure to be able to argue with our fellow labourer in the cause of amelioration, to this extent, that we think it would be well to add to the legislative amendments we formerly suggested, some provision for enabling all courts of law or equity, where infants, married women, or those labouring under any other disabilities, and not having guardians capable of suing and being sued, were parties, to appoint guardians *ad litem* for them, at the suggestion of their *prochein amis* or any of the parties litigant; and still further to agree with him, "that it would not be a difficult matter to frame a measure which, while amply protecting the interests of heirs, would also afford a reasonable mode of satisfying creditors;" in our opinion all, or very nearly all, that will be attained by the Court of Appeal reversing the present construction of our present statutes, and construing them as, we think, they ought to have been construed at first: and the whole of it will be certainly obtained by passing an explanatory act embodying the above and former suggestions made by us, to effect the same purpose, provided it seem best to the legislature, that lands of deceased debtors should be real estate; but if it is considered better to make them personal property, concerning which the executor can be sued, then by passing for Upper Canada a statute in the very same words (except the description of places, &c.) as England passed for India—we mean the 9 Geo. III. ch. 33; or by adopting the old principle of English law applicable to colonial lands in colonies which (unlike Upper Canada) have no constitution by statute given them by the mother country; viz., that such colonial lands, both while their owner lives, as well as after he is dead, are merely chattel property, and not real estate, (*Noel* v. *Robertson*, 2 Vent. 358; *Blanchard* v. *Galty*, 4 Mod. 226); so in that case the interest of the real representatives would be protected to the same extent as the interests of the personal representatives; by obliging the administrators to give security for their due administration, and making them and the executors liable for wasting the real estate or administering it improperly. Many would think this sufficient; but the lands of deceased debtors must be either wholly and solely realty or personalty, and cannot be either and neither, and both at the same time, if any real amendment is desired. *Gardiner* v. *Gardiner*, and that class of cases, by incautiously going too far to stop, and then fearing to recede or advance to a secure position, have placed the Canadian courts in a position similar to that in which Cæsar would have been, if, when having passed the Rubicon contrary to law, he became panic stricken, and, fearing to march upon Rome, and inaugurate a new form of government, stopped half way, merely establishing a bad precedent, and adding to previous confusion.

CHANCERY DELAYS.

Much has been written, and many and loud have been the denunciations against Chancery delays. They have afforded amusemsnt to the readers of popular novels,—but they have also given deep and bitter anguish to those who have been subjected to their torture.

That the *principles* of the court are merciful and equitable, few will deny; but there are also few, if any, who will acknowledge that its *practice* is as equally merciful and equitable. By some means or other, that which was intended to mitigate the rigor of common law, has been made a rigorous taskmaster over those who have been induced to seek what they supposed to be the protection of its jurisdiction against the infliction of legal wrong. And is there no remedy? Are these delays attributable to the judges, the practitioners, or the suitors? Few can, perhaps, give satisfactory answers. A great deal of the difficulty may, we think, be found in that portion of the practice which determines the computation of time in pleading.

Take an ordinary case of a foreclosure suit. Before it can come to be heard on motion for a decree, or *pro confesso* by the most expeditious way, seven weeks *at least*, often eight weeks, must elapse from the date of serving the bill. Now, an ordinary common law suit, taking the full time allowed for each step, can be brought to trial in twenty-eight days, or four weeks. But if the defendant does not appear, the plaintiff can take out his execution in eighteen days from the date of serving the writ; while in no Chancery case (except those of a very special nature) can he have his decree within seven weeks, or forty-nine days, even when the defendant does not appear. Surely it cannot be maintained that Chancery pleading requires longer time to prepare than common law pleading. If anything, Chancery pleading, being principally by bill, answer, or demurrer, and replication, is more simple than summons and appearance, declaration, plea, replication, rejoinder, surrejoinder, rebutter, surrebutter, with an occasional demurrer, although, in fact, few cases go beyond rejoinder. In eight days from the service of the declaration (or eighteen days from the service of the writ), in common law, the plaintiff is entitled to know what defence his adversary relies upon; but in Chancery he must wait twenty-eight days, and then must allow him twenty-one days more, before he can bring the case to a hearing; while at common law the defendant is only allowed eight days until the case is ready for trial. This slowness, we must confess, is most detrimental to the interests of a case; for the sooner the action is brought to issue, the better it is for the professional man, and the litigants;—the facts are fresh in the minds of all, and can be presented to the court with a freshness and clearness which a long delay must seriously diminish.

Then take a case which goes through the ordinary formalities of examination and hearing. The Chancery suit, if not proceeded with after answer filed, cannot be dismissed by the defendant until twenty-eight days after answer, and then two clear (or four full) days' notice of motion to dismiss must be given; whereas at common law, if after the defendant has filed his pleas, and served notice to reply, the plaintiff neglects to reply for eight days after such notice, the defendant may sign judgment of *non pros*. But should the case go on, the Chancery suit requires fourteen days' notice of examination, and the common law suit only eight days' notice of trial. And here comes in some similarity between Chancery and law proceedings. Although in the great majority of cases the common law suit is finally decided at the trial, while the Chancery suit must wait for the hearing term, which commences about nine weeks after the commencement of the examination term, yet judgment in the common law suit cannot be signed (unless immediate execution is granted) until the term after the verdict, which is about eight or nine weeks after the commencement of the assizes. But even this analogy is only in name. In the common law suit, the verdict—equal to the decree in Chancery—is pronounced, and only the formality of entering up judgment remains; while in Chancery there is as yet no verdict, but only the merits of the case, in such a state that the court can on argument adjudicate upon them. True, the verdict at law may be impeached, and a rule to show cause may delay its being entered up, but such a proceeding seldom delays a common law suit more than the time the rule stands for judgment—a period, in Chancery proceedings, which we often hear Chancery practitioners complain of as most unnecessarily long.

Now in the English Court of Chancery, the time allowed for pleading is much shorter than that allowed in the Court of Chancery here. There, a defendant must enter an appearance within eight days after service of the bill; and if the defendant does not plead, answer, or demur, the plaintiff may file a traversing note, which in effect makes the defendant traverse the case made out in the bill. If the defendant answers, demurs or pleads, he must do so within twelve days after appearance; or, when required to answer, by the delivery of interrogatories, then within fourteen days from the service of such interrogatories. A motion for decree requires a month's notice to be given; and a bill may be taken *pro confesso*, when the defendant is attached for not answering, within three weeks after the execution of the attachment, by serving on such defendant a three weeks' notice of motion to take the bill *pro confesso* against him.

These comparisons show strongly against the practice of our Court of Chancery in regard to the times allowed for pleading; but there is another, and perhaps the sorest spot

of all, to which we have not yet referred: we mean the Master's office Here, whatever may be the delay in the former part of the case, delay the most annoying and unmerciful occurs. On the argument in court, or on a reference before a judge in chambers, the whole case is heard and disposed of; but in the Master's office the case is gone into piecemeal, and little by little, and with sleepy pace it drags its slow length along. An hour is given for one day, another hour for some future day, and so on until work is spun out over five or six weeks, which could better and more satisfactorily to all parties be done at a sitting of two or three hours. Take for instance a common foreclosure case. Three warrants, for three separate hours, on as many days, have to be taken out, served, and, as they mature, attended. For what, we ask, are these separate days required? Could not the accounts be brought in, and the cause heard and determined, and costs taxed, at the one sitting; and if it was found impossible to settle the report at the same time—and such could be settled in one half the cases—could not the next day, or one not far off, be appointed? Most assuredly we think it could be so arranged; and such a practice would, we are sure, soon clear out the old cases with which the Master's office has become crowded.

Another matter, worthy of the consideration of Chancery reformers, is the repeal of the order of the 30th June, 1859, which provides that the time of the long vacation (seven weeks) shall not be reckoned in the computation of the time allowed for answering. Under its operation a defendant may delay a plaintiff fully eleven weeks before he puts in a defence; and if no answer is put in, the plaintiff may have to wait fourteen weeks before his cause can be heard. The analogy of the common law practice does not support this; for at common law, if a defendant does not appear within the ten days in vacation, final judgment may be signed against him; but should he appear, it is provided that no declaration, or pleading after declaration, shall be filed or served between the 1st July and 21st August. Much better would it have been to have provided that no order *pro confesso* should be taken out during vacation; and that where a bill was served near the close of vacation, the time within vacation should count.

It is scarcely within our province to do more than point out what we consider errors in practice, and to suggest for consideration such alterations as we think useful and practical. It is admitted by all, that Chancery practice has greatly improved in some particulars since the reorganization of the court; and for the sake of reform, we are happy to say that so far as the Judges of that court are concerned, every inclination to reform the old abuses has been shown, in listening to suggestions, and in adopting such as have been represented to be advantageous. The intention—at present vaguely hinted at—of having three courts, by the judges sitting separately, affords a good opportunity for a thorough revision of the practice, and in such a proceeding we would be only following English precedent, for the matter seems to have been taken up there with an intention to thoroughly reform it. Would not the old as well as common law form of entering an appearance in, say, ten days after service of bill, be an improvement; or if not that, then, twelve or fourteen days be sufficient for a defendant to be allowed for preparing his answer, and the common-law eight days for notice of motion for decree, examination and hearing? And could not other periods be shortened proportionally? And in reference to the Master's office, could not cases be disposed of at the one sitting, rather than have them, like the liver of Prometheus, slowly wasted, or, like the stone of Sisyphus, requiring the same ground to be gone over so often? Surely, something should be done to take away the odium which attaches to the court on the ground of delay and unnecessary proceedings. For ourselves we may say that, whatever may be our views as to the continuance of the court as a court of equity, we have made these observations considering that as we have such a court, it ought to be made as thoroughly efficient as are our law courts. The question of reform has lost none of its force since the publication in these columns of the letter of "A City Solicitor;" and whatever may be the opinions of parties in regard to the frequency of the facts there stated, no one can deny that they may and do occur in the progress of a cause.

As a supplement to our remarks, we may add the following extract from a Report of the Liverpool Law Society, on Chancery Reform. We copy from the *Law Times:*

As to the Judges working out their own Decrees.

By the Acts of 15 & 16 Vict., cc. 80 and 86, important and sweeping changes were introduced into the Court of Chancery.

By the first-mentioned Act the office of Master in Chancery was abolished, it being recited that it was expedient that the business then disposed of in the office of such Masters, should be transacted by and under the more immediate direction and control of the judges of the court; and the Master of the Rolls and Vice-Chancellors for the time being were, by sect. 11, required to sit at chambers for the despatch of such part of the business of the court as could, without detriment to the public advantage arising from the discussion of questions in open court be heard in chambers. And by sect. 16 the Master of the Rolls and every of the Vice-Chancellors for the time being, were authorised to appoint two chief clerks each for the purpose of assisting in the general business of each court, and the causes and matters belonging thereto, And it was also enacted by sect. 29 that the Master of the Rolls and the Vice-Chancellors respectively should have the sole power (subject to any rules which might be made by the Lord Chancellor, with the advice and assistance of them or any two of them) to order what matters and things should be investigated by and before their respective chief clerks, either with or without their direction during their progress, and what matters and things

should be heard and investigated by themselves; and particularly, if the judge should so direct, his chief clerks respectively should take accounts, and make such inquiries as had usually been prosecuted before the chief clerks of the Masters; and the judge should give such aid and directions in every or any such account or inquiry as he might think proper, but subject to the right there provided for the suitor to bring in any particular point before the judge himself. And by sec. 36 all the powers of the Masters were given to the Masters of the Rolls and the Vice-Chancellors.

It appears to the committee that the intention of this Act was to substitute the judge in the cause, and not his chief clerk for the former Master in Chancery—and that the chief clerk should assist the judge in the same way as the Master's chief clerk assisted the Master. A decree was therefore intended, except in the minor details, to be worked out by the judge who made it, sitting in chambers.

In order to enable this intention to be carried out, it is clearly necessary that each judge so assuming the duties of a Master in Chancery, should sit in Chambers for a considerable portion of his time, at least so long, if not longer, than the time for which he is engaged in court. In its actual working, however, the Act has not fulfilled its design. From the great increase of business in the court since the improvement in its procedure, nearly the whole time of the judge is occupied in hearing matters in open court, and only a very small portion of each day is devoted to sitting in chambers, the result of which is, that the task of working out the decrees, formerly devolving on the old Masters in Chancery, is substantially thrown upon the chief clerks: and that instead of obtaining the decision of the judge in chambers in the first instance, as was intended, the suitor has first to go before the chief clerk, and when he desires the opinion of the judge, or the assistance of counsel, has to incur the expense and delay of briefing both the counsel who have been engaged in the cause to argue the matter in open court. This course of things also tends to augment the amount of business transacted in open court, whereby the evil increases itself.

In working out a decree before a chief clerk moreover, more time has necessarily to be consumed than would be required by the judge who has heard the cause in court, for he has to be made acquainted with the nature and details of the suit, with which the judge is already familiar. It was indeed to remedy this precise evil, of a suit being heard before one judicial officer and worked out by another, that the Act of 1852 was passed.

From the above causes, and the undue amount of business thus thrown upon the chief clerks, they have become so much overburdened with work, that great delays arise in chambers from their sheer inability to dispose of the mass of matters before them. This has led to a return to the old practice of the Master's chambers, of allotting to each business an interval much to short to dispose of it satisfactorily, thus leading to frequent adjournments, great loss of time, and increased expense to the parties.

CHANCERY EXAMINATION TERMS.

The following changes have been made in the times for holding the Examination Terms in the following places:

London.—Fourth Tuesday in September (27th), instead of the second Tuesday.

Niagara.—Third Tuesday in October (18th), instead of the fourth Tuesday in September.

Belleville.—Second Tuesday in October (11th), instead of second Tuesday in September.

Notices already given for the days formerly appointed to be good for the days now named.

AUTUMN CIRCUITS. 1859.

The Courts of Oyer and Terminer and General Gaol Delivery, and of Assize Nisi Prius, in and for the several Counties of that part of the Province formerly Upper Canada, after the present Term, will be held as follows:

EASTERN CIRCUIT.

THE HON. MR. JUSTICE RICHARDS.

Brockville,	Tuesday,	4th October.
Perth,	Tuesday,	11th October.
Ottawa,	Tuesday,	18th October.
L'Orignal,	Thursday,	27th October.
Cornwall,	Tuesday,	1st November.

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE HAGARTY.

Belleville,	Wednesday,	21st September.
Picton,	Tuesday,	4th October.
Kingston,	Monday,	10th October.
Peterborough,	Monday,	24th October.
Whitby,	Monday,	31st October.
Cobourg,	Monday,	7th November.

HOME CIRCUIT.

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., CHIEF JUSTICE.

Owen's Sound,	Wednesday,	28th September.
Barrie,	Tuesday,	4th October.
Milton,	Tuesday,	11th October.
Welland,	Monday,	17th October.
Hamilton,	Monday,	24th October.
Niagara,	Friday,	11th November.

OXFORD CIRCUIT.

THE HON. MR. JUSTICE BURNS.

Cayuga,	Wednesday,	28th September.
Simcoe,	Monday,	3rd October.
Woodstock,	Friday,	7th October.
Brantford,	Monday,	17th October.
Stratford,	Monday,	24th October.
Berlin,	Monday,	31st October.
Guelph,	Monday,	7th November.

WESTERN CIRCUIT.

THE HON. MR. JUSTICE MCLEAN.

Goderich,	Tuesday,	27th September.
London,	Tuesday,	4th October.
St. Thomas,	Tuesday,	18th October.
Chatham,	Tuesday,	25th October.
Sarnia,	Tuesday,	1st November.
Sandwich,	Tuesday,	8th November.

CITY OF TORONTO.

THE HON. CHIEF JUSTICE DRAPER.

Monday, ... 10th October.

Of which all Sheriffs, Magistrates, Coroners, Gaolers, and other Peace Officers are requested to take notice.

By the Court,

CHARLES C. SMALL.

Clerk of the Crown and Pleas.

Trinity Term,
22nd August, 1859.

FEES FOR SUPERIOR COURT BUILDINGS.

The following comparison of the fees required to be paid under the statutes for providing accommodation for the Superior Courts of Law and Equity, may not be uninteresting to practitioners. The list does not include the fees paid under the rules or orders of the Courts.

	9 Vic. c. 33 & 18 Vic. c. 122.	20 Vic. c. 64.	22 Vic. c. 31.
Amount provided £6,000	£10,000	£10,000	£30,000
COMMON LAW.			
Writs, &c., having the seal of the Court	1s. 3d.	1s 6d.	2s. 6d.
Judgments entered.....	2s. 6d.	3s. 0d.	3s 0d.
Certificate of judgment	nil.	nil.	2s. 6d.
Setting down for argument	nil	nil.	1s. 6d.
Nisi Prius record	1s. 3d.	nil.	5s. 0d.
Rule of Court	nil.	nil.	1s. 6d.
Taxation of costs	nil.	nil.	0s. 9d.
	5s. 0d.	4s. 6d.	16s. 3d.
CHANCERY.			
Filing Bills	5s 0d.	6s. 3d.	12s. 6d.
Decree or Decretal Order.....	nil.	nil.	5s. 0d.
Certificates.....	nil.	nil.	2s. 6d.
Writs	nil.	nil.	2s. 6d.
	5s. 0d.	6s. 3d.	22s. 0d.
ERROR AND APPEAL.			
Entering Appeal	5s. 0d.	7s. 0d.	20s. 0d.
Judgment	nil.	nil.	10s. 0d.
	5s. 0d.	7s. 6d.	30s. 0d.
Total under the Statutes ...	15s. 0d.	18s. 3d.	68s. 3d.

COUNTY COURT COMMITMENTS IN ENGLAND.

For the sake of giving the advocates of both sides of this question a fair chance of discussion, we here republish the "Report of the Committee of County Court Judges to the Right Honorable the Lord High Chancellor."

July 25, 1859.

My Lord,—In obedience to your Lordship's wish, conveyed to us by Mr Johnson, in his letter of the 28th ultimo, we have continued the inquiry into the subject of county court imprisonment, which we had commenced under the directions of the late Lord Chancellor; and we now beg leave to report to your Lordship the result of our inquiry, and to forward copies of the questions we addressed to all the judges of the county courts and the answers we have received thereto.

Your Lordship will perceive that it is the opinion of twenty-four of the judges that the power of a judge to send a person to prison for disobedience in not appearing in court to an after-judgment summons should no longer exist, in which opinion we all concur; and it will also appear that almost all the judges who consider that the power should be retained do not commit for non-appearance until they have satisfied themselves that the person summoned ought to be committed either for fraud or for having neglected or refused to pay, having had the means to pay.

It would appear, therefore, on the first glance, that the latter practically acquiesce in the opinion of those judges who think that the power to commit for non-appearance should not exist; but this is not the case, for they consider it essential that the power should be retained, because they argue that, although they do not commit until they have by inquiry, either of the plaintiff, officers of the court or others, morally satisfied themselves that it is a fit case for committal, yet they contend that should the power to commit for non-appearance be abolished, a defendant who does not appear can seldom or never be committed, inasmuch as the judge scarcely ever can be satisfied by *legal* evidence of the defendant's ability to pay, where he is not present to be examined, and that the consequence will be that persons summoned under sect 98 of 9 & 10 Vic. c. 95, will never attend, as they will by staying away, effectually prevent their being committed.

We beg leave to state that we do not concur in the view thus taken, as we conceive that in nearly all cases where the party summoned does not appear, sufficient evidence can be obtained to enable the judge to decide upon the question of committal.

Upon the whole, we beg leave to recommend that the law should be altered, so that no person who neglects to appear to a judgment summons should be committed unless the judge has satisfied himself that he is liable to be committed for some one of the causes mentioned in sect. 99 of 9 & 10 Vict. c. 95; but we are of opinion that no other alteration is needed, and that any limitation of the number of times for which a person may be sent to prison would operate most prejudicially upon the welfare of all classes, who, from fluctuation in the labour market or other circumstances, require credit to be given them at times.

It is obviously of immense importance to these classes that the promises which they in those times make should be capable of being enforced, when they are again in work, or they would find in time of need that such promises were of little avail.

We express, we believe, the feeling of all the judges when we say that any alteration of the law which would take away from the county courts the power of imprisonment would relieve the judges of a most painful duty, but would produce great misery among the working classes, who, forced to buy on credit, would hereafter only obtain it on terms which would cause those who paid their debts to pay for those who did not.

Your Lordship will perceive that with two or three exceptions the judges are of opinion that it is essential that the working classes shall obtain credit on fair terms, and that they consider that the county courts enable them so to obtain it; could they not do so, in times of sickness or scarcity of work, they would be compelled to resort to their parishes for relief, and their homes would be broken up.

To take away all remedy for the recovery of debts under 40*s.*, as has been suggested, we feel justified in stating would be most impolitic, and would tend in times of depression to aggravate distress, and consequently to increase discontent and its concomitant evils. It is the opinion of many of the judges that, since the establishment of the Courts, the periods of depression in the north have passed over the people lighter than they used to do.

The law would certainly be a harsh law if it permitted a man to be sent to prison again and again for owing a small debt, but it does not permit any such thing. For owing a debt a man cannot be so punished, but only where he possesses the means of paying it and will not. After having suffered one imprisonment he cannot be imprisoned again unless he subsequently thereto has the means of paying and still refuses. Such instances of obstinacy are extremely rare, and we would submit that it would be highly impolitic in order to allow these few persons to indulge their obstinate feelings, to deprive all creditors of the power to compel a man to pay a debt, when he is proved to have the means of satisfying it.

The experience of the whole Courts of Request shows that when men could by remaining in prison for a certain time rid themselves of their debts they preferred to do so. The period in these courts for which a man could be imprisoned was generally 20 days for a debt of 20*s.*, and 40 days for one of 40*s.*, and so on, increasing 20 days for every 20*s.* owed.

The bill introduced into the House of Commons by Mr. Collier, Q.C., provides that no person shall be committed who does not appear to a judgment summons, unless the judge is satisfied that he ought to be committed for any cause which he would be liable to be committed for, had he appeared in court.

We think that so much of the bill should become law, but we cannot too strongly express our objections to the proposal

to limit the time to which an obstinate person may be imprisoned, not because, as we hope we have shewn, that such person ought to be punished, but because the power to compel payment, where means of payment exist, is essentially necessary for the welfare of those classes who obtain credit upon the faith of paying out of their future earnings.

The second clause of Mr. Collier's bill would, in our opinion, operate as a measure of confiscation upon the debts now due to tradesmen on the judgments of the county courts (in some cases amounting to £50, exclusive of costs), or which the creditors have allowed to be incurred, from their knowledge that by law they could compel payment whenever their debtors might possess the means of satisfying them.

By the late Lord Chancellor's direction, we also inquired into the working of the courts as far as regards loan societies, beer scores, and the selling of goods by travelling drapers and such persons.

The questions we circulated and the answers we received we beg leave to enclose, and to recommend, so far as the second of the above subjects is concerned, that in the next session of Parliament a measure should be introduced providing that no debt for beer, consumed on the premises where sold, shall be recoverable except by action commenced within fourteen days from the time of the incurring thereof.

It does not appear to us that any beneficial suggestion can be made with reference to loan societies, and we do not propose any interference with travelling drapers and such persons, because we think that the judges of the courts, by carefully weeding from the accounts of these persons all sums charged for goods supplied to a wife on the credit of her husband not befitting her station, or which he has not sanctioned, can prevent any ill effect which would otherwise arise from this system of trading, and because we think that when so restrained the system is not disadvantageous to the labouring classes.—We have the honour to be, &c., my Lord, your Lordship's obedient servants,

JAMES MANNING.
J. H. KOE.
E. COOKE.
J. WORLLEDGE.
W. FURNER.

SELECTIONS.

JURISPRUDENCE AND RELIEF IN EQUITY.

FALCKE *v.* GRAY (33 L. T. Rep. 297).

The more flattering a bargain is to a purchaser's sense of superior knowledge and good fortune, the more hazardous it becomes in his suit for specific performance of the contract. The plaintiff Mr. Falcke made a capital bargain. A pair of large oriental china jars were the ornament of Mrs. Gray's drawing-room at Gloucester terrace. They had been bequeathed to her by a lady, with the tradition that George the Fourth had once offered 100*l.* for them. In January Mrs. Gray put the house into an agent's hands to be let furnished. Mr. Falcke, who was in search of such a residence, looked through Mrs. Gray's, was struck by the jars, not with any more royal or sentimental adoration, for he had been a dealer in curiosities and old china. Cautious by habit he did not spoil the affair by precipitation. Mrs. Gray was written to and came to town. They met at the house. It was arranged that the plaintiff should have certain articles of the furniture at valuation. The agent's clerk valued the ordinary articles, but, distrusting his connoisseurship in fictiles, suggested Messrs. Watson, of Duke street, the other defendants, as competent valuers. The suggestion was not adopted, and either in a random way, or by the help of some analogies not disclosed, the clerk set down the jars at 25*l.* This did not satisfy Mrs. Gray. He protested he was no judge of such matters. She pressed him for a further opinion. 'Suppose we say 40*l.*' was his amended valuation. Mr. Falcke showed no eagerness; the affair was evidently in excellent train, and he knew very well that 40*l.* was not a reasonable price. So he admitted in the suit; from the evidence in which it also appears that he knew the jars were worth at least 125*l.* Finally an agreement was drawn up by Mrs. Gray's house agents, and signed by Mrs Gray, to the effect that Mr. Falcke should have the option of purchasing the whole or any part of the undermentioned articles at the sums affixed, viz., sideboard 18*l.* 18*s.*, &c., and "two large oriental china jars in drawing-room, 40*l.*" For specific performance of this contract the purchaser filed his bill. But the facts did not rest there. Mrs. Gray, left to her reflections and reminiscenses, had some misgiving, and sent to Messrs. Watson. Whether they were made aware of the contract is not clear on the evidence. They swore that they were not, and Mrs. Gray gave similar evidence. Having arrived and inspected the jars, they at once offered 200*l.* for them. Mrs Gray, feeling some compunction—either on account of her deceased friend or her departed purchaser—asked whether she should be "acting like a lady" to sell the jars. She would, Messrs. Watson said, and drew a cheque for the 200*l.* They inquired, "who had expressed a wish to purchase the jars?" She said the plaintiff had; they replied that they knew him, and that he was a dealer in the same line as themselves. After which they took the jars away.

Inadequacy of price was an obvious fact in the case. The plaintiff's counsel admitted it, but contended that inadequacy was not of itself a sufficient ground for refusing specific performance.

Kindersley, V.C., who heard the cause. laid down, on the contrary, that the general rule as to hard bargains is, that the court shall not decree specific performance in such cases, on the ground that, after all, specific performance is a matter of discretion, and is to be used to advance justice. The rule thus broadly enunciated solicits explanation if it be compared with the following passage of Lord Chancellor Hart's judgment in *Sullivan* v. *Jacob*, 1 Moll. 477, cited in the text of the Vendors and Purchasers:—

"A court of equity does not affect to weigh the actual value, nor to insist upon the equivalent in contracts, when each party has equal competence. When undue advantage is taken it will not enforce that; but it cannot listen to one party saying that another man would give him more money or better terms than he agreed to take. I think this was an improvident contract; but improvidence or inadequacy do not determine a court of equity against decreeing specific performance."

The apparent conflict between these positions seems to be scarcely disposed of by the authorities to which the Vice-Chancellor afterwards refers. The cases, he remarks, are not very numerous, where inadequacy of price alone has come into consideration. Those referred to by him are *Kien* v. *Stukeley*, *Vaughan* v. *Thomas*, *Heathcote* v. *Paignon & Day* v. *Newman*.

In *Kien* v. *Stukeley*, 1 Bro. P. C. 191 (1722), at a time when lands and everything else were raised to an extravagant price by the South Sea bubble, the appellant expecting then to sell a portion of that stock at 1000*l.* per cent., agreed for the purchase of some lands at a price which was alleged to be unreasonably high. The case was not decided on the point of inadequacy, but we read in Gilbert's report of it, that "This was very doubtful among the Lords, for on the one side it was argued, that if a bargain and sale was unconscionable, the person who had got such a bargain was not to demand a performance of it in a court of equity, but he could only demand damages for not performing the bargain; for the court of equity was only to assist in carrying conscionable bargains into execution, and where they did not find them fit to be carried into execution, the court of equity was to leave them to law. On the other side it was said, that a man was obliged in conscience to perform a bargain, though it was a hard one; and when he

was obliged in conscience, it was no hardship upon him to be compelled thereto." Compare *Lewis* v. *Lechmere*, 10 Mod. R., a like case with a like result. *Vaughan* v. *Thomas*, 1 Bro. C. C. 556, and *Heathcote* v. *Paignon*, 2 Bro. C. C. 166, were both cases of loans upon annuity, on terms hard upon the borrower. In the one, the lender's bill for specific performance was dismissed; in the other the borrower obtained a decree to set aside the annuity. *Vaughan* v. *Thomas* the Vice Chancellor regards as showing the tendency of the court; *Heathcote* v. *Paignon*, as a case of contract set aside for inadequacy. But, on referring to the latter case, it will be found that Lord Thurlow inferred the distress of the borrower from the terms of the loan; and that he affirmed the judgment of the Master of the Rolls expressly on the ground that advantage had been taken of his distress. *Day* v. *Newman*, 2 Cox. 77, is considerd by the Vice Chancellor to be decisive on the point of refusing the specific performance of hard bargains. It is certainly a very remarkable judgment on a somewhat remarkable case. The father of the purchaser, who was about twenty-four years of age, had been in treaty for the property for 9,000*l.* That negotiation having gone off, he left the son at the vendor's house on a stay of some length. During this time the son agreed to purchase for 6,000*l.* down and 10,000*l.* more on the death of his uncle. Lord Alvanly dismissed the vendor's bill for specific performance. He undoubtedly treated the contract as made between persons *sui juris*, without fraud or pressure; as a deliberate bargain; indeed, he says emphatically, "I go on the terms of the bargain." Yet twice in his judgment he characterises the purchaser as a young man: "A young man thinks fit to make a bargain, seemingly with his eyes open, and without any appearance of fraud practised. . . . A man of the age of twenty-four, not vesting money, but choosing to buy an estate, makes a foolish bargain. . . . If I had any doubt about the adequacy of the price, I would put it in some mode of inquiry; but as the case stands the value is 9000*l.* And then the question is, whether a young man shall in this court be holden to a bargain like this." These four cases, then, seem scarcely to countervail the principle laid down by Lord Chancellor Hart and adopted by Lord St. Leonards.

The principal case, however, went much further than mere inadequacy of price. Therefore, as between the vendor and purchaser, there was not even that equal competence required by Lord Chancellor Hart. Not that, be it observed, in order to make a good contract, it is any duty of a purchaser to inform a vendor of the value of the thing sold, or to apprise him of inadequacy in the price agreed on. If such were a buyer's duty, and he failed to perform it, a court of equity would set aside the contract; that the court will not do. Thus, if the buyer knows there is a mine under the estate, and that the seller is ignorant of the mine, the buyer, Lord Eldon holds in *Fox* v. *Mackreth*, 2 Bro. C. C. 419, is not obliged to make the discovery. "It is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation on the party to make the discovery." Yet, though the contract is good under such circumstances, the buyer cannot obtain specific performance of it. This distinction is clearly recognised by Lord Thurlow, as quoted by the Vice-Chancellor in his judgment. It is also insisted on by the court in the above case of *Day* v. *Newman*.

The real difficulty in the present case was, that the seller had the assistance of a professional agent, and that the buyer, although aware of the character of the bargain, did not press the contract. The plaintiff's counsel, accordingly, relied on *Haywood* v. *Cope*, 31 L. T. Rep. 48; 25 Beav. 148, where the defendant took a colliery at 100*l.* a-year, but getting little or no coal, wished to be off his lease. The Master of the Rolls decreed specific performance, although the plaintiff had not expressly communicated unsuccessful trials made by him through shafts, twenty years before, to find coal, and the defendant alleged that he was wholly ignorant of such matters; for before entering into agreement for the lease, the defendant went down the old shafts himself, and took with him three other persons for the purpose of ascertaining the value and nature of the seams of coal. "He did not," concluded the Master of the Rolls, "trust his own judgment." Then in the principal case could the defendant Mrs. Gray, ignorant of the value of the jars, be said not to trust her own judgment; that is, be said to trust her agent's judgment? Clearly not. Though a valuer, he professed himself no judge. The employment of an agent who, to the purchaser's knowledge, was as ignorant as the seller herself, must leave the case in the same position as if the seller had employed no agent at all. Suppose the case had been otherwise, and that the purchaser had believed the agent to be competent. Still there would not have been an equal competence in fact. As the matter stood, the case was analagous to that of a vendor's ignorance of a mine under his estate. "The clear intention of Mrs. Gray," observed the Vice-Chancellor, "was, that there should be put upon the articles a fair and reasonable price; by which we must understand, fair and reasonable according to the supposed equal competence of the vendor and purchaser to judge of the price. The purchaser knew that this was the footing on which the vendor was dealing; and he knew that the footing was false. So he lost his equity to specific performance of his overgood contract.

Therefore take heed, good reader, and, if you would come for the aid of equity, be not greedy of bargains.

The plaintiff is left to his remedy at law. Of course: but what a state of jurisprudence! The court and its officers have received an elaborate bill or statement of the complaint in writing, and a no less elaborate answer and defence in writing; the case has, perhaps, been then amended and brought into a perfect shape, and been further and more perfectly answered; witnesses have been examined and cross-examined, until the transaction of the sale has been probed to the quick. The letter has been penetrated, and the spirit discerned; the very conscience of the parties has been unveiled and left naked to the world; the court, in short, has placed itself precisely in the position to dispose most effectually of the whole litigation, yet practically it declines to adjudicate. It leaves the litigation just where it found it, *minus* the costs. Such a waste of judicial strength and machinery, of litigant's life and money, and of witnesses' time, is on the very face of it a most serious evil. We venture to say that in no country ancient or modern, has such a system existed as this, in sensible, business-like England, of turning a cause, thoroughly sifted in one court, out of that court to be tried in another court. And what is the principle under which so monstrous a practice can have grown up? That relief in a court of equity is a discretionary aid to the virtuous and meritorious. A contract is admitted to be good, but the morals of the contracting parties, and not the subject-matter or the exigencies of the contract itself, are to determine the jurisdiction. Saints are to seek relief in Lincoln's-inn, sinners at Westminister. The only principle on which the existence of separate courts of law and equity can be tolerated—the principle of division of labour in the administration of justice—is ignored. The same contract can but be the subject of one adjudication under any rational system of jurisprudence. The real difference lies in the difference between contracts themselves. Some relates to perishable materials—as food; or to transient opportunities—as seasons of navigation: or to complex actions—as carrying on a trade; or to other matters which do not admit of the delay, or do not suit the machinery of a process for specific performance; or which relate to subjects adequately represented by money. Others are of a nature to be specifically enforced, and cannot be adequately so represented. Why are damages to be regarded as the normal remedy for breach of contract, and specific performance as an eclectic indulgence? Why is Lincoln's-inn to be regarded as aiding Westminster by specific

performance, any more than Westminster as adminicular to Lincoln's-inn by damages? The notions of Chancery holiness and Chancery discretionary relief in aid of law are a growth from the ecclesiastical root of Bishop Chancellors, but are altogether inconsistent with a due civil administration of justice. The morals of the china jar contract might properly raise a question of judicial relief or no judicial relief, but they ought not juridically to influence the kind of relief. Much less should they afford ground for a discretionary jurisdiction as between one kind of relief and another. A leading principle in the admisitration of justice is, that a court shall completely dispose of a matter within its cognisance. Justice is one and indivisible. If specific performance be justice, let there be specific performance: if damages, let there be damages; if dismissal, then dismissal.

The continuance of the practice of leaving a peccant plaintiff to his remedy at law in damages is the more wonderful, when, by sect. 2 of the Chancery Amendment Act of 1858, in the case of a suit for specific performance, the court may, if it thinks fit, award damages to the party injured; and by the same Act the court is furnished with the necessary powers for causing the damages to be assessed. There the Legislature has halted. The reason of the comparative failure of this Act, as far as it goes, is that, instead of grasping principles, it fingers details. The remedy required is a sweeping enactment that the Court of Chancery shall be bound to administer complete and final justice in every case within its cognisance, and be supplied with all the machinery necessary in that behalf. The plaintiff then, in going to Lincoln's-inn, will have made his election. The cause will receive an adjudication on principles of jurisprudence, and not be denied one under the traditions of ecclesiastical discretion. Such is a true solution of the fusion of law and equity problem.—*Law Times.*

DIVISION COURTS.

CORRESPONDENCE.

GODERICH, 11th August, 1859.

To the Editors of the Law Journal.

GENTLEMEN,—There are two questions to which I humbly desire an answer, in your next issue of the *Journal.*

1st. Has the Judge of the Division Court the power to prohibit agents from acting at said Court?

2nd. When an agent acts for several plaintiffs in said Court, has the Clerk the power or any right to withhold the money collected for any one of these plaintiffs, to satisfy the costs of all the suits placed in said Clerk's hands for collection by one agent, and is the agent in any way responsible for the costs?

My reasons for asking these questions are as follows:

1st. The Judge here, at a late sitting of the Division Court, declared that he would no longer allow agents to appear in said Court, for any client; and that the suitor must henceforth appear in person, or by a duly admitted attorney; all this was the effect of some insult given to the Judge while presiding, by an agent while pleading a cause at said Court; but why punish the innocent for the act of a single aggressor?

2nd. The Clerk here has been in the habit of taking claims for collection, and paying his own costs out of the first monies collected, I have put in several different parties, in two cases there is more collected than what will pay all costs; in one case there is not enough collected to pay all costs incurred on the same.

The Clerk thinks he is entitled to keep enough for all costs, and pay over the balance only. Now I think that he is bound to pay to each plaintiff whatever balance there is, if any, after paying himself the costs incurred by that plaintiff.

I feel a difficulty in laying the matter plainly before you; hoping you may be able to comprehend what I wish, and that you will answer the same in your next issue,

I am, Gentlemen, yours obediently,

A SUBSCRIBER.

[1. We know of no law prohibiting parties from appearing by agents in the Division Courts. But non-professional men are disabled from acting as advocates. The Judge may in his discretion, refuse to hear those who make it a business of conducting or defending suits for other men.

2. If the Clerk knows no one in the transaction but the agent, and has opened an account as to debt and costs with him, it being understood that the Clerk was to have a general lien for his costs on the suits entered, we think he can deduct them out of the first monies coming to his hands. But such a practice, we would add, seems to us objectionable.—EDS. L. J.]

HAWKSVILLE, 31st August, 1859.

To the Editors of the Law Journal.

GENTLEMEN,—Agreeable to your request in the June number of the *Law Journal,* I annex a statement, as under, of all cases in which Judgment Summonses have issued in the Division Court here, for the period from 1st January, 1858, to 30th June, 1859,—18 months.

Court Sitting 15th January, 1858.—No. of Suits, 123.

Kroeling *v.* Rush, claim $21 42. Defendant dismissed, on promising that Plaintiff be paid by 1st February.

Ruff *v.* Klippert, claim $9 80. Defendant examined and dismissed.

Gilles *v.* Spetz, claim $38 20. Ordered, that Defendant pay $2 per month until debt paid. Only 3 instalments paid; no further proceedings taken.

Gilles *v.* Bishop, claim $22 59. Dismissed.

Ruff *v.* Saur, claim $15 80. Ordered to pay $1 per month, Defendant stated his ability to pay—no payment made, and no further proceeds had.

Court Sitting 16th February.—No. of Suits, 271.

Gilles *v.* Heimpel, claim $29 50. Ordered to pay $1 per month, Defendant stated his ability to pay—no payment made, and no further proceedings taken.

McNab *v.* Heimpel, claim $15 80. Ordered to pay $1 per month, subsequently settled between parties.

Mosser *v.* Colosky, claim $41 50. No service—Defendant absconded.

Court Sitting 18th March.—No. of Suits, 181.

Beisang & Wishnowsky *v.* Saur, claim $12 60. Dismissed. Plaintiff not present.

Court Sitting 20th May.—No. of Suits, 162.

Niemeir *v.* Tschirhart, claim $12 84. Ordered to pay 75 cents per month. Only three payments made, and no further proceedings taken.

McNab *v.* Otterhein, claim $8 04. Ordered to be imprisoned 10 days, for not appearing. Warrant issued, and return stayed by Plaintiff. Parties settled.

Voisin *v.* Flachs, claim $2 54. Summons withdrawn.

McNab *v.* Doerlucker, claim $12 42. Ordered to pay $4 per month. Defendant stated his ability to pay—payments all made, agreeably to order.

Hawke *v.* Welsh, claim $14 75. By consent. Defendant ordered to pay Plaintiff's claim in 20 days. Order complied with.

Kratt *v.* Loughead, claim $23 75. Ordered to be imprisoned 20 days, for refusing to be sworn. Parties settled same evening.

McNab *v.* Dechert, claim $12 87. Withdrawn.

Court Sitting 16th July.—No. of Suits, 82.

Lewis v. Munser, *et al.*, claim $52 17. Ordered, that claim be paid 30th September following, by consent of parties—no payment made, and no further proceedings had.

Schafer v. Mehring, claim $20 66. Withdrawn.

Court Sitting 23rd September.—No. of Suits, 220.

No Judgment Summons issued.

Court Sitting 4th November.—No. of Suits, 171.

Funk v. Hohmeier, claim $13 80. Dismissed.

1858. RECAPITULATION.

Jan.....	5	Judgmt.	Sum.,	aggregate claims,	$112 81—123	Suits.
Feb....	3	"	"	"	186 80—271	"
March.	1	"	"	"	12 60—181	"
May ...	7	"	"	"	87 21—162	"
July ...	2	"	"	"	70 83— 82	"
Sept....	–	"	"	"	220	"
Nov ...	1	"	"	"	13 80— 71	"
Total	19	"	"	"	$484 05 1110	

2 Warrants issued—none committed.

Court Sitting 21st January, 1859.—No. of Suits, 137.

No Judgment Summons issued.

Court Sitting 3rd March.—No. of Suits, 98.

Caulfield & Flemming v. Eisenmenger, claim $7 75. Withdrawn.

Do. do. v. Baker, claim $22 08. By Defendant's consent and *effer*, ordered, that claim be paid 1st July, 1859. Subsequently settled.

Zoeger v. Hamer, claim $13 20. Withdrawn.

Winger *et. al.* v. Welsh, claim $39 00. Ordered to be imprisoned 20 days, for refusing to give up property in his possession, in the nature of claim on third party. No Warrant. Settled.

Court Sitting 19th May.—No. of Suits, 127.

Zoeger v. Rush, claim $14 95. Withdrawn.

Doering v. Campbell, claim $40 95. Withdrawn.

1859. RECAPITULATION.

Jan.....	No Judgment Summons.				137	Suits.
March.	4	Judgment	Summonses	claims	$82 03— 98	"
May ...	2	"	"	"	55 60—127	"
Total	6	"	"	"	$137 63 362	
1858—12 mo.—19 Judg. S. for					$488 05 claims, No. of Suits	1110
1859— 6 " — 6		"	"	"	137 60 " " "	362
Grand Total	25	"	"	"	$625 65 " " "	1472

No committal made.

I have endeavoured to make the statement so full, that you could understand to what extent the 91st clause has been oppressively administered in this Court. By giving a history of the parties connected with these suits, you would perceive that it was the plaintiffs who had greatest cause of complaint. According to some of the articles published against this clause, the creditors have been the dishonest and disobliging parties; that the debtors, after enjoying the use of the goods furnished them, appear to be the innocent, wronged, and suffering parties, and that the judges have acted cruel and oppressive in administering the law. Whatever may be the facts in other localities, such has certainly not been the case here.

I may just add, that the 91st clause, has had the effect of making many a man pay debts, who was able to do so, and who would have availed himself of some shift to avoid paying but from fear of a Judgment Summons. The clause is, therefore, useful, and should not be repealed.

Your obedient servant,

M. P. EMPEY,

Clerk, 6th D. C., C. Waterloo.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(Reported by THOMAS HODGINS, Esq., LL. B., Barrister at law.)

BECKIT v. WRAGG.

(*Concluded from page 186.*)

SPRAGGE, V. C.—I have arrived at the same conclusion as a majority of the members of this Court, retaining the same opinion as in the Court below, namely, that the Bill should be dismissed, but I do not come to this conclusion upon the same grounds as most of the other members of this Court, so far at least as their judgment proceeds upon this, that cases of express trust are within the Dormant Equities Act.

I cannot bring myself to the conclusion that express trusts are within the act. If they were, then if Willard were defendant instead of Wragg, the bill must have been dismissed as against him, and this even though the breach of trust had occurred just before the passing of the Act. But the language of the Act appears to me to be inapplicable to the case of express trusts, looking at that which is to be affected, and the grounds upon which it is to be affected. If within the Act, the thing to be affected is the title to real estate in the trustee which is valid at law. The provision of the statute is, that such title shall not be disturbed or affected by any thing which arose before the passing of the Chancery Act 1837. Suppose the section had ended there, and suppose a Bill filed against an express trustee for a breach of trust occuring before 1837, could it with any propriety be said that the title of the trustee in the legal estate was sought to be affected by reason of the breach of trust? In truth the title of the trustee would not be sought to be affected at all: but the existence of that title and the position in which it placed the holder of it relatively in his *cestui que trust* would be the plaintiff's *locus standi* in court. The clause goes on to provide that such legal title shall not be disturbed or affected for the purpose of giving effect to any equitable claim, interest or estate which arose before the same date 1837: now to take this literally and apply it to the case of express trusts would make it necessarily apply to every case where the trust was created before 1837, however recently the breach of trust had occurred, or even if no breach of trust had occurred: for to a Bill filed complaining of a breach of trust or simply calling for an account of the Trust estate, the short answer would be, this Bill is filed for the purpose of giving effect to an equitable claim, interest, or estate which arose before the passing of the Chancery Act.

The concluding words of the section exempting from the protection of the act, cases where there has been actual and positive fraud in the party whose title is sought to be disturbed or affected, would still have the *cestui que trust* remediless in large classes of cases, *e. g*, the common case of calling for an account of rents and profits; the case of the legal estate devolving upon the heir at law of the original trustee, and others might be suggested cases, where the right of the *cestui que trust* to relief, is indisputably clear.

Take the case of a trust created by will or marriage settlement before 1837, to sell lands upon the youngest of several infants becoming of age; or afterwards, in the discretion of trustees. The right of suit might be barred, if express trusts are within the act, before even any right of suit accrued, for not carrying out the trusts, for there is nothing in the clause to make the statute apply only to cases where there was a breach of trust before the passing of the act, or where the legal estate became vested in the trustee by a breach of trust; and we cannot say that it shall apply only in such cases. If it applied to cases of express trust at all it must apply in the cases which I have suggested. But not only would the consequence of so applying it be nothing less than monstrous but for the reasons which I have offered. The language of the clause is as it appears to me, altogether inapplicable to cases of express trust.

Other reasons were urged upon the same point by Mr. Bennett one of the counsel for the plaintiff in the *Attorney General v. Grasett*, (the Hospital case) which appear to me to be sound and weighty. He argued that the statute dealt only with adverse estates when there was on the one hand an estate in land valid at

law, on the other some equitable claim or interest existent before 1837 hostile to it; that this is not at all the position of an express trustee, and his *cestui que trust* where the estates of both co-exist by the same title, and the estate of the one is in equity the estate of the other.

I think this a reasonable and just view of the statute, for though the statute does not use the word hostile or any equivalent term, still its frame and language apply well to the position of parties having hostile interests in lands and not the position of an express trustee and his *cestui que trust*.

For these reasons and for those given by the Chancellor in his judgment in the case in the Court below I think cases of express trust are not within the act.

But for other reasons than because cases of express trust are within the dormant Equities act, I think this Plaintiff not entitled to relief.

Suppose Wragg a purchaser for value from Willard, but with constructive notice of the trust, would he be affected? Willard was an express trustee to whom I think the statute does apply. Wragg a purchaser for value. As to him the statute could not as a general rule apply, but if he had actual notice his conscience would be affected as with a purchase under the registry acts. If he had constructive notice, only he would probably not be affected as he is not under the Registry Acts.

As put by the defendant's answer, the conveyance from Elliott to Willard as his agent. Willard paid Elliott for it with Wragg's money. Willard was a mere trustee for Wragg. Having purchased as his agent, there was then a resulting trust in favor of Wragg, as between him and Willard, and Willard conveyed to him accordingly.

Suppose Willard to have been at the same time a trustee for Beckit to rent this mill, and among other things to pay the purchase money to Elliott for Beckit, he would be in the position of a trustee as to both Beckit and Wragg Suppose he had been employed by two persons for the same purpose *e. g.* to purchase land; and suppose him to have taken the conveyance to himself, and then conveyed to one of the two (having used the money of that one in paying the purchase money), and each being ignorant of his being a trustee for the other: the equity of the party receiving the conveyance would be at least equal to that of the other, perhaps better, having furnished the purchase money; and having the legal estate he would have an advantage which the other would have no equity to deprive him of.

In the case above supposed is he or not a purchaser for value? If he had purchased of the trustee innocently he would be protected. If he purchases through the trustee, the trustee not then having the legal estate, in ignorance of the trust, is he not entitled to the same protection, or is the knowledge of his agent *his* knowledge so as to fix him with notice? I think not, because an agent is not assumed to disclose to his principal that which it is his interest to conceal from him. I do not think him affected with notice.

Wragg did not purchase from Willard. If he had and with actual notice he would I assume be affected with the trust with which Willard was affected; but he purchases direct from Elliott through an agent, and it happens that that agent was a trustee for another person of the same land. Can Wragg under these circumstances be an express trustee not transferable? He may be affected with notice, I think, not more; and unless affected with actual notice so as to affect his conscience, so as to make him a participator in the actual and positive fraud of the express trustee. I think he is not so affected and that this Bill should be dismissed.

The other Judges concurred in the judgment of the Chief Justice.

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

GRANT *v.* GREAT WESTERN RAILWAY COMPANY.

Administration—Amount of personalty.

Appeal from the Court of Common Pleas. The case is reported in 7 U. C. C. P. 488. The plaintiff's husband had been killed by the accident on the defendants' railway, at the Desjardin's bridge, on the 12th March, 1857. The plaintiff obtained letters of administration from the Surrogate Court of the county of Wentworth, dated the 8th June 1857, and, under the act 10 & 11 Vic. cap. 6, brought an action against the defendants to recover damages. The cause was tried in Hamilton, in November 1857, before *Hagarty*, J., and the jury gave damages £2,809. It was proved that the deceased, who was a Scotchman by birth, had since 1838 resided in the United States; that he had personal property there, valued at $2,709, and real estate at $33,000; that his debts were $11,000, secured by mortgage on his real estate, and other debts $3,600; that his net annual receipts were estimated at $3000, besides a rental from real property; and that his personal habits were very saving. It was also proved that at the time of his death within the jurisdiction of the Surrogate Court, he had on his person only two dollars and some few shillings in silver, and the usual clothing, except a coat. At the trial it was contended on behalf of the defendants that the case failed on the issue, and that at the time of intestate's death he had no personal estate and effects within the jurisdiction of said Surrogate Court. The plaintiff would not consent to reserve leave to defendants to move for a nonsuit on that ground. The learned judge allowed the case to proceed, subject to the objection, as there was some slight evidence of personalty, and as the act 33 Geo. III. cap. 8, sec. 2, without specifying any amount, used the words "having personal estate within the limits of each county respectively." The defendants accordingly moved for a rule for a new trial, on the ground of excessive damages, and of misdirection. The learned judge ruled that there was evidence of *bona notabilia* belonging to deceased in the county, entitling the plaintiff to administer; whereupon the court discharged the rule. In the Court below it was

Held, that the Surrogate Court of the county of Wentworth had jurisdiction to grant administration of the effects of the deceased, although such effects were of a less value than £5.

Held also, that although the deceased was domiciled in a foreign country, his representative was entitled to administration, but such administration should be granted only to an inhabitant of this Province.

The defendants appealed to the court above, but the judgment of the Common Pleas was affirmed, and the appeal dismissed.

STAYNER *v.* APPLEGARTH.

Married woman—Certificate—Evidence.

This case will be found reported at page 158 of the *Law Journal*, and 6 U. C. C. P. 133. It was an appeal from the Court of Common Pleas. The question reserved for the consideration of the Court was whether using the following words in the certificate on the back of a conveyance of a married woman was sufficient, "being *duly* examined, she did appear to give her consent." It was contended that the word *duly* was equivalent to saying that she was examined from her husband. The Court of Common Pleas held that the certificate itself was a necessary fact of the conveyance and that the Magistrates have no power to say what they may consider to have been duly done, and that they could not exercise a judicial opinion in this matter, but should certify the fact that was done, and consequently held that no estate passed under such conveyance and certificate.

The Court of Appeal affirmed this judgment and dismissed the appeal with costs.

The decision in this case does nothing more than affect costs, for the new act 22 Vic cap 35 has in future made good those certificates given before the Act.

COMMON PLEAS.

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

PARKER *v.* THE MUNICIPALITIES OF THE UNITED TOWNSHIPS OF PITTSBURGH AND HOWE ISLAND.

By-law—What is notice of passing—Opportunity of opposing.

A by-law having been passed without the proper number (six) of notices being posted up, but proof of some having been posted being given, and one or more of them having come to the notice of the appellant.

Held sufficient.

The appellant being aware of the day of passing the by law, and having given notice that he intended opposing the same, took no further steps in opposition until making the application to the court to quash it.

Held, not sufficient.

In Trinity Term last, *Philpotts* obtained a rule *nisi*, calling on the defendants to shew cause why a by-law passed the 28th of

November, 1857, entitled "a by-law to close the road crossing lot Nos. five and six, in the 4th concession of Pittsburgh, upon the petition of John Ferguson and others, dated the 21st of June, 1857," should not be quashed, on the grounds that the same was passed without due or sufficient notice being given of the passing the same, under the statutes in such case made, and because the said relator had no opportunity of opposing the same, and because he was wrongfully deprived of such opportunity, and on grounds disclosed in affidavits and papers filed, and because the by-law is uncertain and indefinite, in not stating in the preamble any object of passing the same, and in not shewing and defining at what point the road therein mentioned was to be stopped or closed.

The by-law recited it was expedient and necessary to stop the road crossing lot Nos. five and six, in the 4th concession of the township of Pittsburgh, not being an original allowance for road; and it enacted that the road be closed, as not being useful to the public. The affidavit of the relator stated that he was seised, in fee simple, of the east half of lot No. six, in the 4th concession of Pittsburgh; that there is a road called the Old Perth road, which crosses his land in the north part, and a new road called the Kingston and Phillipsville macadamized road, which crosses his land on the south part; that between these roads, and parallel to them there is a steep ridge of granite rock, thirty or forty feet high, which crosses the land, dividing it into two parts, each totally separated from the other, which ridge cannot be crossed by any vehicle; that the old Perth road has been a public highway for thirty-five years, and was the only mode of access to the north and most valuable part of this land; that he is greatly injured by stopping it; that he was informed of the intention of the municipal council to stop this road a month before the by-law was passed, and that notices to that effect had been posted up near the premises; thas he made diligent search but could not find any such notice, and is informed that by neglect of the township clerk no such notice was put up; that he attended one meeting of the township council, with witnesses, prepared to oppose the passing such a by-law, but was informed by the reeve they would not act in the matter on that day, and would give him notice before passing such a by-law; but either on that or some other day in that week, they passed it without further notice to him; that in April, 1858, the old Perth road was blocked up, so that he is deprived of access to the north part of his farm with wheeled vehicles; that he never received any notice from the reeve or any other person, that any such by-law was intended to be passed, and had no other knowledge of it till it was passed; that he asked the township clerk where he had put up notices, and was told that the township clerk had not put them up himself, but had sent out three notices by another person, with instructions to put them up.

In Michaelmas Term *H. Smith*, Q. C., shewed cause. He excepted to the style and title of the rule and affidavit on which it had been moved, as being against the "municipality of the united townships of Pittsburgh and Howe Island," whereas there there is no such union of townships. By 8 Vic., ch. 7, schedule B., it is provided what townships shall constitute to county of Frontenac, and among them is "Pittsburg, which shall include Howe Island." The 12th Vic., ch. 78, made no change. But the 14th & Vic, ch. 5, sec. 14, and schedule D., erected Howe Island into a separate township.

He filed affidavits shewing that Parker, the relator, did not own or occupy the *east*, but the *west* half of lot No. six, 4th concession of Pittsburgh, and denying the inconvenience stated by Parker, to arise from closing the old road, and representing such closing and the opening of the new macadamized road, as a great advantage and public convenience; that cord-wood has been, and can be hauled from the north to the south part of Bennet's farm, and that trifling expense would make the communication good. One party swears he put up two notices of the intention to pass the by-law in the neighbourhood, and is aware that other similar notices were put up.

The township reeve and clerk both swore, that Howe Island is a part of ward No. 5, in the township of Pittsburgh, which township alone forms the municipality. The reeve further stated, that on the 14th of November, 1857, Parker spoke to him on the subject of this by-law being passed, and that he informed Parker the matter would be taken up in council on that day fortnight; that on the 28th of November the by-law was passed; that on the 14th of November, Parker told the reeve he would send a surveyor with a map to oppose the by-law on the 28th of November, and Parker also told him he had seen a notice of the intention of the council to pass the by-law. A sworn copy of the minutes of the council, was annexed to the reeve's affidavit, shewing that on the 14th of November they received notice from Bennett Parker, that he would object to the closing of the old road across lots Nos. five and six, in the 4th concession of Pittsburgh, *dated the 12th of November*, 1857, and that such by-law was passed on the 28th of November.

Smith cited *Lafferty* v. *Municipal Council of Wentworth*, 8 U. C. Q. B. 232; *Fisher* v. *Municipality of Vaughan*, 10, U. C. Q. B. 492; and *Bryant* v. *Municipality of Pittsburgh*, 13 U. C. Q. B. 347.

DRAPER, C. J., delivered the judgment of the court.

The application was rested on two grounds. 1st.—Want of notice. 2nd.—That the applicant has no opportunity of being heard, which he claimed.

As to the first, the case of *Lafferty* v. *The Municipal Council of Wentworth*, is very like the present. The applicant does not positively negative any notices having been put up, and the municipality do not prove that six were put up But they prove positively that some were put up, and others, it is believed were, while it is sworn that the applicant stated he had seen one of the notices, and it appears that he attended on the 14th of November, before the by-law was introduced, and had express notice from the reeve to attend on the 28th of November, when the by-law would be brought up, and that he gave notice of his intended opposition, and stated he should send a surveyor with a map to oppose its passing. We are clearly warranted by the case referred to, in saying that, under these circumstances, we could not quash the by-law for want of notice.

The second objection equally fails, for the default was that of the applicant. who neither appeared on the 28th day of November, as he was told, and stated he meant to do, either in person or by some one to represent him. Nor does it appear that the made any further enquiry, or attempted to be heard, or took any other step until he resolved on this application.

Per cur.—Rule discharged with costs.

BRUYERE v. KNOX.

Ejectment—Sheriff's sale—Registration—Priority of.

Held, that a purchaser for value *with a registered title*, under a sheriff's sale of "A.'s" interest in land, was entitled under the registry laws to prevail against a non registered conveyance made by "A." prior to such sale by the sheriff.

Ejectment for lot No. 2, in the second concession of the township of Sidney, Hastings; writ issued 1st of September, 1857.

The trial took place before *Draper*, C. J., in March, 1858. Both parties claimed under a sale made by the sheriff of the County of Hasting under a *fi. fa.* against the lands of Robert Lester Morrough. *Adam H. Meyers* (the attorney for the plaintiff in the execution) attended on his behalf and as his agent at the sale, and the land was there bid in for the plaintiff, but Meyers took a deed from the sheriff, dated the 26th of April, 1848, to himself in fee. The *fi. fa.* was recited in the deed, as commanding the sheriff to levy £603 11s., and it was also recited that Meyers was the highest bidder at the sum of £200. The plaintiff in the execution, who is also the plaintiff in this action, finding this out, applied to Meyers, who thereupon said it was a mistake, and drew a deed in his own handwriting from the sheriff to the plaintiff, also writing a letter to the sheriff, who then executed the second deed of the same land to the plaintiff, reciting the execution, &c., as in the first deed, but treating the plaintiff as the purchaser as well as the execution creditor. This second deed bore date the 23rd of August, 1848, and was registered before the sheriff's deed to Meyers was registered, 23rd of August, 1848.

It was admitted that Morough's title was a registered title

The defendant claimed under a deed from Adam Henry Meyers, dated the 6th of September, 1849, for an expressed consideration of £350, which had never been registered. The deed from the sheriff to Meyers, dated 27th of April, 1848, was registered on the 7th of March, 1857.

On this evidence the learned judge directed a verdict for the plaintiff, subject to the opinion of the court: the plaintiff contend-

ing that the deed to him, by the direction and with the knowledge of Meyer's operated as an estoppel upon Meyers and the defendant, who claimed herein that the title being a registered title, and that plaintiff being a purchaser for value (because his taking the deed operated as a satisfaction for £200 of his execution), and having registered his deed before the registration of that to Meyers, this deed became fraudulent and void as against the plaintiff, and especially as Meyers paid the sheriff nothing for all that appears.

For the defendant it was insisted that the sheriff, having executed one deed by virtue of the *fi. fa.* and the sale made thereunder, had exhausted the power, and had no authority whatever to make the second deed to the plaintiff. It was also urged that it did not appear the land had been granted by the Crown, and therefore the Registry Act would not apply.

The case was argued in Michaelmas Term last. *Bell* (of Belleville), for the plaintiff, cited *Doe Brennan* v. *O'Neil*, 4 U. C. Q. B. 8.; *Thomas* v. *Cook*, 2 B. & A. 119; *Walker* v. *Richardson*, 2 M. & W. 882; *Stone* v. *Whiting*, 2 Stark. N. P. C. 236.

Wallbridge, Q. C., for defendant.

DRAPER, C. J., delivered the judgment of the court.

The cases of *Thomas* v. *Cook*, *Walker* v. *Richardson*, and *Stone* v. *Whiting*, have no bearing on the present question. They relate to the surrender of terms by the operation of law.

Doe Brennan v. *O'Neil* is more to the purpose. It decided that where the title to land is a registered title, and the owner makes a deed to a purchaser, which deed is not registered, and afterwards upon a *fi. fa.* against the lands of the former owner the sheriff sells and conveys the same lands to a purchaser for value, who gets the deed from the sheriff registered, the first deed is fraudulent and void under the registry laws as against the purchaser at the sheriff's sale.

That case is a direct authority in the plaintiff's favour, unless the fact that both the deeds were made by the sheriff instead of the first unregistered deed being made by the original owner, against whom the judgment was recovered, makes any difference.

When the owner in fee simple conveys his land in fee to a purchaser for valuable consideration, he ceases to have any right, interest or estate whatever; and consequently at the common law any attempt on his part to make a subsequent sale or other disposition of them would be nugatory and void. Nevertheless the registry acts do enable that owner to make a second conveyance for valuable consideration to another purchaser; and if such second conveyance obtains priority of registration, as against those claiming under it, the first conveyance becomes fraudulent and void. The object of the registry law is to protect subsequent purchasers, making them safe in purchasing from him who is shewn to be owner by the registry books; and it has made this change, that at common law deeds take effect from the date of their execution, while under the registry law they have priority only according to the order of their registration.

The law imposes on the sheriff an express duty to sell, directing the observation of certain preliminaries; but the necessity of a conveyance arises, not from the law authorising the sale, but from the general law regulating the transmission of real estate. If the sale be effectually made, the conveyance may, according to *Doe* v. *Miller* (10 U. C. Q. B. 65), be executed at any time afterwards. This present case may be looked at in two aspects, 1st, treating the conveyance to Meyers as made in pursuance of the sale, or, 2nd, treating it as made by mistake, or by the fraud of the grantee, to a party not entitled to it under the sale.

There is much difficulty at first sight in arguing that after a sheriff has in due form made a sale of lands, awarding them to the highest bidder, he can again expose the same lands to sale, and convey them to a subsequent purchaser. Unless the registry law intervenes, the second sale can pass nothing, nor have any operation on the estate. But the same proposition would be undoubtedly true, if (*mutatis mutandis*) it were enunciated respecting the the original proprietor of the lands; and yet under the registry law the second purchaser, being first in the order of registry, would prevail. Why? Not because any estate, any *scintilla juris* remained in the vendor after the first conveyance, for as regards him the second sale is fraudulent and wrongful; but because, under the circumstances, the registry law avoids the first deed, not in favour of the vendor, but as against the subsequent purchaser for value. That reason would not appear equally applicable to a sheriff's deed. The consequence is attached to the neglect and omission of the first purchaser. The second purchaser from the original proprietor searches into the title of his vendor; he finds all right, and duly registered. He is (at law at least) under no obligation to enquire further. The second purchaser from the sheriff makes the same search into the execution debtor's title. Satisfied with that if he also ascertains that there is a judgment and a writ giving power to the sheriff to sell the debtor's estate. What need is there on his part for further enquiry? I confess I cannot satisfactorily distinguish it in principle from *Doe* v. *Brennan*. Suppose a sheriff to have sold lands regularly under a *fi. fa.*; to have executed a deed to the purchaser; to have returned the writ, and to have paid over the proceeds to the execution creditor, and satisfaction to be entered; and that after all this, the execution debtor sells the land to a third party for valuable consideration, who gains priority of registration over the sheriff's vendee, would he not prevail under registry law? He has searched at the registry office; has found a registered title ending in his vendor; has found that there have been judgments, and that they are satisfied. What more could he look for? I should think as against him the sheriff's deed, through the neglect and omission of the sheriff's vendee, would be held fraudulent and void.* But this conclusion is predicated on the assumption that the sheriff has gone through the formality of a sale, at which the second purchaser was the highest bidder, and having paid his money has obtained his deed and gained priority of registry; and if we assume that the sheriff had awarded the land to another party at a previous sale, and had executed a deed to him, and incautiously parted with it without being paid, a second sale might possibly be upheld as being within the power of the sheriff, though it is not necessary now to determine that question.

In this case, however, there has been but one sale, and upon the facts as admitted we are warranted in treating that, as a sale to the plaintiff, for Meyers, though the bidder, paid nothing, and was acting as agent for the plaintiff; no money, in fact, passed into the sheriff's hands at all. I see no suggestion of any payment, except that the amount of the bid must have been credited as money received by the plaintiff on the execution, and therefore his demand *pro tanto* was satisfied. There was no other person except the plaintiff who was entitled to the conveyance; and it is admitted that the sheriff executed the second deed, because, as Meyers informed him, the first was made in mistake. But if so, the sheriff had not executed the power the law gave him, which was to convey the debtor's land to the purchaser at the sale; and to execute a deed to another party not the purchaser, and without the purchaser's authority, if done by mistake, and *a fortiori* if done through fraud, cannot, I think, be held to be an execution of the power, or to justify our treating the sheriff as *functus officio*. If the defendant, being a purchaser for valuable consideration, had obtained priority of registration of the deed to Meyers, the case would have required a very different consideration; but as it is, we are acting in conformity with the spirit of the Registry Act, and in accordance with the justice of the case, in determining that the plaintiff is entitled to the postea.

Per Cur.—*Postea* to plaintiff.

See *Doe* v. *Douston*, 1 B. & B. 230; *Doe* v. *Jones*, 9 M. & W. 372; *Doe* v. *Tiffany*, 6 U. C. Q. B. 79.

* Note by Eds. L. J. See the case of *Burnham* v. *Daly* (11 U. C. Q. B. 211).

COMMON LAW CHAMBERS.

(Reported by C. E. ENGLISH, Esq., M.A., Barrister-at-Law.)

MCLEARY v. A. M. SMITH.

Practice—Award—Stay of proceedings.

A judge in Chambers will not interfere to stay proceedings on an award, in order that a motion may be made in Term to set it aside, when the facts sworn to, are conflicting, and for all that appears before the judge, the arbitrator may have made his award in accordance with the facts of the case proved before him.

Quere. Should not a motion in Chambers, to stay proceedings on an award, be made within the next four days after the award is made, as is required in a motion in Banc in Term?

The particulars of this case, appear in the judgment.

RICHARDS, J.—*H. Eccles, Q. C.*, for the plaintiff in this cause, took out a summons to shew cause why all proceedings under the

award in this cause, should not be stayed until next Term, in order that the plaintiff might then move the Court to set aside the award, on grounds disclosed in affidavits and papers filed.

The plaintiff states in his affidavit, that the action was brought to recover the value of certain buildings erected by him for the defendant, under a contract by which he agreed to receive from the defendant, some portion of the amount claimed by him, in goods, to be procured by the defendant, out of an establishment of the defendant and his co-partner, John Smith.

That during the progress of the work, he opened an account with Smith & Smith, and procured goods, which he supposed would be charged to the defendant, and carried to his account on the contract.

That defendant and John Smith, on the 17th January last, jointly caused a writ to be issued against him, for the recovery of the amount of the said account; thereby treated him as their debtor, and gave him no credit whatever.

That on consulting his solicitors, he was advised that he had no defence to the action, but was driven to the necessity of suing the said A. M. Smith alone, upon his contract with him, and thereupon, this action was commenced on the 25th February last.

That both suits were entered for trial at the last Toronto Assizes, and were referred to the arbitration of W. A. Campbell as sole arbitrator, who, on the 10th of June, made his award in each of the said cases, against Thompson McCleary (probably the plaintiff is meant).

That the award was made against him in this cause, on the grounds, that the goods were furnished to him by Smith & Smith, were of greater value than the amount of his claim against defendant in this cause, and that the same might be set off against his claim.

That in the action brought against him by Smith & Smith, the arbitrator awarded them the balance, after deducting the amount he found due to the plaintiff, on his contract with defendant.

That at the arbitration, the account against him was first proved to the full extent to which the plaintiffs in that suit were prepared to prove it, and afterwards, in proceeding in this cause, the arbitrator allowed the same account to be applied, in part, to this cause.

The award, dated the 10th June 1859, recited that a verdict was taken at the Assizes held on the 11th April, 1859, for plaintiff for £500, subject to the award of W. A. Campbell, and the arbitrator adjudged that plaintiff had not any cause of action against the defendant, and that he was not entitled to recover anything in the said action, and that the verdict entered for the plaintiff, should be set aside, and a verdict be entered for the defendant.

The summons to stay proceedings, was applied for on the 22nd June.

The defendant files his own affidavit, and states that the plaintiff in this cause, was sued by Smith and Smith, because he had contracted a debt with them, exceeding the amount he owed plaintiff, to the extent of the sum awarded (said to be about £81).

He says that it was specially agreed between plaintiff, and himself and partner, that the goods got by plaintiff from Smith & Smith, to the extent of the amount of his contract, should be delivered to the plaintiff on that contract, in payment thereof, and they were so delivered to the extent of the amount of the contract, but in consequence of plaintiff having got goods to a much larger amount than he was indebted to him, the firm of Smith & Smith, were obliged to sue him therefor.

He further states, that plaintiff, long before he was sued, was well aware that Smith & Smith were at all times prepared to credit him with the amount of defendant's indebtedness to him, as so much paid by him, in reduction of his indebtedness to them, but he claimed a very much larger amount against the defendants, in consequence of which, he brought this action.

He further states, that all he owed plaintiff, was allowed him by the arbitrator, in payment of the claim of Smith & Smith, and the award made, is the actual amount due Smith & Smith, after payment to plaintiff of his claim against defendant.

He also states, that in the suit of Smith & Smith against plaintiff, they had proved the whole amount, to shew the plaintiffs actual indebtedness, but they never denied plaintiff's right to deduct therefrom, the amount of £330, as paid by the contract referred to, in plaintiff's affidavit.

It is contended on behalf of the plaintiff, that Smith & Smith, having claimed in their action against him, the full amount of the goods obtained from them, without allowing the sum due on the contract, he was compelled to bring this action against defendant, to recover that amount, and whilst admitting as between the parties, the adjustment of the debts as settled by the arbitrator, may be equitable, yet the plaintiff ought to be allowed the costs of his action.

On the other hand, the defendant says there never was any dispute, that the goods to the extent of £330, were paid for by the building agreement.

That Smith & Smith were obliged to sue the now plaintiff, to recover the amount he owed them beyond that, and of course they are entitled to the costs in that suit, as they had a clear right to recover the £81 odd, beyond the £330.

That in this suit, plaintiff sought to recover work beyond the contract, and failed, and therefore ought to lose the costs.

I am of opinion, that this summons must be discharged. I cannot doubt, if it was agreed between the plaintiff and defendant, and defendant's partner, that the goods he obtained from Smith & Smith, were to go in payment of £330, on the contract with the defendant, that would be a good answer, *pro tanto*, in an action by Smith & Smith, against the plaintiff (in the action,) to recover the value of the goods delivered, and it seems equally clear to me, in any action brought by plaintiff against defendant to recover the sum of £330 under the contract, he might shew, that by the agreement between the parties, that sum was to be paid, and was, in fact, paid in goods out of the store of Smith & Smith. I must assume this was satisfactorily shewn to the arbitrator, and that he has decided according to the evidence given before him.

Under the affidavits and papers filed, I do not feel warranted in making the summons absolute.

There is another question that may arise, whether the application is made in time. I have not decided on that ground, as it was not raised before me. It will be well, however, for the plaintiff to consider, if he should desire to move in Term, against my order, whether he has made his application in time.

This is a reference under a verdict at *nisi prius*. If the award had been made before the Term, any motion to set aside, must have been made within the first four days of Term. If during the Term, then within the four days next following the making of the award.

The time for making the award, was enlarged over the Term, it was made on 10th June, and this application is made on the 22nd. Ought not the plaintiff, in analogy to moving within the four days, when the award is made in Term, to apply to a Judge in Chambers to stay proceedings, within four days after the award is made? See *Cromer* v. *Chul*, 15 Ex. 310.

On the whole, I think the summons must be discharged with costs.

CHANCERY.

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

PENLEY v. BEACON ASSURANCE COMPANY.

Contract for Insurance—Principal and Agent—Limitation for bringing action—Jurisdiction.

A party effected an insurance, through the agent of the defendants, by paying the premium required by the established rates of the company. The agent gave the usual receipt, and informed the head office of the insurance and payment, and was credited with the amount. A fire occurred shortly afterwards, in the insurer's premises, and before the policy was issued. By a condition on the policies of the company, it was provided, that "no suit or action against the company, should be sustainable in any court of law or chancery, unless commenced within six months after loss or damage." On a bill filed to recover the amount of insurance, or to compel the issue of a policy, it was

Held, that courts of equity have jurisdiction in policies of insurance. (*Molleaux* v. *London Assurance Company*, Atk 545, observed upon.)

Held, also, that there was a contract by the defendants, to issue a policy to the plaintiff; that the agent was their agent to keep books, and by his entries there, did so bind the defendants.

Held, further, that the limitation in the policy, applies only to cases where the insured was in possession of a policy, and not to cases where the company has only issued a receipt. (29th April, 1859.)

In this case, the bill was filed on the 8th February, 1858, setting out that the plaintiff did on the 27th October, 1856, contract

with the defendants for an insurance for £500 on his stock in trade, that he paid the premium therefor, £12 10s., and obtained the following receipt from the agent of the company:

The Beacon Assurance Co., Chief Offices, 6 Waterloo Place, London, England, and Kingston, Canada West.

(*Interim Receipt.*) *Agent's Office, 27th October*, 1856.

No. 108. Received of William D. Penley, the sum of £12 10s., currency, being the premium for an insurance to the extent of £500, currency, on property described in the order of this date, subject to the approval of the Board at Kingston; the said premises to be considered insured for 21 days from the above date, within which time the determination of the Board will be notified. If approved, a policy will be delivered; otherwise the amount received will be refunded, less the premium for the sum so insured.

(Signed) R. NEWBERRY, *Agent.*

That the defendants did, within the time specified, approve of said contract, and retained the said sum, promising to deliver a policy to plaintiff immediately. That in the interim, on the 1st November, 1856, the plaintiff's premises were burnt, and that plaintiff thereby, became entitled to the £500. That defendants refuse to pay or issue a policy, pretending that they had not approved of said contract of insurance. The b" then prayed that they may be ordered to issue a policy, or to pay the amount specified.

The answer denied that the Board approved of the proposal, that they returned or offered to return the £12 10s.; that within the 21 days, they refused to accept the risk, and that they communicated with their agent, whom they believed informed the plaintiff. That plaintiff never obtained a policy, and that at the expiration of the 21 days, the contract in the receipt expired; that the agent had no authority to continue any liability thereunder, and that plaintiff was so aware. The defendants then set out, that on all their policies there is the following condition. "It is furthermore hereby expressly provided, that no suit or action of any kind against this company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of six months next after the loss or damage shall occur; and in case any suit or action shall be commenced against said company, after the expiration of six months after such loss or damage shall have *occurred, the lapse of time shall be taken and deemed as conclu*sive evidence against the validity of the claim, thereby so attempted to be enforced." That plaintiff, not having brought this suit within the time so limited, is not entitled to relief.

The plaintiff having joined issue, evidence was gone into, the effect of which appears in the judgment of the Court.

G. Morphy, for the plaintiff.

Roaf, for the defendants.

The cases cited in *Walker* v. *Provincial Insurance Company*, ante, p. 162, were relied upon in this case.

THE CHANCELLOR.—This is a bill to recover from the defendants, the amount of an insurance effected in their office by the plaintiff, or in the alternative, to compel them to issue a policy to him, for the amount. A receipt only, is held by the plaintiff; and he states that the defendants promised to issue a policy as soon as possible. The receipt is dated in October, 1856, and the fire occurred on the 1st November, of the same year. The object of the bill, is to obtain relief in this court—there being no relief in law, the contract not being under seal. As to the jurisdiction of equity in such cases, I find very little authority for it in England. In the case of *Motteaux* v. *London Assurance Company*, (1 Atk 545,) Lord *Hardwicke*, considered policies of insurance, as properly within the jurisdiction of the law courts. But Courts of Equity in the United States, have entertained these cases, and have decreed relief; and in *Mead* v. *Davidson*, (3 A. and E. 303,) Lord *Denman*, admits the jurisdiction of courts of equity to compel the execution of a formal policy, on the underwriter's promise to indemnify, and on his acceptance of the premium. And in *Jones* v. *Provincial Insurance Company*, (16 Q. B. U. C. 477,) the Chief Justice of Upper Canada, expressly refers to this Court as having jurisdiction. We therefore assume the jurisdiction, until the Court of Appeal or the Legislature, alters it; and which, it appears the Courts of Equity in the United States have always maintained.

In the defence set up, it said, 1st, that there was no risk assumed; and 2nd, that as the policies issued by the Company, contain a condition requiring actions to be brought in six months, and as that was not done in this case, the Court cannot interfere.

As to the first ground it entirely fails. The evidence of the agent proves, that on receiving the proposition for insurance, he sent it to Kingston, and subsequently told the plaintiff that he was insured; and has an entry in his books, which he says would not be there unless the plaintiff was insured. The letters between the agent and the head office, are not produced; some of them may have referred to this case, and could, perhaps, have thrown much light on it; and why they were destroyed is not stated. If accidental, it would not be right to visit the wrong on the company. We have, therefore, as regards the agent, his statement to the plaintiff, that he was insured, and the entry in the book. We have also, the fact, that immediately after the fire, one of the directors of the company, went to Belleville, and gave the agent directions to allow the plaintiff to dispose of whatever furniture he chose; and thus by their own act, the company clearly showed their liability, just at the time when they had power to set up this defence. And then, too, the secretary is not produced, to prove from the books of the company, that the risk was not assumed, or to prove what was the authority of the agent. We think then, that the agent was clearly the agent of the company to bind them, and that he did so bind them, by telling the plaintiff he was insured, and by the entry in his book.

Then as to the delay in bringing the action, according to the terms of the company's policies, and the case of the *Provincial Insurance Company* v. *Ætna Insurance Company* (16 Q. B. U. C. 135,) referred to by Mr. *Roaf*, I think the regulation is legal, and that the company has thus a right to lay down a limit for actions to be brought. It is, I think, a sound rule, and I am prepared to act upon it. That condition, however, does not apply here. This is a proceeding against the company for not issuing a policy, and the rule vitiating the policy, does not apply, for the company are wrong-doers, and cannot set up as a defence, that delay has occurred, since they have not issued that to which the penalty of delay is attached, and by which the plaintiff's right might be affected. The defence, therefore, entirely fails on both grounds, and the decree will be in favor of the plaintiff. In drawing up the decree, it would, I think, be well to look at the cases in the United States, as to the form in which it should be drawn.

SPRAGE, V. C.—It appears to me, there was an insurance effected by the plaintiff, for a year, and that it continued until the fire. With regard to the limitation of time for bringing an action, the regulation presupposes that the party is armed with his policy; and if he is not in possession of his policy, how can the limitation apply, and especially when the company by its own default, has not given a policy? The plaintiff is, therefore, I think, entitled to the relief prayed for.

SPRAGE, V. C.—I also agree with the learned Chancellor. I think the agent of the company, had sufficient authority to bind the company—that he was an agent to keep books, and by the entry there, did so bind. The limitation referred to, clearly applies to a policy, and not to cases where no policy has been issued.

Decree for the plaintiff with costs.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

Assessment Act—Township Rates—County Rates.

Southampton, July, 1859.

GENTLEMEN,—I, in common with I dare say many others, find much difficulty in reconciling with each other several parts of the Assessment Act of 1853.

Sec. 31 says that the several townships, counties, &c., shall each year estimate all sums that may be required, &c., making due allowance, &c.

Sec. 33 says that the County Council, in apportioning any county rate, shall do so on the equalized assessment rolls of the preceding year; and that the aggregate value of such

equalized roll, for each municipality, shall be considered the aggregate valuation for the purpose of rating it, for any county or township tax.

Sec. 34 says that the county clerk shall, on or before the first day of August in each year, certify the several municipal clerks the total amount which shall have been directed to be levied in the then current year, for county purposes, and that such municipal clerk shall calculate and insert the same in the collector's roll.

Sec. 31 places in the hands of the County Council the power of fixing the county rate, making it simply the duty of the several municipalities to collect the same.

Sec. 34 would seem to place that duty in the hands of the municipal clerks, leaving them to make the necessary calculation, after having been informed of the amount required for county purposes.

It may at first sight appear a matter of little consequence in whose hands the duty is placed; not so, however, in the following instance. In the year 1858, the counties of Huron and Bruce passed a by-law imposing a rate to raise $58,021, of which $8,000 was to meet non-resident rates, or 4-29ths of the whole sum. 3-13ths of the present year's roll of one of the villages in this county is non-resident, and consequently if no higher rate than that imposed by the County Council can be collected, it follows that the amount collected must fall short of the sum certified by the county clerk as being payable to the counties by the village. The rates imposed on the lands of non-residents being in another table.

Is the Village Council, in making their yearly estimate, have a right to make the *amount* payable to the counties one of the items for which they have to provide, and to make due allowance for taxes on non-resident lands which may not be collected, as under the Assessment Act (Sec. 31) I think they have, then in such case have they not a right to altogether ignore the by-law of the County Council imposing a county rate?

I cannot conceive the use of imposing a rate based on a roll on which the taxes are not computed or collected. Compelling township and village councils to collect an arbitrary rate, must in many cases compel such municipalities to raise more or less than the sum required.

An explanation of the difficulty will oblige. Yours, &c.

VILLAGE CLERK.

[It is provided by the Assessment Act of 1853, first that each township, &c., shall make estimates of all sums that may be required for the lawful purposes of any such *township*, and to pass a by-law or by-laws authorizing the levy and collection of a rate sufficient to raise the sums required. This rate is to be so much in the pound upon the assessed value of the property in the township (sec. 31). So far provision is made for the collection of a sum or sums required for township purposes only.

It is then provided, that where any sum is to be levied for *county* purposes the Municipal Council of the county shall *ascertain* and by by-law direct what *portion* of such sum shall be levied in each township, &c. (s. 34). Thereupon it is made the duty of the county clerk, before a day named, to certify to the clerk of each township the total amount directed to be levied in the township during the year for county purposes (s. 34). When this is done, it becomes the duty of the township clerk, &c., to calculate and insert the same in the collector's roll (s. 34). We can see no difficulty in the law.]—EDS. L. J.

TO THE EDITORS OF THE LAW JOURNAL.

Municipal Laws—Election of Mayor in case of resignation.

Stratford, August 27, 1859.

GENTLEMEN,—Your opinion is respectfully requested on the following points:

In January last, Mr. Daly was duly elected Mayor of Stratford, by the people. In July he resigned, and at the beginning of August his resignation was accepted, and Mr. Smith, the Reeve (and also a Councillor), was elected by the Council to fill the vacancy, by virtue of sec. 148 of the Municipal Act. Mr. Smith continues to hold the three offices of Mayor, Reeve and Councillor, and holds that he can do so legally.

1. The question arises—had the Council the power to fill the vacancy in the manner mentioned?

2. If the new Mayor be not duly elected, what steps should be taken to set the election aside?

3. If held to be duly elected, is he not bound to resign his position as Reeve or Councillor, or both? The law provides that Town Councils shall be composed of a Mayor, and *three* Councillors for each ward. We have now, by the action of the Mayor, an incomplete Council, because his ward is only represented by *two* Councillors.

4. Supposing the election to be declared illegal, would the acts of the Council subsequent to such election be therefore nullified?

5. What is the meaning of the word "Bankrupt," as applied in sec. 121, when there is no bankrupt law? If a man has been summoned before the Judge of the Division Court, under a judgment summons, and has admitted his inability to make immediate payment of his debts, is he therefore to be deemed "Bankrupt" or "Insolvent?"

AN ELECTOR.

[1. Yes.

2. See sections 127 and 128.

3. We think so. The intention of the act seems to be that the office of Mayor should be separate from that of Councillor, and therefore from that of Reeve; otherwise the Council, as defined in the 66th section, "in towns," would be incomplete. As stated in note (*i*) in sec. 122, to Harrison's Municipal Manual, the words "or otherwise" refer to every state of circumstances that may render a new election necessary, and as such the courts may apply them as referring to cases like the present.

4. No.

5. He must be properly "declared a Bankrupt," or "apply for relief as an Insolvent Debtor," before his seat can become vacant.]—EDS. L. J.

MONTHLY REPERTORY.

COMMON LAW.

C. C. R. REGINA v. AVERY AND ANOTHER. *April*, 30.

Adulterer—Adultery—Larceny—Taking goods of husband with privity of wife.

A. and B. took the goods of a husband without his consent, and with the intent to deprive him absolutely of his property in them, but with the consent and privity of the wife. There was no evidence that the wife had committed, or intended to commit adultery with either of them.

Held, that inasmuch as it was not left to the jury to say which was the principal in taking the goods, the wife or the strangers, it must be considered that the wife took them, and that the strangers assisted, in which case no larceny was committed.

C. C. R. REGINA v. SUNLEY. *April*, 30.

Illegal possession—Custody and keeping of naval stores—Evidence—Constructive possession.

Where A, residing at Portsmouth, being illegally possessed of naval stores, sent them by a railway, directed them to B. at the London terminus of that railway, directing them to be delivered to C. They were not so delivered, but kept by B. at the London terminus.

Held, that under the circumstances given below, there was evidence that such goods were in the possession, custody and keeping of A., within the meaning of 9 & 10, Wm. III., c. 41, s. 2.

Q. B. *April*, 30.

REGINA v. THE GREAT WESTERN RAILWAY COMPANY AND OTHERS.

Meaning of the word "theretofore."

When a street, which was a public highway, had been once put in good repair, but, at the time of the passing of the special Act, was out of repair.

Held, that the Commissioners had no power under s. 53, of 10 & 11 Vic. c. 84, to do the necessary repairs, and charge the expenses on the adjoining occupiers, as the word "theretofore" in that section is not restricted to the time of the passing of the special Act, but is used in its ordinary sense.

C. P. CLARKE v. DICKSON. *May*, 2.

False representation—Prospectus—Ambiguous representation therein—Question for jury—Variance.

An action for a false misrepresentation is maintainable, although the representation may be capable of being so construed as not to be absolutely untrue. In such a case, the way in which it was intended to be, and would be ordinarily understood may be properly left to the jury.

Q. B. FRAY v. VOWLES. *May* 3.

Attorney and client—Power of attorney to compromise.

To a declaration by a client against his attorney for compromising two actions in which the client was plaintiff, contrary to the client's express directions; it was pleaded that the compromise was entered into by the advice of counsel, and that it was necessary for, and beneficial to the client's interest so to do.

Held, that this was a bad plea.

The client, and not the attorney, is *dominus litus*; and though by the retainer the attorney may have an implied authority to enter into a compromise that authority may be withdrawn by the client at any time.

EX. FREWEN v. LETHBRIDGE. *May* 5.

Common Law Procedure Act, 1856, s. 212—*Construction of the words "entering verdict" in the section.*

Upon a motion for a rule *nisi* to set aside the master's *allocatur* for costs upon the ground that judgment had not been entered within two terms after verdict, within the meaning of s. 139 of the Common Law Procedure Act, 1852.

Held, that the Act had been complied with.

CHANCERY.

V. C. S. TEED v. BEERE. *March* 17.

Statute of limitations—Money received by a Barrister's Clerk on his behalf and not accounted for—Confidential relation—Proceedings in a former suit.

J. B. the confidental clerk of the plaintiff, a Barrister, having defrauded his employer of a considerable amount of fees which he had received on his behalf, absconded in the year 1846, and was not heard of till after his death. J. B. died intestate, and his widow in 1854, instituted a suit for the administration of his estate, under which the common decree was made. The plaintiff then put in his claim as a creditor for the amount due to him, which claim was disallowed by the chief clerk on the ground that it was barred by the statute of limitations.

The plaintiff afterwards filed a bill against the next of kin of J. B. to recover the amount of the fees of which he had been defrauded, out of her distributive share of the assets of the intestate.

Held, that in consequence of the confidential relation which existed between J. B. and the plaintiff, the debt was not barred by the statute of limitations, and that the plaintiff was not precluded from enforcing his claim in a suit instituted by him for that purpose, by reason of the certificate of the chief clerk disallowing the claim made under the former suit.

L. J. GRESLEY v. MOUSLEY.

Purchase by Solicitor of client—Under value—Lapse of time—Acquiescence—Devise of right of claim.

A purchase of real estate by a solicitor from his client, set aside after twenty years, on the ground of inadequate consideration, and of the embarrassed circumstances and want of independent professional advice of the client.

A solicitor who purchases from his client must not only take care that the transaction is perfectly fair, but also that the evidence of its fairness is preserved; for the onus of supporting it is on the solicitor, and he cannot complain that he has lost the means of proving his case by lapse of time.

The right to set aside a voidable sale of real estate is not analgous to a right of entry at law, but is an equitable estate, which is devisable.

V. C. K. HOLROYD v. HOLROYD. *May* 1.

Partnership property—Intestacy—Conversion.

Where land is purchased during the continuance of a partnership, with partnership assets, and for partnership purposes, on the death of one partner intestate, such land must be considered as personal estate as between the heir at law and personal representative of the intestate.

V. C. S. MORGAN v. HIGGINS. *Jan.* 20.

Solicitor and client—Acceptance of a gross sum by a solicitor in lieu of delivering a bill of costs—Pressure—Right to an account—Costs of suit.

A solicitor is not justified in accepting from his client a gross sum as a remuneration for his professional services in lieu of delivery of a bill of costs, without the intervention of a third party, or adopting some other mode of extricating his client from the effect of that pressure which the law assumes while the relation of solicitor and client exists between them.

When a mortgage has been executed by a client in favor of his solicitor, who prepared it and who had the sole management of his property, for the purpose of securing amongst other things the payment of a gross amount, instead of the delivery of a bill of costs, and the evidence shows that the solicitor took no proper steps to relieve his client from his incapacity to enter into such an agreement, such a mortgage can only stand as a security for the amount to be found due in respect thereof; and in a suit instituted against the solicitor for an account of what is so due and owing, the costs up to the hearing must be borne by the defendant.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

GEORGE D. WILSON, Esquire, M.D., and EDWARD HOPKINS, Esquire, M.D., Associate Coroners for the County of Brant.—(Gazetted 13th August.)

JOHN BEATTY, the younger, Esquire, Associate Coroner, United Counties of Northumberland and Durham.

JAMES FITZGERALD, Esquire, Associate Coroner, County of Victoria.

JOSIAH FIDLER, of the Town of Lindsay, Esquire, M.D., Coroner for the Town of Lindsay.—(Gazetted 27th August.)

NOTARIES PUBLIC.

SAMUEL COCHRANE, the younger, of Oshawa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 13th August.)

CHARLES POOL, of the Town of Cornwall, Esquire, to be a Notary Public in Upper Canada.

ALEXANDER J. CATTANACH, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 20th August.)

EDMUND JOHN SENKLER, the younger, of Brockville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 27th August.)

TO CORRESPONDENTS.

A SUBSCRIBER—M. P. EMPEY,—under "Division Courts."

VILLAGE CLERK—AN ELECTOR,—under "General Correspondence."

A TOWN CLERK,—too late for the present number.