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DIARY FOR JULY.

1. SUNDAY..... *4th Sunday after Trinity.* Long Vacation commences.
2. Monday ..... { County Court and Surrogate Court Terms begin. Recorder's Court begins. Heir and Devisee Sittings commence.
7. Saturday ... .. Co Courts and Surrogate Court Term ends
8. SUNDAY..... *5th Sunday after Trinity.*
14. Saturday..... { Heir and Devise Sittings end. Last day for Judges of Co. Courts to make ret. of appeals from Assessment.
15. SUNDAY..... *6th Sunday after Trinity.*
22. SUNDAY..... *7th Sunday after Trinity.*
29. SUNDAY..... *8th Sunday after Trinity.*
31. Tuesday..... Last day for Clerks of County Courts to certify County Rate to Municipalities in County.

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JULY, 1860.

NOTICE TO SUBSCRIBERS.

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

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

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

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

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

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

JURISDICTION OF COUNTY COURTS AS TO LANDS.

It is enacted, by the County Courts Act, that the said courts shall not have cognizance of any action "where the title to land is brought in question." (Con. Stat. U. C., cap. 15, sec. 16, sub-sec. 1, p. 78.)

This is in terms nearly similar to sec. 58 of the English County Courts Act (9 & 10 Vic. cap. 95), which provides that the English County Courts "shall not have any cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise, shall be in question."

Our statute, instead of using the words "any corporeal or incorporeal hereditaments," &c., makes use simply of the word "land." This word, in law, comprehends any ground, soil or earth whatsoever. It includes houses and buildings of all kinds; for the ownership of the land carries with it everything both above and below the surface. A pond of water is therefore described as land covered with water, and a grant of lands includes all rivers and minerals under the surface.—(Williams' Real Property, 13.)

It would seem that the word "land," as used in our statute, is of the most extensive signification. This opinion is strengthened by a reference to sec. 20 of the act (Con. Stat. U. C. p. 79), which enacts that "No plea, replication or other pleading, whereby the title to any land, or to any annual or other rent, duty or other custom or thing, *relating to or issuing out of lands or tenements*, is brought in question, shall be received by any County Court, without an affidavit thereto annexed, that the same is not pleaded vexatiously, nor for the mere purpose of excluding the Court from jurisdiction, but that the same does contain matters which the deponent believes to be necessary for the party pleading, to enable him to go into the merits of the case."

The object of the act is to exclude County Courts from having jurisdiction in any action where the title to land is *bona fide* brought in question, but not to enable a defendant vexatiously to set up that defence in order to oust the Court of jurisdiction.

One marked difference between our County Courts and the Courts of the same name in England, is, that while here actions brought in a County Court are conducted by written pleadings, as in the Superior Courts, there the actions are conducted *viva voce*. This distinction must be borne in mind, when reading English decisions as applicable to the provisions of our act.

In Upper Canada the title to land may be brought in question either on the face of the pleadings, or in some cases be suggested in evidence. Where the title is raised upon the pleadings, the judge can go no further. Thus, where defendant in replevin made cognizance, as bailiff, of A., alleging that the *locus in quo* was the freehold of A., and that he as bailiff took the cattle, &c., damage feasant, although plaintiff did not take issue on the plea of *liberum tenementum*, but on the allegation that defendant did, as bailiff of A., take the cattle, &c., it was held that the County Court was ousted of jurisdiction. (*Tenniswood* v. *Pattison*, 3 C. B. 243; see also *Powley* v. *Whitehead*, 16 U. C. Q. B. 589, 5 U. C. L. J. 15) So a plea of not possessed in an action of trespass in a County Court. (*Timothy* v. *Farmer*, 7 C. B. 814; but see *Latham* v. *Spedding*, 15 Jur. 576; 20 L. J. Q. B. 302.) So where plaintiff declared against defendant, his lessee, for removing a tenement, &c., and for converting the materials thereof to his own use, and defendant pleaded, first, that before removal

he acquired the freehold of the tenement by purchase secondly, that before removal he acquired the soil on which the tenement was erected, &c.; and, thirdly, that the building was not plaintiff's, as alleged. (*Reynolds* v. *Offett, coram* Chewett, Co. J., 3 U. C. L. J. 169.)

After the defendant has, under our statute, sworn that his plea is not pleaded vexatiously, the judge is not at liberty to entertain the surmise that it means nothing. The defendant pleads it at his peril, and the County Court is without jurisdiction to inquire into the truth of it. (*Powley* v. *Whitehead*, 16 U. C. Q. B. 592, 5 U. C. L. J. 15.) If the plea be not accompanied by such an affidavit, the court may order it to be taken off the file, because of its irregularity; but when the defendant swears that it is necessary for his defence upon the merits to have the title brought in question, then the jurisdiction ceases. (*Ib.* per Burns, J.)

If the title be not raised on the pleadings, but suggested by defendant in evidence, it is for the judge to inquire into the case, in order to satisfy himself that the action will bring title to land in question. (*Cowen* v. *Pierce*, 1 C. C. Chron. 282; Cox & Lloyd's County Courts, 254.)

It is certainly not enough for defendant merely to assert that he disputes title, in order to withdraw an action from the cognizance of a County Court. The judge must be satisfied, not that the claim is a good one, but that it is preferred with *bona fides*, and is sufficiently substantial to have an existence, however dubious may be its value, (but see *Marsh* v. *Dewes*, 7 Jur. 558.) For this purpose he may hear the objection and investigate the claim of title, so as to ascertain whether it be *bona fide* and substantial. It is plain that the court cannot ascertain whether title is really in dispute in the action, so as to be unable to decide the action without deciding upon the disputed title, unless it institutes an inquiry into the fact. (*Lilley* v. *Harvey*, 5 D. & L. 648; *Lloyd* v. *Jones*, 6 C. B. 81; Cox & Lloyd's County Courts, 253.) The court must be satisfied that the title is in dispute *in the action*, so that the action cannot be tried *without trying the title*. (*Ib.*)

If title be not a material ingredient in the action; if the real merits of the case can be tried without any reference whatever to title, the Court is not ousted of jurisdiction. Thus, where an action was brought to recover damages for an injury caused to the plaintiff's premises by the negligent conduct of the defendants' servants whereby canal water was suffered to overflow, and at the trial the defendants disputed the title to certain embankments, and went into evidence to show that under their private act they were not bound to repair them when wharves were erected contiguous to the canal, and that such wharves had been erected and were out of repair, and caused the damage complained of the plaintiff gave evidence that the damage was caused by the *negligence* of the defendants' servants, in not opening certain sluices; the Court of Queen's Bench held, that the County Court was not ousted of jurisdiction. (*Morton* v. *Grand Junction Canal Company*, 6 W. R. 543.) But where, in trover for the conversion of grain, &c., the pleas were "not guilty," and not "possessed," and under these pleas it appeared in evidence that the real dispute was whether the grain, &c., which defendant had caused to be seized in execution, as being the property of one Barman, his debtor, was the goods of Barman or of the plaintiff—and that depended upon whether a deed which Barman had made in May 1848, of the land on which the grain, &c., was raised in 1849, was a *bona fide* conveyance, or fraudulent, with intent to defeat creditors—it was held, that although the title to land was only brought into question *incidentally*, still the Court was ousted of jurisdiction. (*Trainor* v. *Holcombe*, 7 U. C. Q. B. 548.)

If a party be sued for a nuisance on land, and set up as a defence that he is not the owner of the land, title to land clearly comes in question. (*The Queen* v. *Harden*, 2 El. & B. 188.) So where, in an action for a trespass, committed by breaking the doors of certain rooms in a cottage belonging to the plaintiff: the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed, which defendant denied. (*In re Chew* v. *Holroyd et al*, 8 Ex. 249.)

Title, however, does not necessarily come in question because the subject of dispute is a freehold, or something that forms part of a freehold. Every case must rest on its own peculiar circumstances, the test being, not the nature of the subject matter, but the nature of the *claim*. (Cox & Lloyd's County Courts, 256). Thus, where an action was brought for seizing a horse, and the defence was that the defendant was lord of the manor, and had seized it for a heriot; to which it was replied, that the horse was the joint property of the plaintiffs, and that one of them only was tenant of the manor, it being admitted that the defendant was the lord of the manor; the only question for trial was whether the horse was the joint property of the plaintiffs, and that one of them only was tenant of the manor. (*Penfold et al.* v. *Newland*, 1 C. C. Chron. 123; see also *Jenkins* v. *Evans*, *Ib.* 196.) So an action for taking sand and gravel from Hounslow-heath, was held not to involve a question of title. (*White* v. *Smith*, Cox & Lloyd, 256.)

Besides, defendant may be in such a position that he cannot set up title to land. Where the relation of landlord and tenant exists, the tenant cannot dispute his landlord's title. Nor, if the tenant voluntarily allow another in possession, can the latter dispute the landlord's title. But if

the tenant be evicted by compulsion, then the defendant is not so estopped—title comes in question, and the jurisdiction of the County Court is at an end. (*Mountnay* v. *Collier*, 1 El. & B. 630; *Emery* v. *Barnet*, 4 U. C. L. J. 212; 27 L. J. C. P. 212; 22 Jur. 634.)

In England, but not in Upper Canada, it is provided, "that in any action in the County Court, in which the title to any corporeal or incorporeal hereditament, &c., shall *incidentally* come in question, the judge shall have power to decide the *claim* which it is the immediate object of the action to enforce, if both parties at the hearing shall *consent in any writing*, signed by them or their attorneys, to the judge having such power." (19 & 20 Vic. cap. 108, sec. 25.) But it is by the same section provided, "that the judgment of the court shall not be evidence of *title* between the parties or their privies in any other action in that court, or in any proceeding in any other court." (*Ib.*)

Where a County Court judge, owing to mistaken views as to jurisdiction, refuses to try an action over which he has jurisdiction, the proper remedy is by mandamus. *Trainor* v. *Holcombe*, 7 U.C. Q.B. 548; *Emery* v. *Barnett*, *ubi supra*.) So if he insist upon trying an action over which he has no jurisdiction, the remedy is the opposite one of prohibition. (*Lilley* v. *Harvey*, 5 D. & L. 648.) The one writ issues, as its name (mandamus) imports, to command the *performance*, the other (prohibition) to command the *forbearance* of some act. (Smith on Action, 53.)

The writs of mandamus and prohibition are in such cases, when they arise in England, dispensed with. Instead thereof, the party aggrieved is enabled to obtain all necessary relief by rule or order, either in term or vacation. (19 & 20 Vic. cap. 108, secs. 42, 43.)

If want of jurisdiction be established, the judge has no power *to go further*. He cannot either nonsuit plaintiff or award costs to defendant. (*Penfold et al.* v. *Newland*, 1 C. C. Chron. 123; *Lawford* v. *Partidge*, 1 H. & N. 621, 3 Jur. N.S. 271; *Powley* v. *Whitehead*, 5 U.C.L.J. 15, 16, U.C. Q.B. 589.) But defendant, if able to satisfy a superior court of want of jurisdiction, is not bound to wait a trial in the inferior court: he may at any time during the action move for a prohibition. (*Sewell* v. *Jones*, 18 Jur. 153, 19 L. J. Q. B. 372.)

It now remains for us to notice the Act of last session, extending the jurisdiction of County Courts as to lands. The extension is only to cases as between landlord and tenant, where the yearly value of the premises, or the rent payable in respect thereof, does not exceed $200.

If the term and interest of the tenant is expired, or is determined by a legal notice to quit, or if rent is in arrear for sixty days, and the landlord has a right by law to re-enter for nonpayment thereof; in any such case, where the yearly value of the premises, or the rent payable in respect thereof, does not exceed $200, the landlord may maintain ejectment in a County Court for the recovery thereof. (24 Vic. cap. 63.) In some respects this act resembles secs. 50, 51 & 52 of the English act 19 & 20 Vic. cap. 108; but the jurisdiction exercisable under the English act is much more summary than under ours.

One good effect of our act will be to abridge the term during which refractory tenants may set their landlords at defiance. Before the act, if a landlord were driven to ejectment, the tenant had only to enter an appearance, and defy his landlord for about six months, occupying and perhaps destroying his property without compensation or hope of compensation. In outer counties the assizes were held only twice a year (spring and autumn); and where an appearance was entered, a verdict could not be obtained until one or other of these assizes. County Courts, on the other hand, held their sittings four times a year. So that where the yearly value of the premises sought to be recovered does not exceed $200, the landlord, in the cases for which provision is made by the new act, cannot be longer delayed than three months; and is enabled, where the tenant is worthless, to obtain possession, upon payment of County, instead of Superior, Court costs, as formerly.

LAW REFORMS OF LAST SESSION.

In the June number we published a few important Acts of the last session of the Legislature. In this number we publish some more, in addition to those already published.

Among the Acts now published, our readers will be surprised to notice the Act respecting foreign judgments, the subject of remarks in the last number of the *Journal*. The bill was introduced at a very late stage of the session, and we did not believe it possible for it to become law in the short time that remained. That belief was strengthened by the fact of a communication which we received from Quebec, informing us that it would stand over till next session.

We now find that we were in error, and have to congratulate our readers that the bill became law twelve months sooner than we anticipated. It is in the main a really good measure, and the fact that it was placed on the statute book within a few weeks after its introduction to Parliament by the Government, shows how much the necessity for it was felt.

Let us not, however, be understood as being advocates for hasty legislation. It is too much the fashion to delay important measures till the heel of a session, and then rattle them through as if the destiny of empires depended on their fate. Legislation ought to be a work of deliberation. The

proper discharge of the functions of law-givers is vital to the welfare of a people; and when we wit ess reckless legislation, we tremble for the consequences.

The work of the session, as regards civil procedure and civil rights, is by no means devoid of interest. In other columns we publish an extract from the recent address of his Honor Judge Mackenzie, of Kingston, to the Grand Jury of General Quarter Sessions, on the occasion of the opening of that court, on the 12th June, as giving in comprehensive form a review of the changes effected in the law, so far as material to be known to the legal practitioner. Most if not all of the Acts to which the learned Judge makes reference, will be found in the pages of the *Law Journal*.

THE "LAW MAGAZINE AND LAW REVIEW."

Our readers will peruse with interest an article which we publish in this number of the *Law Journal*, taken from the *Law Magazine and Review*, and headed "The Law and Lawyers in the British Colonies." It gives us great pleasure to find, in a legal periodical so influential, good opinions expressed of the status of our bar, and that pleasure is not by any means diminished when we find in the same article a complimentary reference to the *Upper Canada Law Journal*.

We are sensible of the differences that exist between the bar of this colony and that of the mother country; and feel proud to acknowledge that our endeavour is to emulate our brethren on the other side of the Atlantic. Though our local laws may and no doubt do, in some respects, differ from the laws of the mother country, yet the great body of the law in the two countries is identical. It is the old common law of England,—the germ of all that is noble and great,—a law which is the safeguard and the pride of a people among whom real liberty flourishes in real security.

The beauty of English law is, that, while it adds stability to the throne it equally protects the roof of the most humble cotter. It extends the ægis of its protection to all persons without regard to creed, colour, or standing. It inspires liberty and enobles its devotees. It is impossible that our laws can be in their purity administered by a venal bar. The proper understanding of our laws elevates the mind of man, and so dignifies the profession to whom its administration is especially entrusted.

AUTHORITY OF COUNSEL.

The English Court of Exchequer has at length given judgment in the celebrated case of *Swinfen* v. *Lord Chelmsford*. The judgment is in favor of the defendant. It is in effect decided that a barrister acting in good faith and with a single view to the interests of his client, is not responsible for any mistake, indiscretion, or error of judgment. The case is to be appealed.

23 VIC.—CHAP. XXIV.

An Act respecting Foreign Judgments and Decrees.

[Assented to 19th May, 1860.]

Whereas it is expedient to amend the laws of Upper and Lower Canada respecting Foreign Judgments and Decrees and to assimilate the same: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enact as follows:

1. In any suit brought in either section of the Province upon a Foreign Judgment or Decree (that is to say, upon any Judgment or Decree not obtained in either of the said sections, except as hereinafter mentioned) any defence set up or that might have been set up to the original suit may be pleaded to the suit on the Judgment or Decree.

2. In any suit brought in either section on a Judgment or Decree obtained in the other section in a suit in which the service of process on the defendant or party sued has been personal, no defence that might have been set up to the original suit can be pleaded to that brought upon the Judgment or Decree.

3. In case of a suit against a Corporation, service of process on the officer or officers thereof named in the Act incorporating such Corporation, or in case there be no officers named in the said Act, then service of process according to the law of the section of the Province where the process is served, shall be held to be personal service under this Act.

4. In any suit brought in either section on a Judgment or decree obtained in the other section in a suit in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original suit may be made to the suit on such judgment or decree.

23 VIC.—CHAP. XLIV.

An Act to regulate the removal of causes from County Courts.

[Assented to 19th May, 1860.]

Her Majesty by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. No cause or suit instituted in any County Court in Upper Canada shall be removed or removable from such County Court, by writ of *certiorari* or otherwise, into either of the Superior Courts of Common Law, unless the debt or damages claimed amount to upwards of one hundred dollars, and then only on affidavit and by leave of a Judge of one of the said Superior Courts, in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit.

23 VIC.—CHAP. LXIII.

An Act to extend the Jurisdiction of the County Courts.

[Assented to 19th May, 1860.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The several County Courts in Upper Canada shall have jurisdiction, and hold plea in actions of ejectment for the recovery of corporeal hereditaments, (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars) in the following cases, namely:

1. Where the term and interest of the tenant of any such corporeal hereditament shall have expired, or been determined by the landlord or the tenant, by a legal notice to quit;

2. Where the rent of any such corporeal hereditament shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

II. The fifteenth chapter of the Consolidated Statutes for Upper Canada and this Act shall be read as one Act, as the provisions of this Act had been incorporated with the said chapter fifteen.

III. The provisions of the Act chapter twenty-seven of the Consolidated Statutes for Upper Canada shall, so far as applicable, extend and apply to actions and proceedings under this Act, and to the said County Courts, in reference to such actions and proceedings.

IV. The several County Courts in the exercise of the jurisdiction given by this Act, shall have and exercise the same powers as belong to, and may be exercised by, the Superior Courts of Common Law, in and in respect to actions of ejectment.

V. The Judges of the Superior Courts of Common Law, acting under the three hundred and thirty-ninth section of "The Common Law Procedure Act," may alter the mode of procedure prescribed by the said Act chapter twenty-seven, so far as relates to actions of ejectment in the County Courts under this Act.

VI. The term "landlord" as used in this Act shall be understood to mean the person entitled to the immediate reversion of the lands, or if the property be holden in joint tenancy, coparcenary or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion.

VII. Every action under this Act must be brought in the County Court of the County in which the premises sought to be recovered lie.

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23 VIC.—CHAP. LXV.

An Act to amend the Law of Replevin in Upper Canada.

[Assented to 10th May, 1860.]

Whereas it is expedient to amend the law relating to Replevin, so as to prevent the same being perverted to purposes of injustice: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. No Writ of Replevin shall issue,—

1. Unless an order is granted for the Writ, on an affidavit by the person claiming the property, or some other person, showing to the satisfaction of the Court or Judge the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be);

2. Or unless the affidavit for the Writ states, in addition to what is required by the fourth section of the Act relating to Replevin, that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the Writ, and that there is good reason to apprehend that unless the Writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property;

3. Or, in case the property was distrained for rent or damage feasant, the Writ of Replevin may issue without an order, if the affidavit states, in addition to what is required by the fourth section of the Act relating to Replevin, that the property was distrained and taken under color of a distress for rent or damage feasant, and in such case the Writ shall state that the defendant hath taken and unjustly detains the property, under color of a distress for rent or damage feasant (as the case may be).

II. In case the Writ issues without an order, the Sheriff shall take and detain the property, and shall not replevy the same to the claimant without the order of a Judge, or a rule of the Court in that behalf; but may, within fourteen days from the time of his taking the same, re-deliver it to the defendant, unless in the meantime the claimant obtains and serves on the Sheriff a rule or order directing a different disposition of the property; but this section shall not apply in case of a distress for rent or damage feasant, under the third sub-section of the first section of this Act.

III. When an application for an order is made, the Court or Judge may proceed on the *ex parte* application of the claimant, or may grant a rule or order on the defendant to show cause why the Writ should not issue; and may, on the *ex parte* application, or on the return of the rule or order to show cause, grant or refuse the writ, or direct the Sheriff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the Court, instead of at once replevying the same to the plaintiff; or may impose any terms or conditions in granting the Writ, or in refusing the same, (on the return of a rule or order to show cause,) as under the circumstances in evidence, appear just.

IV. In case a Writ of Replevin is issued, whether with or without an order, or in case any rule or order is made under the preceding section, the defendant may, at any time, or from time to time, apply to the Court or Judge, on affidavit or otherwise, for a rule or order on the plaintiff to show cause why the writ, or why the rule or order respecting the same, should not be discharged or why the same should not be varied or modified in whole or in part, as therein specified, or why all further proceedings under the Writ should not be stayed, or why any other relief, to be referred to in the rule or order so applied applied for, should not be granted to the defendant, with respect to the return, safety or sale of the property or any part thereof, or otherwise; and the Court or Judge may make such rule or order thereon, as, under all the circumstances, best consists with justice between the parties.

V. Before the Sheriff acts on any Writ of Replevin, he shall take a bond, conditioned not only to the effect mentioned in form B, appended to the above cited Act, but also that the plaintiff do pay such damages as the defendant shall sustain by the issuing of the Writ of Replevin, if the plaintiff fails to recover judgment on the suit; and further, that the plaintiff do observe, keep, and perform all rules and orders made by the Court in the suit.

VI. In case the value of goods or other property or effects distrained, taken or detained, does not exceed the sum of forty dollars, the Writ may issue from the Division Court for the Division within which the defendant, or one of the defendants resides, or carries on business, or where the goods or other property or effects, have been distrained, taken, or detained.

VII. But the matter shall be disposed of without formal proceedings, and the powers of the Courts and Officers, and the proceedings generally in the suit shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts; and this Act and the Act relating to Replevin, shall, so far as any such suit is concerned, be read as if they formed part of the Act respecting Division Courts. (Consolidated Statutes for Upper Canada, chapter nineteen.)

VIII. The Act relating to Replevin shall not hereafter authorize the replevying or taking out of the custody of any bailiff any personal property seized by him under any process issued out of a Division Court in Upper Canada.

IX. So far as relates to proceedings in the Superior Courts of Law and in the County Courts, the sections of the Common

Law Procedure Act, numbered respectively from three hundred and thirty-three to three hundred and forty-one, shall be deemed to apply to this Act, as if this Act had been incorporated with the said Common Law Procedure Act, but it shall not be necessary to lay before Parliament the rules, orders, or regulations made by the Judges for the purposes of this Act.

X. This Act applies to Upper Canada only.

23 VIC.—CHAP. XXVII.

An Act respecting Trade Marks.

[Assented to 19th May, 1860.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. It shall be a misdemeanor, to mark any goods with the known and accustomed trade-mark, name or device of any manufacturer, or to pack any goods in any package bearing the known and accustomed trade-mark, name or device of any manufacturer, or in any package which has been used for packing goods manufactured by him,—or knowingly to sell or offer for sale goods so marked or packed,—unless such goods were really manufactured by such manufacturer, or his express consent to use such trade-mark, name, device or package was first obtained,—provided such trade-mark, name, package or device be so used with intent to deceive, and so as to induce persons to believe that such goods were manufactured by such manufacturer, and the goods are sold as being manufactured by him.

II. For the purpose of this Act the use of any trade-mark, name, package or device, either identical with that of any manufacturer or so closely resembling it as to be calculated to be taken for it by ordinary purchasers, shall be held to be a use of the trade-mark, name, package or device of such manufacturer.

III. A suit may be maintained by any manufacturer against any person using his trade-mark, name, package or device, or any imitation thereof,—or selling goods bearing such trade-mark, name or device, or any imitation thereof, or packed in packages being or purporting to be his, contrary to the provisions of this Act; and in such suit any special damages sustained by such manufacturer by reason of any such act as aforesaid may be recovered,—and if no special damages be proved the plaintiff shall recover nominal damages and costs.

IV. Nothing in this Act shall be construed as a declaration that any act hereby made a misdemeanor, was or was not a misdemeanor before its passing,—or that any such suit as aforesaid could or could not heretofore be maintained in either section of the Province;—nor shall any thing herein prevent any offence being dealt with as forgery, or as a fraud or other offence, if without this Act it could be so dealt with.

23 VIC.—CHAP. XXXVIII.

An Act to amend the ninth chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting Civilisation and Enfranchisement of certain Indians."

[Assented to 19th May, 1860.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assemby of Canada, enacts as follows;

I. The third Section of the ninth chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting civilization and enfranchisement of certain Indians," is hereby repealed.

II. The following Section shall be substituted for the repealed third Section of the said Act, and shall, in lieu thereof, be read as the third Section of the said Act: "No person shall sell, barter, exchange, or give to any Indian man, woman or child, within Canada, any kind of spirituous liquors, in any manner or way, or cause or procure the same to be done for any purpose whatsoever; and if any person so sells, barters, exchanges, or gives any such spirituous liquors to any Indian man, woman, or child, as aforesaid, or causes the same to be done, he shall, on conviction thereof, by a Justice of the Peace, upon the evidence of any one credible witness, other than the informer or prosecutor, be fined, not exceeding twenty dollars for every such offence, one moiety of every such sum to go to the informer or prosecutor, and the other moiety thereof, to be paid to Her Majesty, and to be part of the Consolidated Revenue Fund of this Province; but no such penalty shall be incurred by the furnishing to any Indian in case of sickness, any spirituous liquor, either by a medical man, or under the direction of any such medical man.

EASTER TERM JUDGMENTS.

QUEEN'S BENCH.

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

June 16, 1860.

Provincial Insurance Company v. *Shaw.*—Rule *nisi* to enter a nonsuit discharged.

Prov. Insurance Company v. *McDonald.*—Rule *nisi* discharged.

Beaty v. *Ross.*—Rule absolute.

Wittrock v. *Wilson.*—Rule *nisi* discharged.

Wilson v. *Wittrock.*—Postea to plaintiff.

Pullen v. *Curry.*—Rule absolute. Costs to abide the event.

Essex Building Society v. *Beeman.*—Rule discharged, with costs.

Reed et ux v. *Weer.*—Rule absolute.

Corporation of Brant v. *County of Waterloo.*—Rule *nisi* discharged, without costs.

Donovan v. *Cummings.*—New trial, on payment of costs.

Kerr v. *Cameron.*—Rule discharged.

Toole v. *Ashford.*—New trial, on payment of costs.

Boulton v. *Ball et al.*—New trial, on payment of costs. Plaintiff may apply to amend, on payment of costs by first of next term.

Fraser v. *Bank of Toronto.*—Rule *nisi* discharged.

Smeaton v. *Caspar.*—New trial, on payment of costs. Costs to be paid by next term.

McMullen v. *Wardoff.*—Rule discharged.

Cameron v. *McDougall.*—Judgment for defendant on demurrer, with leave to apply to amend within one month.

June 23, 1860.

Moffatt et al. v. *Robertson & Beamish.*—Action on promissory note, against one defendant as maker and the other as indorser. Plea by both defendants, showing want of consideration. Indorser offered to call maker to prove plea. Evidence rejected. Held, properly rejected. Burns, J., *dissentiente.* Rule discharged.

Day v. *Robertson.*—Judgment for defendant.

Meaghar v. *Ætna Insurance Company.*—Judgment for plaintiff on 2nd and 5th pleas, and for defendant on 3rd and 4th pleas; with leave to either party, by first day of next term, to apply for leave to plead or reply.

Fechan v. *Bank of Toronto.*—Appeal from County Court of York and Peel. Assignment to creditors, made on the 12th of a month, and filed on the 15th of same month. Execution on the 13th of same month. Held, that the filing had relation back to its date. Judgment of court below reversed. (Court of Common Pleas, in a case between same parties, decided differently. See also Shaw *v.* Gault, C. P. *infra.*

Brown v. *Garden & Gibson.*—Replevin. Avowry and cognizance by defendants as landlord and bailiff. Special plea. Held, that plea amounts to *nil habuit in tenementes*, and judgment for defen-

dants. Leave to plaintiff to amend, on the usual terms, within a fortnight, by alleging an eviction.

Vanburen v. *Bullock*.—A school case. Judgment deferred till next term, till court has an opportunity of seeing recent School Act.

Kendra v. *Moffatt*.—Action on a covenant in a mortgage for purchase money of land sold. Equitable plea, claiming an abatement of a proportion of purchase money, in respect of a piece of the land sold, to which plaintiff had no title, and payment into court of balance. Held, plea bad.

Small v. *Moylan*.—Information for libel. Special plea of justification. Demurrer. Held, plea bad.

Lamb v. *Teeter*.—Trespass to land and to goods. Stands till next term, with leave to either party in meantime to apply to amend. Both declaration and pleas require to be amended.

McArthur v. *Cool*.—Action on a covenant given by a Division Court bailiff. Held, declaration insufficient. McLean, J., *dissentiente*. Plea good.

Scott v. *Corporation of Peterboro'*.—Held: 2nd plea sufficient bar to the action; 3rd plea also good. Judgment for defendant.

Vankleek v. *Stuart*.—Replevin for saw logs seized by Indian lands agent, from a person to whom Indians sold the same. The timber was sold after it was cut. Rule *nisi* discharged.

Holmstock v. *Palmer*.—Judgment for defendant on record.

The Queen v. *Bullock*.—Indictment for embezzlement. Verdict, guilty. Rule *nisi* for a new trial, on the ground of insufficiency of evidence. Rule absolute.

Bank of Upper Canada v. *Turrant*.—Appeal from decision of judge of the County Court of Hastings. Appeal dismissed, with costs.

In re Quinlan and Morrison.—Rule for certiorari to remove an order to arrest, issued by the judge of the County Court of the County of Welland. Rule granted.

Henderson v. *Dickson*.—Motion to rescind a judge's order. Order not before the court, and therefore application stands over till next term.

COMMON PLEAS.

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

June 16, 1860.

Hodgkiss v. *Hedley*.—Rule discharged.

Robson v. *Buffalo and Lake Huron Railroad Company*.—Judgment for plaintiff, on whole record, for $152 85.

Pierce v. *Small*.—Rule discharged. Hagarty, J., *dissentiente*.

Grasset v. *Hutchinson*.—Per Draper, C. J.: Plaintiff entitled to recover. Richards, J., dissents. Hagarty, J.: No judgment. Rule drops.

Park v. *Davis*.—Action against County Court judge, for permitting a Division Court clerk to act in the discharge of the duties of his office without first requiring him to give the requisite security. Action lies. First count good. Judgment for plaintiff, on demurrer to first count; for defendant on other counts.

Dance v. *Burrowes*.—Judgment for defendant, on demurrer.

Coates v. *Bullock*.—Judgment for defendant.

Regina v. *Hill*.—Application for a writ of mandamus to township clerk, to admit relator to the office of township councillor, where office filled by an election *de facto* if not *de jure*. Rule discharged, without costs. Held, that relator should have proceeded to contest the office by writ of *quo warranto*.

Wilkinson v. *Conklin*.—Ejectment. Rule discharged.

White v. *Nelson*.—Rule discharged.

Gough v. *McBride*.—Ejectment. Held, that a memorial executed by a grantee, when not accompanied by possession of the land affected, is not secondary evidence of the deed as against the grantor. Rule discharged.

Shanks v. *Coates*.—Dower. Rule *nisi* to increase the damages. Rule absolute, no cause being shown.

Ball v. *Goodman*.—(Two cases.) Seduction. Suggestion by administrator, entered by order of Mr. Justice McLean. Demurrer to suggestion, and rule *nisi* to set aside order of Mr. Justice McLean. Judgment for defendant on demurrer, and order set aside. Held, that action did not survive.

The Queen v. *The Corporation of Port Hope*.—Application for a mandamus. Rule absolute.

Craig v. *Rankin*.—Defendant entitled to judgment on the demurrer. Held, that a tax imposed by school trustees on the parents or guardians of persons sending children to school, not legal.

Haggart v. *Wintermote*.—Ejectment. Rule *nisi* for new trial discharged.

Merrick v. *L'Esperance*.—Action on a guarantee. Rule *nisi* to enter a nonsuit discharged.

Read v. *Ranks*.—Dower. Rule *nisi* discharged.

Hill v. *Small*.—Rule discharged.

McCallum v. *Snyder*.—Rule discharged.

Smith v. *Birnie*.—Judgment for plaintiff on first plea, for defendant on second. Rule absolute as to so much as asks amount of note to be deducted from verdict, and discharged as to residue.

Owens v *Davidson*.—Action as to a disputed boundary. Postea to defendant.

Winter v. *Stewart*.—Rule discharged.

Johnston v. *Smith*.—Action against sheriff for neglect to levy and false return. Verdict for plaintiff. Rule *nisi* for new trial discharged.

Russel v. *Carscallan*.—Ejectment. Rule absolute.

June 23, 1860.

Hodge v. *The State Insurance Company*.—Rule *nisi* for a new trial refused.

Ferris v. *Chesterfield*.—Appeal dismissed, with costs.

Annis v. *Dormon*.—(Two cases.) Judgment for plaintiff, on demurrer; and rule *nisi* for new trial absolute. Costs to abide the event.

Howes v. *Mills*.—(Two cases.) Judgment for plaintiff on demurrer, and rule *nisi* discharged.

Cuthbert v. *Street*.—Rule *nisi* to enter verdict for plaintiff made absolute.

Buell v. *Ford*.—Plaintiff entitled to judgment on the demurrer, with leave to defendant to amend his special pleading. Only one special plea to the whole declaration. Richards, J.: No judgment.

Shaw v. *Gault*.—Appeal from the decision of the County Court of the United Counties of Stormont, Dundas and Glengarry. Held, that there are five days, and five only, allowed to file a bill of sale; and that if not filed within that time, it is void. Held also, that if an execution be placed in the sheriff's hands, between the date of the bill of sale and its filing, though within five days, it is entitled to prevail. Judgment of court below reversed.

Township of Beverley v. *Barlow*.—(Two cases.) Postea to plaintiff.

Randal v. *Fullarton*.—Rule discharged.

Neale v. *Winter*.—Rule to reduce amount endorsed on writ of *fi. fa.* made absolute, without costs.

Brown v. *Wythers*.—Rule discharged, with costs.

Campbell v. *Grier*.—Rule *nisi* for new trial. Costs to abide the event.

PRACTICE COURT.

Present: RICHARDS, J.

June 16, 1860.

VanEvery v. *Drake*.—If defendant pay costs taxed on former rule, and costs of this application, within one month from this date, *then* rule discharged; otherwise, absolute.

In re Thomas v. *Brooks*.—Held, that the power of issuing execution on a rule is confined to cases where money is made payable

by the rule. Where, therefore, an order to enforce an award, though the submission was made a rule of court, and the award did not direct the payment of money, a rule to set aside execution issued on such a rule was made absolute, with costs.

Niagara and Detroit Rivers Railway Company v. *Burkholder.*—Rule *nisi* discharged, without costs. Point decided same as in last case.

ADDRESS

OF HIS HONOR, JUDGE McKENZIE, TO THE GRAND JURY OF UNITED COUNTIES OF FRONTENAC, LENNOX AND ADDINGTON.

On former occasions I directed your attention of the Grand Inquest and of the public, to any changes or alterations effected in the criminal law, and in the administration of justice in general in Sessions of Parliament immediately preceding sittings of the Court. I do not find that any material alteration has been made in the criminal law of the country in the Session of Parliament which recently closed, but changes have been made in the law in reference to civil rights and the authority of the courts of law in Upper Canada. The law which authorized the bringing of suits within the competence of the County Courts in what was termed the "Inferior jurisdiction" of the Superior Courts, has been unconditionally repealed; and very properly so. The consequence of the abrogation of this law is that all suits and actions within the competence of the County Court will require to be brought and prosecuted in that Court itself; and no causes or suits instituted in the County Court shall be removed from such County Court by writ of *certiorari* or otherwise into the Superior Courts of Common Law, unless the debt or damages claimed amount to upwards of one hundred dollars, and then only on affidavit and by leave of a Judge of one of the Superior Courts in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security for debt and costs, or such other terms as he shall think fit.

And for the future, in any action depending in any of Her Majesty's Superior Courts of Common Law in Upper Canada, in which the amount of the demand is ascertained by the signature of the party, and in any action for any debt in which a Judge of either of the Superior Courts shall be satisfied that the case may safely be tried in the County Court, any Judge of the Superior Courts may order that such case may be tried in the County Court of the County where such action was commenced, and such action shall be tried there accordingly, and the record shall be made up as in other cases, and the trial shall take place in such County Court in the same way as ordinary cases are tried therein.

The jurisdiction of the County Courts has also been extended to actions of ejectment in certain cases. The several County Courts in Upper Canada shall have jurisdiction to try actions of ejectment for the recovery of the possession of property where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars, in cases where the term and interest of the tenant of such property shall have expired, or been determined by the landlord or tenant by a legal notice to quit, and where rent shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

The law of Replevin has also been amended and materially improved. For the future no writ of Replevin shall issue unless an order is granted for the writ, on an affidavit, by the person claiming the property, or some other person showing to the satisfaction of the Court or Judge, the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be).

Or unless the affidavit for the writ states in addition to what is required by the fourth section of the former Act relating to Replevin, that the property was wrongfully taken out of the possession of the claimant, or was fraudently got out of his possession within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property.

Or in case the property was distrained for rent or damage feasant the writ of Replevin may issue without an order if the affidavit states in addition to what is required by the former law, that the property was distrained and taken under color of a distress for rent or damage feasant.

In case the writ issue without an order from the Judge, the Sheriff shall take and detain the property, and not replevy the same to the claimant without an order from the Judge of the Court, but may, within fourteen days of taking the same, re deliver it to the defendant, unless in the meantime the claimant obtains and serves on the Sheriff a rule or order directing a different disposition of the property. When the application for an order is made the Court or Judge may proceed on the *ex parte* application of the claimant, or may grant a rule or order on the defendant to show cause against the issuing of the writ.

In case the writ of Replevin is issued whether with or without an order, the defendant may at any time apply to the Court or Judge on affidavit or otherwise, for the discharge of the writ and order, and for such other relief, with respect to the return, safety, or sale of the property or any part of it; or, otherwise, as under all the circumstances in evidence appears just.

When the value of the property taken, or detained, does not exceed the sum of forty dollars, the writ of Replevin may issue from the Division Court, for the division within which the defendant resides, or, where the property has been distrained, taken or detained; and, for the future, it shall not be lawful to replevy or take out of the custody of any Bailiff, any personal property, seized by him, under any process issued out of a Division Court in Upper Canada.

Another law of a very curious character, was passed in the last Session of Parliament—namely, the Act passed to exempt certain articles from seizure in satisfaction of Debts. The following chattels are, for the future, exempt from seizure, under any writ, issued out of any Court whatever in this Province, namely:—The bed, bedding and bedsteads in ordinary use by the debtor and his family; the necessary and ordinary wearing apparel of the debtor and his family; one stove and pipes, one crane and its appendages, one pair of and-irons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six tea cups, six saucers, one sugar basin, one milk jug, one tea pot, six spoons, all spinning wheels and weaving looms in domestic use., and ten volumes of books, one axe, on saw, one gun, six traps and such fishing nets and seines as are in common use, all necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value forty dollars, one cow, four sheep, two hogs, and food thereof for thirty days, tools and implements of, or chattels ordinarily used in the debtors occupation, to the value of sixty dollars. The Debtor, under this Act, may select, out of any large number, the several chattels exempt from seizure.

The law, respecting Foreign Judgments and Decrees, has been amended, and placed upon a sensible footing. In any suit which may, hereafter be brought upon a Foreign Judgment or Decree, any defence set up, or that might have been set up, to the original suit, may be pleaded to the suit on the

Judgment or Decree. But in any suit brought in either section of this Province, on a Judgment or Decree obtained in the other section of it, in a suit in which the service of process on the defendant, or party sued, has been personal, no defence that might have been set up to the original suit can be pleaded to that brought on the Judgment or Decree; but on such suit, in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original suit, may be made to the suit on such Judment or Decree.

An Act was also passed, in relation to Insurance Companies not incorporated within the limits of this Province. For the future, Foreign Insurance Companies cannot carry on business in this Province, without license from the Finance Minister of the Province, after investing $50,000 in government debentures or municipal loan funds, or in the stocks of one or more of the chartered banks of the Province. An Act was also passed to diminish the number of licenses to be issued for the sale of intoxicating liquors, by retail, with a view of circumscribing, if possible, the intolerable nuisance of drunkenness. I am afraid the provisions of this law will effect but little good under present circumstances. If the Legislature really wish to enact laws to retard the march of intemperance it must do something more than to pass such a milk-and-water enactment as this Act contains.—However, it is something gained, and let us hope that it my prove a stepping-stone for better things—a precursor of a wiser, a more enlightened and more extensive measure, bearing upon the sale and traffic of intoxicating liquors generally.

THE CASE OF THE REV. MR. HATCH.

The following letter was addressed to the Editor of the *Times*.

"Sir,—The indictment of Eugenia Plummer for perjury, which has just terminated in her conviction, has been rightly characterised by Mr. Baron Channell as one of the most extraordinary cases ever heard in an English court of justice. With the general merits of this trial I do not propose to deal; but as the case, when duly considered, affords a striking illustration of a serious defect in our criminal jurisprudence, I am anxious, in the language of the Clapham school of divines, to "improve the occasion."

"The defect to which I allude is the rule of law which prohibits every person, and the wife of every person, who stands as a defendant at a criminal bar from giving evidence on oath. Let us see how that rule has operated in the case in question. In December last the Rev. Henry Hatch was indicted at the Old Bailey for the very serious offence of indecently assaulting Miss Plummer, a little girl twelve years of age, who was one of his pupils. Such deeds are κατ' ἐξοχήν, deeds of darkness; and the very nature of the charge almost precluded the possibility of any disinterested eye-witness being present to confirm or contradict the statement made by the prosecutrix. One would imagine that in such a case, if in no other, the proper course to pursue would be to hear all that could be said, first by the accuser, and next by the accused, and then to decide from the conflict of testimony on which side the truth lay. This seems to be the natural mode of procedure which common sense would suggest, and which justice would sanction. But, the law of England takes a different view of the subject; and while pretending to reverence the maxim, *audi alteram partem* it doggedly compels the jury to hear only one side. It opens the mouth of the prosecutor, but it closes the mouth of the defendant. Nay, it does more, for it closes also the mouth of the defendant's wife. However material the facts may be to which the defendant or his wife can depose, they will not be permitted under any circumstances to divulge what they know. In the case of Mr. Hatch this rule operated with twofold injustice. Eugenia Plummer, in describing the assaults which she alleged had been committed upon her, laid the scene of one of them—contrary to all that might have been expected—in the very room occupied by Mrs. Hatch. Here was an opportunity for testing the truth of her story. Let the jury hear what the husband and wife have to say on this part of the case. Examine them separately, cross examine them astutely, and compare their statements with each other, and with the child's. O dear no—that will never do! They may state what is not true—they may mislead the weak jury. They must not be examined at all. The two best witnesses, next to the prosecutrix herself, are inadmissible to testify. The result was what might have been anticipated in such a state of the law. The uncontradicted testimony of Miss Plummer was believed, and the rev. defendant was a ruined man. One only course was open to him, as affording a possible chance of re-establishing his innocence. He resolves to indict his accuser for perjury. Here the tables are turned. He and his wife can state what they know, and the girl's evidence cannot be heard. The trial comes on, and the verdict of the second jury is diametrically opposed to that pronounced by the first. No man can blame either of the juries, but every man must feel that both of them have been placed in an unfair position. Each has been forced by law to decide on what was practically an *ex parte* statement. There have been two trials, and at neither has an opportunity been afforded for hearing "the whole truth." I do not mean to suggest for one moment that the last verdict may have been erroneous. I believe that verdict to have been a righteous judgment, but still I cannot disguise the fact that it would have been more satisfactory both to the public and to the jurors themselves had the law permitted, as I venture to contend that it ought to have permitted, the examination and cross-examination of Eugenia Plummer. It was a grave defect in the law which made the second trial necessary; the same defect in the law has made the second trial inconclusive.

"I remain, yours faithfully,

"Athenæum, May 15." J. Pitt Taylor."

JURIDICAL SOCIETY.

(*From the Solicitor's Journal.*)

A paper, by Walker Marshall, Esq., Barrister-at-Law, on "The Common Law Courts and Equitable Jurisdiction," was read at the meeting of this Society, on Monday, the 7th May. It was as follows:

The society will doubtless remember that some eighteen months ago a discussion took place here, upon what is popularly called the fusion of law and equity. Previously to that the Attorney-General, in the inaugural address delivered by him, as first president of this society, upon the 12th of March, 1855, had struck the key-note of reform, and in indicating the history of the division of the two jurisdictions suggested the means of their union. The subject on which I shall have the honour of reading this evening is not, therefore, invested, in this room, with the attraction of novelty. But, considering that since the occasions to which I have referred the Common Law Commissioners have presented their third report, in which they recommend, that the common law courts should be invested with all equitable powers necessary to enable them to deal completely and finally with every suit properly initiated in these tribunals, so as to supersede in every case the necessity of the intervention of a court of equity, either before or after judgment; seeing, further, that a Bill carrying out these recommendations to their full extent has been presented to the Legislature, and has undergone an interesting discussion in the House of Lords, where it has been read a second time, and been referred to a select committee; it can scarcely, I think, be considered superflous or ill-timed, if this question is

brought before the society, now that it has entered upon a new phase, and that a practical issue has been raised regarding it.

I believe the greatest difficulty connected with the subject and that which offers the most obstinate resistance to the efforts of those who desire to see the law and equity administered by one tribunal, lies in the use of the word "equity." The primary meaning of this word differs widely from the technical sense. Indeed, I apprehend that neither in the initiation of the jurisdiction of the Chancellor, nor in the principles pursued after the jurisdiction was established will there be found much trace of that most vicious of all judicial modes of action, namely, the adjudicating according to the mere moral sense of the judge respecting which it has been sarcastically observed that under such a system the equity of each different Chancellor would vary like to the measure of his foot. If such a state of things ever existed in this country it has long ceased to exist. On the contrary, the equity administered by our tribunals seems in exact accordance with the definition given by Grotius. "De Æquitate," § 3:—"Æquitas est virtus voluntatis, corrrctrix ejus in quo lex propter universalitatem deficit." Further, Courts of equity admit that the foundation of both jurisdictions is the same by their maxim *æquitas sequitur legem.*

It was not, in fact, from any defect of the common law, nor from any incapacity in the Legislature to deal with all the rights arising out of the complex relations and dealings of mankind, that the equitable jurisdiction among us was established. The chief reason, I suspect, is rather to be found in the inflexible determination of the common law tribunals to adhere to established writs, forms, processes; and that the equity tribunal, when it possessed itself of the litigated matter, dealt and deals with it very much in the same way that the common law tribunals would have done, if it had arrogated or been invested with, an appropriate process. As said by the Attorney General in the address to which I have already referred, "It was justly observed by one of the judges in the reign of Henry VI., that if actions on the case had been allowed by courts of law as often as occasion required, the writ of subpœna would have been unnecessary; or, in other words, there would be no distinction between courts of law and courts of equity, and the whole of the present jurisdiction of the Court of Chancery would have been part of the ordinary jurisdiction of courts of law. But, unfortunately, the spirit of the statute of Westminster the second was not carried out by the judges of the courts of common law; and in the time of Edward III. they declined to act upon writs to which the existing formulæ of pleading, or counting as it was then called, were inapplicable."

Let us test this by examining a few of the most familiar *heads of equitable jurisdiction. Inquiring as to each, whether* there is anything in principle antagonistic to the rules of law, or anything with which a court of common law could not deal on the ground that it is to be judged of only by applying natural reason, or, if you please, equitable considerations—for if there is not, it may fairly be assumed that it was only the defect of *process* which brought it within the jurisdiction of the Court of Chancery.

Take, for example, a very common head of equitable jurisdiction—specific performance. Is there anything about that which is not quite as much legal as equitable? The obligation to deliver goods or an estate which the defendant has sold is an obligation quite as perfect as the obligation to pay money for which he has given his bond. It is obviously only by reason of the want of adequate process that the common law tribunals did not grant this relief. If they had chosen to create a new writ, although, as in the old action of ejectment, a fictitious one, they might have compelled specific performance by delivery of an estate sold, and the making of a title to it, just as by ejectment they put the owner in possession of his land; and they might have compelled the delivery of goods sold, by a similar ratification of process, just as they compelled the delivery up of goods to the owner, by the action of detinue, where his chattels were wrongfully detained.

Specific performance suggests injunction; for as the one compels the performance of a private obligation, the other restrains the party bound to perform such obligation from committing a breach. Surely this is strictly as much a legal right, as the title to damages after the breach is committed.

So far as an argument in favour of investing common law courts with powers to grant relief at present afforded exclusively by the courts of equity, may be derived from the fact that such relief has been granted by these courts, such examples are not wanting. Not many years have elapsed, since the common law courts had jurisdiction, in at least two instances, to protect a person against a threatened injury, and to enforce specific performance of a private obligation. In both these instances this protection and relief were afforded before any damage had been sustained, and before any cause of action had arisen. So that it would be difficult to cite any instance, in which, according to the prevalent technical distinction, the case would be one more distinctively equitable. One of these instances is afforded by the writ *curia claudenda*, by which the owner of land was protected against an apprehended damage likely to result from the neglect of an adjoining owner to fence his land. As said by Fitzherbert in his "Natura Brevium," p. 127, "A man shall have this writ *quia timet.*" This writ was abolished by the statute 3 & 4 Will. IV. c 27. The other instance in which the common law courts granted specific relief against a threatened invasion of a right, is afforded by the writ called *warrantia charlæ* abolished by the same statute. by this writ the feoffee of lands by deed with warranty, could compel his feoffor or his heir to warrant the lands to him. Although this relief was granted for the purpose of protecting the feoffee in cases where he was impleaded in assize or other action in which he could not vouch or call to warranty; yet it is laid down by Fitzherbert in his same work on Writs, p. 134, that "A man may sue forth this writ of *warrantia chartæ* before he be impleaded in any action." Therefore, by these two writs not only was specific relief given by courts of law; but that relief was extended before any invasion of the right thus protected and enforced.

It is, perhaps, not unworthy of notice that in the practice thus established of granting the writ *warrantia chartæ* before the feoffee was sued, there may be discovered a trace of that kind of relief which consists in the declaration of a right not attacked, at present a matter of purely equitable jurisdiction. How it was that this principle never germinated into that wide field of relief which obtains, I believe, in all systems founded on the civil law, of declaring the *status* of individuals, *and the right to property, and thus guarding against the in*firmity and casualties of human testimony, is perhaps one of many examples of the manner in which our system came to be built up. Some exigencies were met and others neglected.

I entertain no doubt that a deeper investigation into the modes and principles of action of the common law courts would bring out other instances in which they acted not merely in analogy with, but exactly in the same way in which the courts of equity act, and according to the principles by which they are governed. I will mention only one other case, in which, as it appears to me, the common law courts act according to a rule as "equitable" as any laid down or applied by the Court of Chancery. A plea showing that in case the plaintiff recovered the defendant would have a cause of action to recover back the same sum, is admitted as a good defence to avoid what is called "circuity of action." In other words, the court of common law modifies the strict legal rights of the parties, in order to avert the inconvenience of a multiplicity of suits; or of two actions being brought, the judgments in which would neutralize each other. In this rule we find

something not unlike the principle acted upon in the equity courts, in requiring that all the persons materially interested in the subject of the suit should be made parties to the suit, in order that a decree may be made once for all decisive on the subject matter. Lord Redesdale, in his Treatise on Pleadings, p. 164, states the object of this rule of courts of equity to be "to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation."

But it was not only the want of adequate writs, and the obstinate adherence of the common law tribunals to the ancient forms, which occasioned the necessary interference of the Court of Chancery. Another cause was the want of officers, and of appropriate machinery for investigating complicated transactions. The most striking example of a transfer of jurisdiction through this cause is afforded by the action of account, a common law remedy, but which to all practical intents has become transferred to the Court of Chancery, avowedly and solely on the ground of defective machinery in the courts of common law.

There is yet another reason for the Court of Chancery having assumed jurisdiction arising out of the rigid adherence of the law courts to certain conventional rules, notwithstanding, in particular cases, such adherence was against strict right. Upon this head there is a greater apparent foundation for calling the jurisdiction of the Court of Chancery equitable than upon either of the others already mentioned. But inasmuch as the law tribunals acted upon the same principles as the Court of Chancery, when the matter presented itself in a shape which did not infringe these rules, the reason, I apprehend, is rather to be found in the attachment to the rules themselves, than in the nature of the subject matter. Thus, the common law courts would enforce a deed or written contract according to its letter, notwithstanding, by mistake, it expressed that which was not the intention of the parties, and the invariable adherence to this rule induced the Court of Chancery to reform the contract. Yet, at the same time, the court of law would open an account stated, and balance mutually settled between the parties, on the ground of mistake.

It may, perhaps, admit of question, whether the abnegation of the rights of *cestui que trusts* at common law is not, as regards personalty, referable to a technical rule. With respect to lands, it arose probably from reasons connected with the incidents of tenure under the feudal system. But with reference to personalty, what is there, it may be asked, in the duty of a trustee less positive or absolute than that of a bailee; and why could he not be called to an account in a court of law? The reason, perhaps, was because there was no privity; that is, because the trustee did not promise *to him* to stand possessed of the fund for his benefit; it was to another he made the promise, and on this ground the *cestui que trust* was not regarded as a person having any rights whatever. If this was the reason for the rule, surely the rule was a technical one. Should it be said that courts of equity came to have jurisdiction in these cases by reason of their faculty of sifting the conscience of trustees, then that merely shows that there was the further ground of the defect of adequate machinery, namely, the administering of interrogatories in courts of common law to the defendant. But my only object at present is, to show that it was not by reason of any inherent equity in the subject matter; but on account of defective process, a rigid adherence to forms, and an inflexible attachment to rules that the Court of Chancery came to the aid of the law courts, and averted some measure of the injustice which would otherwise have ensued.

These observations or surmises have, of course, no application to that jurisdiction exercised by the Court of Chancery over the persons and properties of infants and lunatics, or to any matter in which it discharges the functions of a guardian or protector, and acts rather in an administrative than judicial capacity: but only to that equity jurisdiction which is professedly in aid of the law.

An argument might be adduced in favour of the view here taken, founded on the mode in which the defective common law jurisdiction has been amended in our own day. Where it has been desired to give common law courts jurisdiction previously possessed by equity courts only, that object has been effected simply by arming those courts with an adequate process. Thus the common law tribunals have been invested with what is called equitable jurisdiction on the report of a commission to inquire into "the process, practice, and system of pleading" in the courts. The power to grant discovery is conferred by a provision that the Court shall have power to order a party to answer on affidavit, and that neglect or refusal to comply shall be a contempt. So of the supplemental relief by specific performance, given also by the second Common Law Procedure Act, that is conferred by simply providing that a plaintiff may claim, and the Court may grant a writ of *mandamus*. So of injunction it gives the writ merely. There is no provision that "it shall be lawful for courts of common law to enforce performance or restrain a breach"—the process is given, and that is all. Again, the same Act enables the Courts to entertain certain equitable defences, not by saying, that so and so shall be a legal answer to a claim; but merely by enabling the defendant to plead, and by empowering the courts to receive such defence.

But however artificial the distinction between the jurisdiction of different tribunals may be, unless some inconvenience ensues, the distinction may afford the increased accuracy and efficiency resulting from the division of labour. Upon examination, however, I believe it will be found that in the instances to which I have referred, and many others too numerous to mention the delay, embarrassment, uncertainty, expense, and surprise, due to this artificial distinction, very far outweighs any advantage from the division of labour.

In reviewing the evils arising out of the distinctive jurisdictions, I shall take the liberty of referring to the time when the distinction existed in all its integrity, that is, before the reforms of the last eight years. Happily, in speaking of many of these inconveniences, it is necessary to use the past tense.

It is now a principle which meets with tolerably general acceptance, that a tribunal should be invested with plenary powers to deal entire justice in any matter within its jurisdiction, without the aid or intervention of any other court whatever. When this principle is admitted, then it is acknowledged that the necessity for the intervention of a court of equity during the progress of a suit, or its interference with the judgment, arose from an allowed evil.

Now that the limits within which the Court of Chancery acts have been defined by some of the most subtle and exact minds that ever illustrated the law of any country, and has, in most instances at least, been set out, as it were, with metes and bounds, by a long series of precedents, the evils attaching at the commencement of a suit from this division of jurisdiction, are not very grave. But it is not necessary to revert to a very ancient period to arrive at a time when this was far otherwise—when the operation of the equity court was uncertain, and the dividing line indistinct. There is not now the same danger of mistaking the tribunal that there was previous to the time of Lord Hardwick. But the result of a mistake is still the same, that the complainant with his righteous cause is not only dismissed remediless, but is as much *in misericordia* as if he had no rights, and is compelled to make good his adversary's costs.

But, however astute and wary the plaintiff may have been in choosing his tribunal, and however right in the choice made the defendant might set up an answer which would put him all wrong in that court. The right was of legal cognisance, the remedy should be sought in a court of law, and to a court of law he has gone. But the defendant sets up an answer, which

in point of truth is no answer at all; but which, nevertheless, entirely defeats the plaintiff's rights in that court, and drives him in all haste to the abandonment of his suit, or sends him to a court of equity to pray for its intervention to avert the threatened wrong by restraining the defendant from availing himself of his legal defence. Thus by the operation of the rules of law, rigidly construed as they were, a man might offer a defence where none existed—because if the defence was one which according to the law of the land ought not to be allowed to prevail, then it was no defence. And the law administered in the Court of Chancery being applicable to the whole of England may properly be called the law of the land.

Not only might an inequitable defence be advanced as an unanswerable plea to a legal claim, but an inequitable demand might be enforced in a court of law. It is easy to give examples. Thus, in a court of law a guarantee might be enforced against a surety of a bond debtor, notwithstanding he was prejudiced by the giving of time to the principal; and a deed might be enforced, notwithstanding it expressed what the parties to it did not intend, or where it was vitiated by fraud which could, however, be proved only inferentially, &c.

Now, whether a court of equity set the matter right by shutting the mouth of the inequitable plaintiff or inequitable defendant, or by restraining him from enforcing the judgment he had obtained, founded upon such inequitable matter, the contrivance was equally clumsy. The concurrent existence of the two systems is an acknowledgment that the full measure of justice consists in the application of law modified by equity. How was this mingled action secured? The court of law acted in direct defiance of the rule of equity, and the court of equity applied the modifying principle, not by controlling or setting aside the acts of the legal tribunal, but by acting in an independent way upon the suitor. It said to the defendant with his inequitable legal defence, "It is true you have an answer to this claim, and if such your defence were brought before the court in which you are sued, you would have a determination in your favour; but that determination would not be in accordance with justice. Although we cannot control that court, we can you, and we hereby seal your lips against uttering this defence, and do it at your peril." Here you have a court solemnly administering the law which was to bind men's acts and another tribunal saying, "We will prevent facts being presented before it, because if they are it will certainly do a wrong." So a plaintiff obtains from a constituted tribunal an adjudication that he has a certain right as against his adversary. This judgment has been pronounced upon full knowledge of all the facts, because if the Court refused entirely to hear the answer, or, having heard, disregarded it as impertinent, it cannot be said the judgment was in ignorance of the facts. But another tribunal says:—"Those facts you treated as impertinent are the strong circumstances upon which the whole case turns—they show the rights of the parties to be the very reverse of what you have declared they are. We have no power to overrule or set aside your judgment, but if the plaintiff attempts to enforce it we shall send him to prison."

Not only did this division (and does still to the extent to which it now operates) aggravate the delay and increase the expense of litigation, but it acted in a way still more obstructive of justice—it increased the chances of surprise. A litigant party is in greater danger of losing the benefit of a defence or reply if he can only avail himself of it by application to another tribunal.

It frequently happens with moral agents that the effect operates back upon the cause, and increases its intensity. It would be difficult to say how much the distinction between the system administered in courts of law and that recognised in courts of equity, has been aggravated by the exclusive devotion of the professors of each to his own branch. Law and equity together form the art or science of ascertaining, protecting, and vindicating rights. But being divorced, each had its own professors, glorying in his half profession, ignoring the other part, even congratulating himself upon his ignorance of it, and indulging in open contempt of its rules and mode of procedure. A disadvantage connected with this, consists in the necessity in many cases of consulting two sets of legal advisers before a party's rights can be known, or his course of action precribed.

Then what are the advantages derived from the severance of law and equity to the extent that common law courts disregard those considerations upon which the equity courts proceed? I am able to suggest only two—first, that to which allusion has been made already, increased accuracy from the division of labour among the courts; secondly, certainty secured by having the stern rule of law inflexibly administered, and the modifying principle applied by a distinct tribunal.

As to the division of labour advantage, as a mere device for dividing jurisdiction, no worse principle could be adopted. In that view it has every possible vice, inasmuch as its limits are not clearly defined, there is a constant dovetailing and mingling of jurisdiction; neither jurisdiction can act independently of the other, yet they do not act in harmony, but rather in antagonism. Division of labour may, without any disadvantages of that sort, be secured to an almost unlimited extent by confining courts to one particular subject of relief, as bankruptcy, marriage, shipping, contracts, torts, &c. Therefore as a mere means of procuring this end, it is an impolite contrivance, being attended with inconveniences, all of which might be avoided, and the same object attained.

Then as to the supposed advantage of certainty, it may be asked why a rule should be considered certain, merely because it cannot be dispensed with or modified by the court in which the suit is brought, when it may be by the intervention of another court, which will certainly interfere if asked to do so. I confess I do not see the difference in this respect between the application of legal and equitable principles by one tribunal, and their application by different tribunals to the same suit. Nay, there is more uncertainty in the latter case, because there is less calculation as to whether and how the modifying principle will be applied, and at what stage of the suit, and in what manner the equitable court will intervene.

The recent changes which have been effected, in the courts of law and equity, upon the recommendation of the respective commissions, have had for their object assimilation to the extent to which each of those courts is impotent by reason of the want of the powers of the other. If, as a result, we have, in some cases, courts of law and equity each having jurisdiction to dispose finally of the same suit, so that the suitor may elect his tribunal, and obtain the same relief from either. I see no inconvenience or anomaly from that. The requirement is that each should apply the same rules, and adjudicate the same way; not that either should have a monopoly of causes.

So far as regards the defective jurisdiction of the common law courts arising from the want of adequate process, it has been remedied to a great extent by the reforms already effected. Others are in contemplation, and are now before the Legislature. But in respect of that owing to the want of competent machinery, or, in other words, of necessary officers, little if anything remedial has been done. The common law courts have no officers or powers regularly constituted for the purpose of taking accounts of investigating title. It is true that matters of account are frequently in practice referred to one of the Masters, but in these cases the Master acts as any other arbitrator does, by disposing as judge and jury of the case, and entering the verdict for the one party or the other. There are no powers for taking accounts collateral to the suit, and for a report being made to the Court on which the Bourt may act. Until this defect is remedied it is difficult to see how the jurisdiction proposed by the Bill now in Parliament to be given to common law courts can be exercised to its legitimate extent. One of the provisions of the Law and Equity Bill proposes to give specific performance of every contract for the breach

of which damages might be recovered. The case of most ordinary occurences perhaps, will be a suit for the conveyance of land contracted to be sold. In that the necessity of investigating title is in many cases immediately involved—a process which cannot be performed by a jury or other tribunal sitting *in judicio*. There is, however no provision in the Bill for conducting these investigations. The same Bill proposes to allow the recognition of equitable interests in questions of title raised by interpleader. That also may require the investigation of matters not convenient, or perhaps, possible to be determined by a jury, or even by the Court, without the assistance of an officer, who may inquire and report. Indeed, as matters now stand, considerable hardship, and certainly no little cost, and frequently great delay is occasioned to suitors by the want of machinery, for the taking of accounts. Rarely a day passes at Nisi Prius without the discovery being made at some stage of a cause that *a jury* is incompetent to deal with the matter. The consequence is, that the case must go to arbitration. The parties are compelled to accept a tribunal they did not choose—a tribunal from which there is no appeal. They did not desire arbitration, if they had desired it they would not come to the Court for it. They wished the adjudication of the Courts of the land, and not the award of the arbitrator, whose motives of action it is impossible to scrutinize, the grounds of whose decision remain unrevealed in his own breast, and whose fiat is irreversable.. The entire expense of the trial is thrown away, and an indefinite prospect of adjourned meetings is opened up.

The question to what extent the law courts are to be clothed with equitable jurisdiction is now presented before the Legislature in a definite shape by the Law and Equity Bill. Upon its various provisions there is a very great diversity of opinion among the profession. Few, I believe, dissent from *all* the proposed changes; many, no doubt, entertain very strong objections, to *some*. It is, indeed somewhat curious that although three of the equity judges, the Master of the Rolls, and the Lord Justices, have offered a solemn protest against the measure, all of the common law judges have, according to the Lord Chancellor's statement in the House of Lords, signified their approval of it.

The Bill has two aspects or phases, and it is with reference to these, as I apprehend, that a difference of opinion will be entertained. Such as are of opinion that wherever, according to the established law, a case is properly initiated in a common law court, the court should have jurisdiction to apply equitable principles; but who object to any transfer from courts of equity of suits which at present are commenced in these tribunals, will approve of one set of provisions of the Bill and object to others. But such as go further in the direction of fusion will approve also of the other set of clauses, which seek to invest the courts with the power of administering every kind of relief applicable to legal rights. The Bill then appears to me to have two objects—first, to enable courts of law to deal finally with all suits which may now be instituted in these courts: secondly, to enable courts of law to protect, vindicate, and enforce legal rights by granting the same kind of remedy and redress which at present can be obtained only by application to a court equty. The first of those objects is sought to be attained by empowering courts of law to restrain by injunction the defendant in ejectment, and in all actions for the recovery of lands or goods, from injuring or making away with the land or goods (section 9) by enabling the court to grant to a defendant either before or after judgment, the conditional or final relief for which he is now to go to a court of equity (section 10 & 11), by extending to common law courts the relief obtainable in courts of equity in cases of ejectment for a forfeiture for non-payment of rent, or to insure against fire (sections 21 & 22), and by prohibiting the interference of the courts of equity in any suit where the relief therein sought might have been obtained by plea or otherwise (section 30). This I believe to be a summary of the provisions of the Bill directed to the abolition of the necessity of courts of equity intervening before or after judgment in suits cognizable at law. The other class of provisions, namely, those directed to enable common law courts, in cases where no action has been brought to afford relief of a character at present granted only by courts of equity, will be found in the first, twenty-fourth, thirty-second, and thirty third sections. By the first section it is enacted that "in all cases of threatened breach of contract or other injury of such a nature that an action at law for damages might be maintained for the same, if committed, application may be made either *ex parte*, or by rule or summons, to the Court, or a judge, for a writ of injunction." By the twenty-fourth section a new action is given for the delivery up of documents; by the thirty-second and thirty-third sections interpleader is allowed in the case of equitable claims. These are all the equitable powers proposed to be given by this Bill.

The alteration sought to be effected by the Law and Equity Bill, I believe to be the most important which has ever been introduced by any measure affecting the administration of justice in this country; and if carried into effect will inaugurate, as I believe, a brighter era, in which Law will be arrayed in a simpler robe, and bear the sword of justice in a firmer because a surer grasp.

THE LAW AND LAWYERS IN THE BRITISH COLONIES.

(From *The Law Magazine and Law Review.*)

A London lawyer, when he hears of "the legal profession," has brought before his mental vision so much of the world of lawyers as is described in a considerable portion of a neat red book, which, published annually by that respectable firm Stevens & Norton, calls itself "The Law List:" for the significance of terms depends upon the limits and exactitude of a man's knowledge, and by far the greater number of barristers and solicitors in England, have rarely any thing to do with either their foreign or colonial brethren. In this busy bustling world, the inhabitants, both of the old country and the younger one, find it essential to concentrate their attention on their own affairs; and, having no direct occasion to meditate upon systems and practices foreign to their own, they do not make the opportunity.

Of course there are exceptions to this exclusive attention of lawyers to their own local interests and pursuits; but, owing to the incurious character, the speculative inactivity, and the narrowed and practical quality of the national mind, we certainly maintain an extensive ignorance of the national mind, we certainly maintain an extensive ignorance of the law and lawyers of those mighty colonial provinces, which either have created their own systems of jurisprudence, or exercise their jurisdiction under the authority of the British crown.

It would, indeed, form a somewhat heterogeneous body of law, if all the colonial procedures and statutory enactments were collected. But we believe we may safely affirm that there are, in the administration of the law throughout our colonies, two general distinguishing characteristics; the one the unimpeachable integrity of the Bench, and the other the independence of the advocates. Wherever the English people have emigrated, they have carried with them an invincible love of judicial impartiality. No name in the annals of English history is so hated as that of Jefferies. A venal, corrupt, or partial judge, who is open to suggestions off the Bench, or who exhibits partizanship or courtier-like subserviency on it, is certainly the most detested character among us. We believe the impress of integrity has been stamped universally on the character of our judicial officers: nor can there be any doubt that this is of more importance than the possession of the most perfect code, or a staff of the most perfectly taught

lawyers in the world. In some civilized countries the private suitor has no chance against the government; while, in others, the characters of judge and prosecutor are combined in one person: and we read occasionally of the court of justice being transformed into a scene at a theatre, where the judge is only one of the *corps dramatique*.

When, however, there is a free exercise of the profession of the advocate, whether he unites the characters of barrister and solicitor, or they remain distinct, the effect mutually on judge and advocate is necessarily favourable to the administration of justice; and it is this exercise of the profession of the law in open court which is the great safeguard for the community. The mere forms of court practice are of little worth in comparison with the open administration of justice, with the aid of independent advocates, in the presence of the public. In the back woods or young settlements the forms may be rude; but if tradition has maintained the spirit of the English administration of the law in this respect, the essential part of its character will have been preserved.

The etiquette of the profession, as well as the forms of justice, depends upon the *accidents* of society, where its members flourish. Modern refinement, for example, in relation to *honoraria*, in which the fiction is affected to be believed, that counsel are not paid as an apothecary or turnpike-man, and where a mysterious silence pervades the whole money part of the transaction, does not hold in new and old world settlements. A good fellow who kept terms with us, migrated to a young colony which shall here be nameless, and there alternately pursued his profession and the beasts of the field and wood; but he felt some difficulty in getting such endorsements on his brief as would be acceptable in the Temple. The doctrine that "the fee should always be put outside," was indeed strictly enforcible in many cases with him; for the hides and horns, &c. (which represented in his case the "guas"), were, *odoris causâ*, necessarily left external to his hut. Although here all forms of *honoraria*, and often in kind, were tendered, and obliged to be accepted, our friend was never the worse lawyer, or less respectable as an advocate. Happy would it be for the legal professors in the "old country" if clients always paid as regularly, and barristers always dealt as honourably, as our successful, skilful, and learned colonial friend, whose fee-book would be a curiosity of the greatest magnitude in Lincoln's Inn.

It is always with pleasure that we see the *Upper Canada Law Journal* (conducted by Messrs. Ardagh and R. A. Harrison), for it affords evidence that the science of jurisprudence flourishes, and that the legal press is well represented in that province. The matter it contains is, so far as we have seen, excellently selected for the use of lawyers, while in literary character it takes a high standing; and, as regards printing and office preparation, is superior to much which emanates from the press of the mother country, and affords satisfactory evidence of the talent of the legal profession in Upper Canada.

The advertising sheet of the periodical in question might, perhaps, shock the sensitive feelings of the stuck-up mother-country practitioner, for barrister and solicitor advertise in it as a matter of course. We confess we like to see their straightforward announcements, like the following:—

"PATERSON, HARRISON, and HODGINS, Barristers, Solicitors in Chancery, &c. Office, Toronto Street, (two doors south of the Post Office), Toronto, C.W."

"SHERWOOD, STEELE, and SCHOFIELD, Barristers and Solicitors, &c., MacLaughin Buildings, Sparke Street, Central Ottawa.
"Hon. G. SHERWOOD. R. F. STEELE. F. SCHOFIELD."

ROBERT K. A. NICHOL, Barrister and Attorney-at-Law, Conveyancer, Solicitor in Chancery, Notary Public, &c., Vienna, C.W."

In England, we advertise in a different way in the newspapers, thus—

"The Lands Draining Act, 1859, with copious Notes and Index. Edited by Job Briefless, Esq., Barrister-at-law;" or, "The Metropolitan Housemaids' Window-cleaning Protection Act, 1860; with an Introduction and Notes, by Jeremiah Hopeful, Barrister-at-law." On the whole, the Canada principle of advertising is at least as admirable as our own. Besides the popular form of advertising in London, some members of our liberal profession, we have heard, adopt other modes of preventing their dips being hid under bushels; but we need not further advert to their ingenious efforts.

In Upper Canada, it will be seen, the same men practise both as solicitors and barristers, and form themselves into firms. The practice is recommended by good sense and reason. The state of society no doubt favours the combination, and much might be said for the system in England, were it *openly* adopted with us. A paper issued by the Law Amendment Society, published in 1852, on the relation between the Bar, the Attorney, and the Client, affords ample evidence of what is the opinion amongst liberal-minded men in the profession on this subject.

Before we close these brief observations upon our colonial brethren, we will refer to one point which presents itself to our minds; and that is legal education. England furnishes some of the judges and other officers for the colonies, and from home are drafted not a few lawyers who practise in our dependencies. There ought to be ample provision made here for a liberal education in the *principles* of jurisprudence, apart from practice and technical knowledge, such as are gained in counsel's chambers. Without these principles a man goes to a new system or variation of the English procedure at a great disadvantage, and when put to apply law to a new procedure, he feels how deficient his studies and how misdirected his labours have been. It is the opprobrium of the English advocate that he is unacquainted with the science of jurisprudence, for which any amount of mere technical knowledge is no compensation. When he is called on to comprehend a foreign juridical system, he will find that Chitty's Archbold, and Smith's Chancery Practice, are not the only works worth his mastering.

DIVISION COURTS.

OFFICERS AND SUITORS.

SECURITIES TO BE GIVEN BY OFFICERS—ADVICE TO COUNTY JUDGES.

It is all-important to the due working of the Division Courts Act, that its provisions with regard to securities to be given for the due performance of office by Division Court officers, should be observed.

Division Court Bailiffs, as well as Clerks, are entrusted with the performance of duties which greatly affect the public, and the public have a right to be well secured as against misconduct by these officers.

The Legislature, alive to the necessity of proper security, has enacted some wise and stringent provisions, and to some extent made County Judges responsible for the carrying them into effect.

Neither by the subject of these remarks, nor by the remarks themselves, do we intend to bring any charge of misconduct against Division Court Clerks and Bailiffs as a class; far from it. We know them as a body to be intelligent and trustworthy. But in every body of men there are some of less merit than others, some less honest than others, and some more unfortunate than others.

Men who mean well and do well, have nothing to fear from the giving of proper securities; but as the law regulating such securities must be a general one, all must be equally bound by it, and equally called upon to obse[illegible] its provisions.

Every Division Court Clerk and Bailiff is bound by law to enter into a bond and a covenant. The bond is to be made to

Her Majesty, with as many sureties, in such sums, and in such form, as the Governor directs. It is to be conditioned for the due accounting for and payment of all fees, fines and moneys received by the officer by virtue of his office, and also for the due performance of his several duties. The covenant is to be in the form given by the statute (Con. Stat. U.C. c. 19, p. 176), or in words to the same effect. It is to be with so many sureties—being freeholders and householders within the county—and in such sums *as the County Judge may direct, and shall under his hand approve and declare sufficient.* (Con. Stat. U.C. p. 139, sec. 25.)

The covenant, approved as above, must be filed in the office of the Clerk of the Peace, in the county in which the Division Court is situate, "*before any such Clerk or Bailiff enters upon the duties of his office.*" (*Ib.* sec. 29.)

If any surety in any such covenant, 1st, dies; 2nd, becomes resident out of Upper Canada; or, 3rd, insolvent, the County Judge is to notify the Clerk or Bailiff for whom such person became surety, of the death, departure, or insolvency (sec. 29).

The Clerk or Bailiff, *within* one month after being notified, is to give anew the like security, and in the same manner as already mentioned. *The penalty for neglect is forfeiture of office.* (*Ib.*)

The covenant is to be available to and may be sued upon in any court of competent jurisdiction, by any person suffering damage by the default, breach of duty, or misconduct of the officer (sec. 27).

The undertaking of the sureties is threefold: 1st, That the officer (Clerk or Bailiff) shall duly pay over to such person or persons entitled to the same, *all such money as he shall receive by virtue of his office.* 2nd, That he shall and will well and faithfully do and perform the duties *imposed upon him by law.* 3rd, That he shall not misconduct himself in his office, to the damage of *any person being a party in any legal proceeding.* (See Form, Con. Stat. U. C. p. 176.)

The following appear to be the duties of a County Judge in respect to the covenant:

1. To direct the number of sureties, and the sums in which each shall be bound.

2. To approve and declare, under his hand, the covenant to be sufficient.

3. To see that before any Clerk or Bailiff enters on the duties of his office, that the covenant of himself and sureties, approved as above, shall be filed, as the act directs.

4. To notify the Clerk or Bailiff of the death, departure or insolvency of any surety, with a view to the renewal of the security.

If a County Judge were wilfully to refuse or neglect to perform any one of these duties, he would in all probability render himself liable to an action at the suit of a party aggrieved. The duties prescribed are ministerial, and not judicial; and for the wilful non-performance of them, we apprehend an action would lie. Indeed it has been expressly held that if a County Judge neglect to see that a Clerk or Bailiff files his covenant, approved as directed, before entering on the duties of his office, that an action is sustainable. (*Park* v. *Davis*, C. P. Easter Term, 1860.) The Judge should satisfy himself as to the sufficiency of the sureties offered. This probably he may do upon an affidavit of justification. We think that if a Judge were to approve of persons as sufficient, known to him to be otherwise, an action would lie. But at the same time we entertain the clear opinion, that if sureties deemed sufficient and regularly approved by him as sufficient, afterwards are discovered not to be so, there can be no remedy against the Judge. (*Ib.*)

The fact that a County Judge may be sued for the nonperformance of any duty imposed by the Division Courts Act, ought to be known to all concerned.

U. C. REPORTS.

CHAMBERS.

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

JOHN SCOTT v. ROBERT CROSTHWAITE.

Rule for costs of the day—Each party equally to blame—Setting aside.

Where a cause in the absence of plaintiff's counsel was struck out of the docket and afterwards upon his application restored, and then defendant's counsel obtained leave to add further pleas, and the cause at the close of the assize was not tried, a rule obtained by defendant for costs of the day, and all proceedings thereunder, was, on application of plaintiff, set aside.

The *nisi prius* record in this cause, was entered for trial at the last assize for the county of Wentworth. It having been called on for trial, and no one appearing for the plaintiff, though the counsel for defendant was present, it was struck out of the docket.

Subsequently, upon the application of the counsel for the plaintiff, it was restored to the docket, and afterwards plaintiff was allowed to amend by striking out the name of a defendant, and at same time leave to amend was granted to defendant by the addition of further pleas.

The cause was not afterwards tried. Defendant having issued a rule for costs of the day, and taxed them at £24 14s. 6d.: plaintiff obtained a summons on the defendant to show cause why that rule and all proceedings had thereon should not be set aside, on the grounds that, at the time the record was struck out of the docket the counsel for the defendant was present, and did not move for a non-suit, or state that he was ready, or take any other action whatever, and on the ground that the record was restored to the docket after its having been struck out, and that the counsel for the defendant had notice of the application to restore the record, and was present and allowed the record to be restored without objection; and that afterwards, although plaintiff was ready and willing to try the cause, there was no opportunity of doing so before the close of the assize.

In support of the summons, among other affidavits, an affidavit of Charles A. Sadlier, Esq., counsel for the plaintiff was filed. In it he swore that he entered the Court House very soon after the record was struck out the docket, and informed S. B. Freeman, Esq., counsel for defendant, that he, Mr. Sadlier, was about to apply to the learned Judge, (Burns) to have the record restored to the docket, and requested him (Mr. Freeman) to be preseut: That Mr. Freeman was present when the application was made and neither consented nor objected to the application: That the application succeeded: that the record was neither marked as a remanet, nor again struck out; but that the plaintiff was at all times after the same was restored to the docket, ready and desirous of trying the cause.

Jackson, for the plaintiff, cited *Morgan* v. *Ferneyhaugh*, 25 L. T. Rep. 219 S. C. 33, Eng. L. & Eg. 453. *Sleeman et al.* v. *The Copper Miners of England*, 5 D. & L. 457. *Archd. Prac.* 9, Edn. 1399—1401.

On the part of the defendant, an affidavit of S. B. Freeman, Esq., was filed in showing cause. He swore that a person named Jones was also a defendant in this cause at the time the record was entered for trial: That he (Mr. Freeman) did not consent to the record being entered after it had been struck out: That Mr. Sadlier imformed him, that he intended to apply to have the record restored to the docket, and afterwards told him that it had been restored, but that he, Mr. Freeman, was not informed of the time when it had been intended to make the application, until he told him that it was restored: That Mr. Sadlier afterwards told him (Mr. Freeman) that he intended to strike out of the record the name of Jones: That on the following morning he applied to do so, and the application succeeded on the terms that he, Mr. Freeman, should have leave to plead additional pleas on behalf of the defendant, Crosthwaite, and that the additional pleas were accordingly added.

Allott v. *Bearcroft*, 4 D. & L. 327, was cited for defendant.

RICHARDS, J.—The case having been restored to the docket by the learned Judge who struck it off, and the defendant having been made aware of the case having been restored to the docket, and having had his pleadings afterwards amended, I must consider it precisely in the same position as if it had not been struck off the list.

The rule laid down by the learned Judge, as I understand it was, that the causes were called over, if the plaintiff was ready the cause went on, if not, and the defendant did not insist on the cause proceeding, it was passed over, and when the Crown business of the assize was closed, the Judge declined taking any more business.

If the cause had not been restored to the docket, *Allott* v. *Bearcroft*, 1 D. & L. 327, would be an authority in favor of defendant; but *Moryan* v. *Verneyhaugh*, 25 L. T. Rep. 20, might be considered as making it doubtful. The cause having been restored to the docket, I must consider it as passed over, and that both parties are equally to blame for its not having been disposed of at that assize, and in that event, both parties would lose their costs. There is a case in 1 L. T. Rep. N. S. 374, which seems to decide that in such a case the costs would be costs in the case.

As at present advised, I think the rule allowing defendant the costs of the day and all subsequent proceedings thereunder, must be set aside.

Summons absolute.

CHANCERY.

Reported by ALEXANDER GRANT, Esq., Barrister-at-Law.

McMASTER v. CLARE

Fraudulent assignment.

A trader being in insolvent circumstances, at a meeting of his creditors entered into a written agreement that he would execute an assignment, to trustees, for the benefit of creditors, of all his real and personal estate and effects, (except certain policies of life insurance,) and on the second day afterwards he did execute the deed agreed upon, which the trustees accepted, and several of his creditors joined in and executed the same. Afterwards it was discovered that on the day intervening between the day of agreement to assign, and the execution of the deed of assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purchaser. Thereupon the trustees filed a bill seeking to have this sale set aside as fraudulent, and void as against them.

Held, that the trustees being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the date of the execution of the deed of trust, and that the sale being binding upon the debtor, and those claiming under him, the trustees were not entitled to the relief prayed. But, *semble*, that this sale would not have been sustained as against a judgment creditor who had sued out execution.

The bill in this suit was filed by William McMaster, Samuel Benjamin, and Duncan Bell, against John K. Clare and Thomas Hutchinson, and set forth that Hutchinson, in July, 1859, who was then carrying on business in Toronto, Hamilton, London, and Guelph, as dry goods merchant, having became greatly involved, was desirous of effecting an arrangement with his creditors, for which purpose he sent an agent to England, but it being found impossible to effect any arrangement, he did on the 4th of August, call a meeting of his creditors at Toronto, for the 6th of September, at which meeting such of his creditors as then attended requested Hutchinson to execute an assignment of his property and effects for their general benefit, which after considerable difficulty, he consented to do, and on the 8th of the month, the greater part of his creditors having agreed to give him a release in full of their respective debts, he by an instrument under his hand and seal, agreed to execute such assignment, in the form, and according to the draft then submitted, to the plaintiffs, as trustees for his creditors. That in pursuance of such agreement, Hutchinson, on the 10th of September, by indenture bearing date that day, and made between the defendant Thomas Hutchinson, of the first part, his wife of the second part, who joined therein for the purpose of barring dower, and the plaintiffs of the third part: and such of the creditors of Hutchinson as should come in and execute such assignment, of the fourth part, granted, bargained, sold, and assigned to the plaintiffs, all and singular the lands, tenements, and premises, particularly specified in the schedule thereto annexed, and also all and singular the stock in trade of him the said Hutchinson, in his shop in Toronto; and all the household goods, &c., in his dwelling house: also, the stock in trade, goods and chattels in the shop at Hamilton, and all book debts, accounts, credits, judgments, bonds, bills, notes, and securities for money, and all other the real and personal estate of Hutchinson, (excepting certain policies of insurances effected upon his life,) and all reversions, remainders, yearly and other rents, issues, and profits thereof, upon the trusts stated in such indenture, namely, to pay the costs, charges, and expenses attending the execution of the trusts, and apply the proceeds of the trust property and effects towards the payment and satisfaction of all the creditors of Hutchinson ratably, and in proportion to their claims, without any preference or priority, and to pay the surplus, if any, to Hutchinson. The assignment also contained a stipulation that any creditor might execute the indenture, and add to his signature "without release," and that creditors so executing should not have been taken to have discharged or released Hutchinson from any part of the debt remaining unpaid after the receipt of the dividend. And by the indenture Hutchinson covenanted with the plaintiffs for the further assurance of the lands and premises, and that he would execute all such *deeds, conveyances*, &c., as might be requisite to convey to the plaintiffs any lands, tenements, goods, chattels, rights, credits, or other assets, (except the life policies,) omitted from the said indenture, or which were intended, or which should have been included therein; and that he made a true and faithful discovery and assignment of all and singular his real and personal estate and effects to the best of his knowledge and belief. That this indenture was on the 10th of September accepted by the plaintiffs, and on the same day was executed by several of the creditors of Hutchinson, who thereby released him according to the stipulation of the deed, and amongst others the plaintiff Benjamin. That the business carried on by Hutchinson in London was carried on in the name of the defendant Clare, but the business, in reality was that of the defendant Hutchinson.

The bill further stated, that after calling the meeting of his creditors, before referred to, and when his difficulties and insolvency were notorious to the public at large, and well-known to Clare, and after Hutchinson had executed the agreement for transfer, (of the 8th of September,) and in the interval between that day and the execution of the assignment, he had concerted and agreed with Clare to make a private sale to him of all the stock in trade, merchandize, and other effects of the said business, so carried on in London, for the price of $7,913 80, and to accept therefor thirty-five promissory notes of the said Clare, payable in monthly instalments, beginning at three months, and ending at thirty-six months from the 9th day of September, 1859, and without any further or other security for the payment thereof; and that at this time Hutchinson was then indebted to the ptaintiff Benjamin, and several other persons, and was in fact insolvent. The bill charged that the sale so made to Clare was not *bona fide*, or in the ordinary course of trade, and was made with intent to delay and defeat the creditors of Hutchinson; and that the same was contrary to the statute 13 Elizabeth, chapter 5, and also contrary to the provisions in that behalf contained in the act of the legislature of this province, passed in the 22nd year of her Majesty's reign, chapter 96, and entitled an "act for abolishing arrest in civil actions in certain cases, and for the better prevention and more effectual punishment for fraud," and that the same should be set aside as fraudulent as against the plaintiffs and the creditors of Hutchinson. That the notes given by Clare had been delivered by Hutchinson to plaintiffs after the execution of the assignment; but they offered to return them to Clare, upon the sale being declared void; that Clare was a person of no capital or means, and being in possession of the stock and effects, might at any time dispose thereof, and thus defeat the equitable claims of the plaintiffs, unless restrained by injunction from so doing. The prayer of the bill was, that the sale might be declared fraudulent, and null and void as against the plaintiffs, and the creditors of Hutchinson; that the defendant Clare might be ordered to deliver up the goods, &c., to the plaintiffs, and to account for such as has been sold since the execution of the assignment of the 10th of September; that an injunction might be granted restraining Clare from selling or disposing of the goods, a receiver for the estate appointed, and for further and other relief.

Affidavits were filed verifying in all important particulars in the statements of the bill; and thereupon an injunction had been granted *ex parte*, restraining Clare, as prayed, and a motion was afterwards made to extend the injunction so issued.

Mowat, Q. C., and *Blake*, for the plaintiffs.

McDonald and *Fitzgerald*, contra.

In support of the application it was contended that it was not necessary for the plaintiffs to shew that Hutchinson's intention

was to delay his creditors, but it was sufficient if that were the natural consequence of what had been done; that the sale was by an insolvent trader at a credit; the natural effect of such an act would be to delay creditors in enforcing their debts. If the sale had been *bona fide* and for value the creditors would not have been injured; but here there is only a promise to pay at a future day, extending over a period of three years; this, no one could say was such a sale as any dealer would make in the usual course of his trade.

The word "transfers" used in the statute 22 Vic., ch. 96, embraces sales; this sale must, under all circumstances, be deemed to have been fraudulent as against these trustees, as it would clearly be void as against creditors.

[THE CHANCELLOR.—It is said the assignment to the plaintiffs does not cover these goods; if that be so, how can they complain of the sale?]

As between the plaintiffs and Clare, the goods must be deemed to be the property of Hutchinson, although as between Hutchinson and Clare they may not be so considered; besides, at the time of the sale to Clare, Hutchinson had, the day preceding, agreed to make the assignment; and equity, considering that which is agreed to be done as done, will treat these goods as actually belonging to the trustees.

It is now desired to uphold this sale as having been made in compliance with a previous agreement to that effect; but such an agreement, if ever entered into at all, was not binding on either party, it being alleged to have been by parol only, and not to be performed within a year.

On the other side, it was contended that the assignment did not embrace the goods in question; the general words being applicable only to the goods of the assignor in Toronto and Hamilton.—*Harris* v. *The Commercial Bank*, 16 U. C. Q. B. 437. The general words carry nothing.

Trustees for the benefit of creditors are not in the same position as assignees in bankruptcy and insolvency. These goods did not pass, and the plaintiffs have no *locus standi* in this court. The statute under which this suit is instituted is mainly a re-enactment of the 13th Elizabeth, which does not apply to any sale made for value, as this was, and was also a very advantageous one. A creditor cannot be said to be delayed within the meaning of the words of the statute, because his debtor chooses to sell his effects at a long credit.

As to the agreement for sale with Clare, it may be void in law for want of writing; but if it be void, it takes away from it any taint of fraudulent dealing.

Ex parte Bushell 3 M. D. & DeG. 615 *Leak* v. *Young*, 5 Ell & B. 955, *Cook* v. *Caldecott*, 1 M. & M. 522, *Smith* v. *Harris*, 1 Ell. & B. 35, *Baxter* v. *Hill*, 1 Ad & Ell. 456, *Butcher* v. *Harrison*, 4 B. & Ad. 129, *Grimsby* v. *Ball*, 11 M. & W. 531, *Norcutt* v. *Dodd*, Cr. & Ph. 100, *Stone* v. *Van Heythusen*, 11 Hare, 126, *Lester* v. *Turner*, 5 Hare, 281, *Withall* v. *Tuckwell*, 5 Jur. N. S. 925, *French* v. *French*, 6 DeG. M. & G. 95, *Goodwin* v. *Williams*, Ante vol. v., p. 539, *Holmes* v. *Penney*, 3 K. & J. 90, were referred to by the counsel.

THE CHANCELLOR.—This is an application for an injunction to restrain the defendant Clare from selling certain goods purchased by him from his co-defendant Hutchinson, upon the ground that the sale is fraudulent under the statute 22 Vic., ch. 96, sec. 18 & 19.

The plaintiffs, are the assignees of the estate and effects of Hutchinson, for the benefit of his creditors, under a deed which bears date the 10th of September, 1859. Clare purchashed the goods in question on the 9th of September. The reality of the sale to Clare is not questioned. The allegation is that it was void under the statute.

Mr. Mowat, for the plaintiffs, contends that Hutchinson was in insolvent circumstances, at the time of the sale to Clare, within the meaning of the statute; that all sales made by traders under such circumstances are avoided, except sales in the ordinary course of business to innocent purchasers; that this sale, at all events, which was upon long credit, was a sale to delay, if not also to defeat, creditors, and is therefore void under the statute.

Mr. McDonald, on the other hand, contends that Hutchinson was not in insolvent circumstances at the time of the sale to Clare, on the contrary, he asserts that Hutchinson's estate, if properly managed, would pay his debts in full and leave a surplus. He contends further, that sales are not within the recent statute, as they are not within the statute of Elizabeth, and as the sale in question was a *bona fide* sale for valuable consideration not calculated to defraud creditors, but, on the contrary, highly beneficial for them, he contends that the motion should be refused.

In the view which we take of this case it is unnecessary to decide several important points upon the construction of the statute, which have been very ably discussed in the argument; but as the questions are of great public importance, we think it right to say that our present opinion is in favor of the plaintiffs.

We have no doubt that Hutchinson was insolvent, within the meaning of this act of parliament, at the time he made the sale to Clare. His embarrassments were confessedly very great in the month of July. He sent an agent to England in that month to effect a loan, with instructions, if he failed, to call a meeting of his creditors. In the month of August he called a meeting of his creditors for the 6th of September. Before that day arrived, namely, on the 1st of September, all his goods, chattels, and effects, including of course his stock in trade, were taken in execution for upwards of £20,000. Actions to the number of 12 or 14 had been commenced against him. His real estate was heavily mortgaged, and the judgments registered against him amounted to forty thousand pounds. Lastly, he had agreed, on the 8th of September, to assign for the benefit of his creditors.

We think it clear upon these facts, admitted by Hutchinson himself, that he was insolvent, within the meaning of the act, at the time he sold the property in question to Clare, and that Clare must be taken, under the circumstances, to have known it

We agree with Mr. McDonald, that the language of the recent statute, so far as it deals with transfers intended to defeat or delay creditors, is not more extensive than the language of the statute of Elizabeth; but we have no doubt that both statutes embrace sales as well as voluntary transfers. The 6th section of the statute Elizabeth is in these words: "Provided, &c., that the act, &c., shall not extend to any estate, &c., had made, &c., which estate is or shall be upon good consideration, and *bona fide* lawfully conveyed or assured to any person, &c., not having at the time of such conveyance, &c., any manner of notice or knowledge of such covin, fraud, or collusion as aforesaid." Now looking at the statute apart from the authorities, that clause appears to us to remove every shadow of doubt. The first section is quite wide enough to embrace sales, and the exception in the 6th section proves conclusively the rule which the legislature intended to lay down.

It is said, however, that *Wood* v. *Dixie*, 7 Q. B. 892, which has been followed both in England and here, lays down a different rule, namely, that where the sale is made *bona fide*, and with a full intention that the property should pass, it is not void, though made with the intent to defeat or delay creditors. The language of the court in *Wood* v. *Dixie*, is certainly broad; but as applied to the circumstances of that case, the rule there laid down appears to us to be perfectly sound, and in accordance with the received interpretation of the statute. *Wood* v. *Dixie* was not the case of a sale to a stranger. It was a transfer to a creditor in payment of a pre-existent debt. Now it has always been held that it is competent to a debtor, according to the law of this country, apart from the bankrupt and insolvent acts, to prefer one creditor to another. There is nothing in the statute of Elizabeth which prohibits that. Now when a debtor in insolvent circumstances sells his property, or a portion of his property, to one of his creditors, in payment of a pre-existent debt, the necessary consequence of such a transfer is to defeat and delay his other creditors. And the parties must be held to have intended that which was the necessary and obvious consequence of their acts; but to hold such a transfer void upon that ground, would be to hold that a debtor is prohibited by the statute of Elizabeth from preferring one creditor to another, which would be contrary to the settled rule of law.

We must not be understood as meaning that a transfer to a creditor may not be void, under the statute of Elizabeth, as well as a transfer to a stranger. No doubt it may. The transfer in

Twyne's case was a transfer to a creditor, and the reality of the debt was not questioned, but the transfer was held to be colourable, and therefore void under the statute. But what we mean to assert is, that a transfer of his property made by a debtor in insolvent circumstances, to a *bona fide* creditor, with a full intention that the property should pass, is not void under the statute of Elizabeth, because of an intention in the minds of one or both of the parties to defeat or delay the other creditors. Now *Wood* v. *Dixie* decides nothing more than that; and it will be found upon examination that the decisions referred to in the argument of that case were all of the same class. In *Riches* v. *Evans*, 6 C. & P. 640, the transfer was an assignment for the benefit of creditors generally. In *Holdbird* v. *Anderson*, 5 T. R. 235, it was a confession to a *bona fide* creditor after action brought; and in *Pickstock* v. *Lyster*, 3 M. & Sel. 371; *Bott* v. *Smith*, 21 Beav. 511; *Graham* v. *Furber*, 14 C. B. 410; *Harman* v. *Richards*, 10 Hare, 81; *Holmes* v. *Penney*, 3 K. & J. 91, it was an assignment for the benefit of creditors.

But a sale to a stranger would seem in reason and upon authority to stand on a different footing. Recent decisions seem to establish that such a sale, though *bona fide*, and upon valuable consideration, may be void under the statute, if made with intent to defeat creditors.

But, while we hold that sales are within the 22 Vic., ch. 96, as they were within the 13th Elizabeth, we do not accede to the argument that the recent statute has the effect of invalidating all sales made by an insolvent debtor, except sales to innocent purchasers, in the ordinary course of business. Such a construction would create a material discrepancy between the 18th and 19th sections, and would, moreover, interfere with the transactions of traders in this province, in a way not contemplated, as it seems to us, by the legislature. We hold it to be clear that the 18th section has not the effect of avoiding confessions of judgment given, not voluntarily, but upon pressure to a *bona fide* creditor. And if a confession given upon pressure to an importunate creditor, or perhaps as a security for money to be advanced, would be valid under the 18th section—we are strongly disposed to hold that a transfer of property made under the like circumstances, and for the same purpose, would be valid under the subsequent clause. In other words, we think that the transfers which are declared to be void under the 19th section are transfers made with intent to defeat or delay the creditors of the transferor, or to give one or more of his creditors a preference over the others.

It is not necessary in our view of this case to determine whether the sale to Clare, which was, it will be remembered, a sale not to a creditor, but to a stranger, was a sale made with intent to defeat or delay creditors, within the meaning of the act, because assuming in the plaintiffs' favour, and for the purpose of the argument that it was so, we do not think them entitled to the relief which they seek.

The plaintiffs come here either as creditors of Hutchinson, or as purchasers from him under the deed of the 10th of September, 1859. If they come as creditors, then it is clear upon the authority of several cases, of which I need only mention *Smith* v. *Hurst*, 10 Hare, 30, which was followed by *Knapman* v. *Crawford*, in this court, that a creditor has no right to impeach a sale of goods as being fraudulent and void under the statute of Elizabeth, until he has obtained judgment, and issued out execution. And if the plaintiffs could not have filed their bill under the statute of Elizabeth, without having first obtained judgment, and issued out execution, neither can they, in our opinion, under the recent act. Until execution has issued the creditor's title is incomplete, and therefore he has no right to file such a bill.

Then if they come as purchasers under the assignment of the 10th of September, it is equally clear that they cannot succeed. It is clear that the conveyances and transfers which are declared to be covinous by the Statute of Elizabeth, are not made void as to subsequent purchasers, but as to creditors only. The 27th of Elizabeth was framed for the protection of purchasers, but the 13th of Elizabeth was not so. To hold that a conveyance or transfer which would be void, under the 13th of Elizabeth, as against creditors, because made to defeat or delay them, is therefore void as against subsequent purchasers, would be obviously unreasonable and unjust. I have no doubt that such a conveyance would be perfectly valid as against the debtor himself and those claiming under him, and I do not apprehend that the recent statute makes any change in that respect. *Stone* v. *Van Heythusen* (11 Hare, 126), which was cited in argument, is an authority precisely in point. But the principle upon which the Vice Chancellor proceeded appears to have been settled previous to Tayn's case.

The plaintiffs fail, therefore, on both grounds. As creditors their title is incomplete, because they have neither obtained judgment nor sued out execution; and as purchasers they have no right to set aside the previous sale to Clare.

There is another ground also upon which the plaintiffs case appears to us to fail. The deed of the 10th of September does not pass, or profess to pass, the goods in question. By that deed Hutchinson assigns his stock of goods at Toronto and Hamilton; but nothing is said as to the stock at London; and although the deed goes on to assign all his other real and personal estate, yet it is all other real and personal estate now belonging to the debtor; but at that time the stock at London had been sold to Clare, and therefore did not belong to Hutchinson, or pass by the deed.

It is said, however, that the contract of the 8th of September bound the goods, and that as the sale to Clare was in fraud of that contract, it is void as against the plaintiff.

It is enough to say that no such case is made by the bill. The sale to Clare is not impeached on any such ground.

But had it been, a very important question would have arisen upon the 29 Vic. ch 3. Under that statute all sales of goods, not accompanied by possession, are required to be in writing. The goods and chattels must be so described that they may be readily and easily known and distinguished. There must be an affidavit of the *bona fides* of the transaction, and the due execution of the conveyance; and the conveyance must be, moreover, registered; and in default, it is declared to be void against subsequent purchasers as well as creditors. Now the only words either in the agreement of the 8th or the assignment of the 10th which would comprehend the goods in question, are the words: "all my real and personal estate," and it is quite clear that such a description is not sufficient within the statute. (*Harris* v. *Commercial Bank.*) Then if the contract of the 8th would be void against Clare, who purchased on the 9th, as a sale, can it be a biding contract in equity? whenever that question may arise it will require much consideration, but for the reasons already given, it does not arise here.

ESTEN, V. C.—I think on looking to the circumstances under which the sale to Clare took place, and the nature of the sale, it must be deemed to have been made with intent to delay creditors, and that Clare had notice, and that the sale was not in the ordinary course of business, and took place when Hutchinson was insolvent, or in expectation of insolvency, and would therefore be void as against the creditors of Hutchinson, but that he cannot defeat it by any act of his own, even by an assignment for the benefit of creditors; and therefore that the trustees stand in his place, and are bound by this sale, in the same manner that he was. The question then arises, whether the plaintiffs are entitled to relief on the ground of the agreement made of the 8th. I think that an agreement of this nature, if founded on valuable consideration, is such an one as this court should enforce specifically. If, by the agreement, the creditors are to release the debtor, there would be a valuable consideration; and even if it contain no such stipulation, it necessarily arises, from the nature of the transaction, that the creditors will not be free to act in the same manner as if no such agreement had been made; must forego, to some extent, their remedies; are led in fact to forbear suit; and this circumstance, combined with the effect of the existing debt, is sufficient, in my judgment to constitute such a valuable consideration as will attract the jurisdiction of the court. In the cases of *Siggers* v *Evans*, (5 Ell. & Bl. 367.) and *Harland* v. *Bincks*, (16 Q. B. 655,) it was held that a deed of trust for creditors, originally revocable, became in consequence of communication to creditors, and their presumable forbearance, not voluntary or void against creditors. But the objection is, that no such case is presented by this bill, and I am of opinion, that the injunction which has been granted must be dissolved: costs to be costs in the cause.

SPRAGGE, V. C., concurred.

COUNTY COURTS.

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

(Before His Honor Judge ROSWELL, Judge of the County Court of the United Counties of Northumberland and Durham.)

THOMAS FERRIS, v. STEPHEN CHESTERFIELD, ARCHIBALD VIRTUE, AND JOHN H. MORLEY,

Common School Act—Annual School Report—Dissatisfaction—Arbitration—Award—Power of County Judge.

It is by sub. s. 21 of 27 of "the Upper Canada School Act," (Consol. Stat. U. C. p. 735), made the duty of the *trustees* of such school section to cause to be prepared and read at the annual meeting of their section, their annual school report for the year then terminating, which report shall contain, among other things, a full and detailed account of the receipts and expenditure of all school money, &c., and by s. 29 of the same act, it is provided, that "in case the account, &c., is not satisfactory to a majority of the freeholders and householders present at such meeting, then a *majority of the said freeholders and householders* shall appoint one arbitrator, and the *trustees* shall appoint another, and the two arbitrators thus appointed shall examine the said account, and their decision concerning it shall be final, &c., and the sum or sums awarded by them against *any person*, shall be collected by such arbitrators, &c.

Held, that under a reference pursuant to this section, the arbitrators were justified in making an award against a secretary treasurer of a school section, who was also one of three school trustees, who were parties in the reference; and that the reference intended by the act, is not a reference by the trustees in their corporate capacity but as individuals.

Held, also that the jurisdiction of a county judge under s. 130, 131, 133, &c., of the Upper Canada Common School Act, is not necessarily co-extensive with the authority of arbitrators appointed under s. 29; and that were a pleading set up a proceeding had before the county judge, under s. 133, as a bar to proceedings taken under an award made pursuant to s. 29, but did not show in specific terms that the matters decided by the arbitrators were not only identical, but that the county judge had competent jurisdiction respecting them, the pleading was held bad.

This was an action of replevin. The plaintiff declared that the defendants, on the 24th March, 1858, in the township of Darlington, in the county of Durham, took and detained the Goods and Chattels of the plaintiff, to wit, two horses, &c.: and unjustly detained the same against sureties and pledges, until, &c.

The defendant pleaded—First, *Non Cepit;* Second, That the Goods and Chattels, &c., were not the property of the plaintiff; and, Third, a special plea as follows:

And for a third plea the defendants say, that the plaintiff, one John Irwin and one William Irwin, were duly elected trustees of School section, number sixteen, in the township of Darlington, for the year of our Lord, one thousand eight hundred and fifty-seven: That the annual meeting of the said school section was duly held according to law on the second Wednesday in January, in the year of our Lord, one thousand eight hundred and fifty-eight: That it was the duty of the said trustees to cause to be prepared and read at the said annual school meeting of the said school section their annual school report, for the year terminating on the thirty-first day of December, in the year of our Lord, one thousand eight hundred and fifty-seven, which report was to include among other things prescribed by law, a full and detailed account of the receipts and expeditures of all school monies received and expended on behalf of the said section, for any purpose, whatever, during the said year, terminating as aforesaid: That at the said school meeting, it was the duty of the freeholders or householders of the said section, present at the said meeting, or a majority of them, amongst other things, to receive and decide upon the said report of the said trustees: That the said trustees did cause to be prepared and read at the said annual school meeting of the said section so held as aforesaid, their annual report for the year terminating as aforesaid: That the account included in the said report and furnished by the said trustees, was at the said annual school meeting, duly decided not to be satisfactory to a majority of the freeholders or householders present at such meeting: That a majority of the said freeholders or householders thereupon duly appointed one person, to wit, one William H. Rogers, and the said trustees then duly appointed another person, to wit, one Donald H. McLeod: And the said William H. Rogers and the said Donald H. McLeod, the said two arbitrators thus duly appointed thereupon, duly examined the said account: And, thereupon, to wit, on the nineteenth day of February, in the year of our Lord, one thousand, eight hundred and fifty-eight, duly made and published their award in writing, of and concerning the same, and thereby duly awarded, that the said plaintiff was indebted to the said school section, in the sum of thirty-three pounds, two shillings and four-pence, and thereby authorize the collector of taxes for the said section, such collector being then the defendant, Archibald Virtue, to collect the said sum so awarded against the said plaintiff, within one month from the date of the said award, together with interest unless the same should be sooner paid: That the same being unpaid, and the said month having elapsed, the said defendant, Archibald Virtue, and the said defendant, Stephen Chesterfield, as his servant, bailiff and agent, thereupon duly distrained the said goods, chattels and personal property of the plaintiff, for the said sum so awarded, as aforesaid, as they lawfully might for the causes aforesaid, and put the same into the possession of the said defendant, John H. Morley, a public inn-keeper, to be kept until the same could be lawfully sold, which is the taking and detaining in the declaration alleged.

To this plea the plaintiff demurred.

The following were the alleged grounds of demurrer.

Because the corporation of said school section are not properly described therein; and, because it is not shown in what capacity the award therein set forth is made against said plaintiff: Nor is it shown that the said arbitrator had authority to make an award against an individual member of a trustee corporation: And because such arbitration and award are remedies between freeholders and householders of a school section, and the school corporation of such section, and not between said freeholders and householders, and a trustee or secretary, treasurer of said section.

The plaintiff also replied specially to the third plea of defendant, that on or about the thirtieth day of January in said year, one thousand, eight hundred and fifty-eight, the plaintiff was ordered to appear before the judge of this honorable court in pursuance of and under the provisions of the Upper Canada School Act of 1850, to answer certain charges preferred against him as secretary treasurer of said school section, by John Irwin and William Irwin, trustees as aforesaid, in regard to his alleged indebtedness to said school section, as set out in said supposed award, and concerning which, the said supposed award was made. And that the judge of this honorable court after having heard and fully considered the complaint of said John Irwin and William Irwin, and the evidence and proof adduced in support of such alleged indebtedness, and the allegations of the plaintiff and of the said John Irwin and William Irwin, and the argument of counsel for both parties, ordered the said plaintiff to be discharged, and decided that the said plaintiff was not in any manner indebted to said school section, nor bound to pay over any monies, nor to deliver any books, papers, or chattels, belonging to said school section; and that the plaintiff was thereby totally discharged and released of and from all liability for and on account of the said school section. And the plaintiff further says, that the making of said supposed award was vexatious, and that it included all or a part of the expenditures of money made by the plaintiff on behalf of said school section, and monies for which said plaintiff was not responsible, which had been previously investigated and allowed to the plaintiff, aforesaid, by the judge of this honorable court.

To this replication the defendant demurred.

The following were his causes of demurrer:

Because the proceedings therein alleged to have been had before the county court judge, was a proceeding taken by the trustees against the secretary-treasurer, while the proceeding set-out in the third plea of the defendants, is a proceeding between the freeholders and householders of the school section, and the trustees, and the proceedings by the trustees against the secretary-treasurer, is no bar to the proceeding and award set-out in the defendants' plea; and because the said county court judge had no power that the said secretary-treasurer was not indebted as a trustee to the school section or otherwise, and because it is alleged that the said John and William Irwin were at the time of the said proceeding before the county court judge, trustees of the said school section.

Thos. Hodgins, for plaintiff.

J. D. Armour, for defendant

BOSWELL, Co. J.—The first demurrer, which is replied by the plaintiff to the defendant's third plea, raises the question, whether an arbitration and award, as set forth in that plea, are authorized by the 29th clause of the Common School Act (Con. Stat. U.C. 737).

The 21st sub-section of the 27th clause requires the *trustees* to cause to be prepared, at their annual meeting, their annual report, "which shall include, among other things, a full and detailed account of the receipt and expenditure of all school moneys received and expended on behalf of such section, for any purpose whatever, during the year." By the 29th clause it is enacted that "in case the account mentioned in the sub-section just recited is not satisfactory to a majority of the freeholders and householders present at the annual meeting, then a majority of the said freeholders and householders shall appoint an arbitrator, and the *trustees* shall appoint another; and the two arbitrators thus appointed shall examine the said account, and their decision respecting it shall be final, and the sum or sums awarded by them against any person shall be collected by such arbitrators," &c. It is contended, on behalf of the plaintiff, that an arbitration under this clause is given only as a remedy between the freeholders and householders of a school section on the one part, and the trustees in their corporate capacity on the other part; and therefore, that the award set forth in plea, which is against one of the trustees only, and in his individual capacity, is bad. The several cases decided by the superior courts, upon arbitrations between a teacher and the trustees, are relied upon as supporting this view. There is, however, a marked distinction between these cases and the present one. In their dealing with the teacher the trustees *are not principals, but agents only, for the section. In this case,* there is no third party. It is a question as between a trustee and his *cestui que trust.* To present a correct account of moneys entrusted to him, is as much a personal obligation on the part of a trustee, as of every other person. The law, indeed, is the more jealous of his conduct in this respect because he is a trustee. The fact that the trustees in this case have been created a corporation, certainly ought not, and in my opinion does not, make any difference. The language of the act clearly contemplates a personal responsibility, and I cannot perceive any objection in principle to an arbitration and award such as are set forth in this plea. It is not denied that the plaintiff, against whom the award was made, was a party to the arbitration, and the fact of his being secretary and treasurer would account for the award being against him and not the other trustees, who may reasonably be supposed to have less actual responsibility. It is true that the 130th and three *succeeding clauses of the same statute give a remedy against a* secretary-treasurer, but that remedy is of a limited nature, and difficulties may well arise between the section and the secretary-treasurer, which could not be settled by the proceedings contemplated in those clauses. Looking also at the pains obviously taken in the several enactments of the School Act, to bring all matters of controversy as much as possible within the remedy of arbitration, I cannot doubt its application in this instance. The clauses last referred to have to be more particularly considered in deciding the other demurrer, and the observations it will be necessary to make on them are applicable in some respects also to this portion of the case.

The second demurrer, which is rejoined by the defendants to the second replication of the plaintiff, varies the question whether the proceeding under the 130th and following clauses is necessarily a bar to a proceeding under the 29th section.

The replication sets forth that the plaintiff was ordered to appear before the judge of the County Court, in pursuance of the provisions of the School Act, to answer a certain charge preferred against him as secretary-treasurer by the other trustees, in regard to his said alleged indebtedness, as set out in the supposed award, and concerning which the said supposed award was made, and that the judge, after having heard and fully considered the complaint, and the evidence and proof adduced in support of said alleged indebtedness, and the allegations of the other trustees, and the agreement of counsel for both parties, ordered the plaintiff to be discharged, &c.

If the jurisdiction given to the county judge were co-extensive with the power given to arbitrators under the 21st clause of the act, and it were shown that the matter brought before him was identical with that disposed of by the arbitrators, then this replication would, I think, be a sufficient answer to the plea, although the parties using the remedy may not have been identical.

The identity of the *matter* investigated by the county judge with that decided by the arbitrators, is probably sufficiently alleged in the replication. The charge against him is stated to be "in regard to his alleged indebtedness, as set out in the award, and concerning which the award was made."

But the question then arises, Is the jurisdiction of the county judge co-extensive with the power of the arbitrators, so that the decision made by him would necessarily cover the whole matter of controversy left to arbitration? The 130th clause (the first of the penal clauses) enacts that "if any secretary-treasurer has in his possession any books, papers, chattels or moneys, which came into his possession as secretary-treasurer, and wrongfully withholds or refuses to deliver up or account for or pay over the same or any part thereof to the person and in the manner directed by a majority of the school trustees then in office, such withholding, &c., shall be a misdemeanor." Under the next clause, "the county judge, upon application by a majority of trustees, shall order the secretary-treasurer to appear before him; and by the 133d clause, at the time and place appointed, the judge shall, in a summary manner, hear the complaint; and if he is of opinion that it is well founded, he shall order the party to deliver up, account for, and pay over the books, papers, chattels and moneys, as aforesaid." Under these provisions of the act, it is quite clear that the judge has no jurisdiction, except where a secretary-treasurer "has in his possession books, moneys, &c., which came into his possession as secretary-treasurer, and which he wrongfully withholds or refuses to deliver up and account for and pay over to the person and in the manner directed by a majority of the school trustees." He must, in fact, have been guilty of the misdemeanor contemplated by the 130th clause, before the judge could be required to interfere. It is certainly possible, however, that a secretary-treasurer of a school section may be found to be indebted to the section otherwise than for money which came into his possession, which he wrongfully withholds or refuses to account for and pay over. He may be liable for some neglect, and in many ways disputes may arise respecting his accounts, which would be the fair subjects of an arbitration, and over which the summary power given to the county judge could exercise no control. I know nothing of this case, except from the pleadings. The proceedings alluded to were not had before me. It may have been possible, however, that they were taken for the purpose of enforcing the award. Supposing that to have been the case, then all that is said in the replication, with reference to the subject matter of the complaint, would be true; but the judge would not have been justified, in such a case, in interfering.

The mode of collecting money due on the award is specifically pointed out in the act, and the neglecting to pay the money awarded would clearly not come within the meaning of the 130th section of the School Act.

It is true, however, on the other hand, that the matter decided by the arbitrators might in this case have been one over which the county judge had jurisdiction; but as, in the view I take of the statute, his jurisdiction is a limited one, not co-extensive as respects the subject of enquiry with the power given to arbitrators, the replication should have shown in specific terms that the charge brought before the judge, and the matters decided by the arbitrators, were not only identical, but that the county judge had competent jurisdiction respecting them; and this, I think, it utterly fails to do. (*Kennedy* v. *Burness et al.*, 15 U. C. Q. B. 488, and the cases there cited by the C. J., viz., *Moratia* v. *Sloper et al.*, Willes, 30; *Mure* v. *Kaye*, 4 Taunt. 34.) I am of opinion, therefore, that the proceeding before the county judge, as stated in the replication, does not form a legal answer to the arbitrators' award and subsequent distress for the sum awarded, and therefore that, on the whole proceedings, judgment must be for the defendants.*

* From this judgment the plaintiff appealed, during last Easter Term, to the Court of Common Pleas, and the appeal was dismissed

GENERAL CORRESPONDENCE.

Court of Revision—Powers—Proceedings.

Fort Erie, 30th May, 1860.

To the Editors of the Law Journal

Gentlemen,—I desire to obtain your opinion, through the columns of the *Journal*, in your next issue, on the following case, which occurred in this village at the last meeting of the Court of Revision.

A rate-payer, being present at the meeting, gave notice, then and there, that he complained that the *unrented* property of the Corporation, on account of the greater and increased depression of the times, is valued 25 per cent. too much. Whereupon the Court of Revision forthwith unanimously resolved that a reduction of 25 per cent. be made on all such property.

Question: Has the Court of Revision, under the provisions of the Assessment Law, the power to make such reduction, upon a complaint made as above stated?

Nine cases of appeal, duly made, were tried and decided upon; but in no instance did one of the appellants complain that his real property was assessed too high. The members of the Court of Revision contend that they have the power to revise the assessment roll, even without a formal notice from a rate-payer.

I would also wish you to state, whether the County Council have not the power, in equalizing the assessment rolls, of increasing or diminishing *village* assessments as well as townships.

Yours, &c.,

James Stanton,
Village Clerk.

[1st. The jurisdiction of the Court of Revision is "*to try* all *complaints* in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum."—(Con. Stat. U. C. ch. 55, sec. 58, p. 660.)

2nd. If a municipal elector thinks that *any person* has been assessed too low or too high, &c., the Clerk is, *on his request in writing*, to give notice to such person, and to the assessor, of the time when the matter (*i. e.*, complaint) will be tried by the Court, and the matter is to be decided in the same manner as complaints by a person assessed.—(*Ib.* sec. 60, sub-sec. 2.)

3rd. The word "person" may be held to include any body, corporate or politic, and probably would be held, in the case put, to include the corporation of the village. (Con. Stat. U. C. p. 6, sec. 12.) But if so, the complaint, we think, could only be determined upon a request, in writing, such as pointed out by the statute; and the statute does not appear to have been complied with in the case put. We cannot subscribe to the doctrine that the Court of Revision has the power to revise the assessment roll, without the formalities of the statute having been previously complied with. The Court is the creature of the statute, and has no powers beyond those given by the statute; and those given by the statute must, in our opinion, be executed in the mode pointed out by the statute.

4th. The powers of a County Council to examine the assessment rolls of each local municipality within the county, for the purpose of ascertaining whether the valuation made by the assessors bears a just relation to the valuation made in *all* the local municipalities of the county, and, for the purpose of county rates, to increase or decrease the aggregate valuation of real property in any local municipality, extends as well to villages as to townships.—Eds. L. J.]

Affidavits—Sufficiency—Description of deponent.

To the Editors of the Law Journal.

London, C.W., 28th May, 1860.

Gentlemen,—Will you kindly inform me, in your next issue, whether an affidavit requires *all* the Christian names of the party making it, to be in full. Thus: would an affidavit made by one *John A. Smith* be read in court? By answering this, you would oblige greatly, J. F.

[In general, an affidavit should set forth the deponent's *names* in words at length. Our correspondent is referred to *Richardson* v. *Northrup*, Tuy. U. C. R. 452; and *Westover* v. *Burnham*, MS. R. & H. Dig. Arrest, I. 29. He will find the former a case in point. An affidavit containing the initial only of deponent's second Christian name, was there held insufficient.—Ed. L. J.]

Mortgagor and Mortgagee—Remedies—Power of Sale—Ejectment—Covenant.

To the Editors of the Law Journal.

Renfrew (C.W.), 4th June, 1860.

Gentlemen,—Having been advised by a subscriber to seek advice through the medium of your valuable and widely circulated journal. I beg to submit for your perusal a plain statement of facts, as they have occurred to me.

I arrived in this country, from England, in May, 1858, and was persuaded to purchase a farm, which I did, from a Mr. A., who had only been in possession eight months, he having paid £170, and sold it to me, with everything as it stood, on the 27th May, 1858, for £400;—terms of payment, £250 down, £50 on the 24th December, and £25 annually for four years, with interest at 6 per cent. Mr. A. being in want of cash one month after the first payment, requested me to favor him with the £50 due in December. Although five months before due, I accommodated him.

In the month of October of the same year (1858), I received a letter from Messrs. B. & C., solicitors, with one from a Mr. D., informing me that the mortgage held by Mr. A. on the farm for £100, had been transferred to Mr. D. of Ottawa, and that all future payments were to be made to Mr. D. The first year's interest became due on the 27th May, 1859, which I paid to Mr. D. personally, and hold his receipt for the same. Having been informed that Mr. A. had triumphantly said, in the front of a bar of a public hotel, that he had transferred the mortgage to a person who would "keep me to the hip," I men-

tioned the circumstance to Mr. D., who then told me he would not distress me, if the payments were made in reasonable time.

On the 2nd January of the present year, I received a notice from Mr. D., demanding immediate payment of £25, due on the 24th December, 1859. From what Mr. D. had previously told me, I wrote to him informing him that at the time I had not the means, but would pay him shortly. My request for time was disregarded, and by a letter dated 12th January, 1860, Mr. D. informed me that unless the £25 was immediately paid, he would have recourse to the law; and I was informed by notice dated the 17th, from Messrs. E. & F., solicitors, that instructions had been given them, that unless the instalment and interest was immediately paid, they would act according to instructions. Being led astray by the wording of the mortgage, that three months' grace would be allowed before I could be distressed, and being confident I could make the payment before that time, I wrote to those gentlemen, stating I would be sure to pay all demands before the 24th March.

On the 19th of that month, I forwarded, through a friend at Ottawa, £25, for payment to Messrs. E. & F. But Mr. F., who has acted all through this business, refused to take payment, as a summons had been taken out in the Inferior Court of Queen's Bench ten days previously. That summons was served upon me four days after the offer of payment had been made. The fact of the summons being served upon me by the sheriff's officer from Perth, when it could have been sent to Mr. Torney, the solicitor at Renfrew, showed plainly that the parties were determined to put me to every possible expense.

By the summons I perceived I was prosecuted by Mr. A., who claimed the instalment and interest from May 1858, although I had paid the interest to D. up to May 1859. I felt surprised that Mr. A. had any right of claim on me, after he had transferred his interest to Mr. D. Finding I had broken the covenant, through ignorance as well as want of means to pay at the time when due, I instructed my friend to wait on Mr. F. and ask him to stop proceedings, and I would pay all reasonable and lawful costs. The £25 was then received, and Mr. F. promised that no further expenses should be incurred. I requested that the bill of costs should be forwarded to me. In the interval I was informed that if the interest up to the 24th December, 1859, was not paid, proceedings would be gone on with. I considered the interest was not due till the 27th May, 1860, but, fearing expense, I forwarded the £3.

The bill of costs was forwarded to me, and to my surprise I found I was prosecuted by two parties for the same debt—by A., who had sold his interest, and by D., who bought it. The charges for costs were, for A. £3 19s. 11d., for D. £2 10s. 8d. Although I considered I was imposed upon, I forwarded the amount of £6 10s. 7d. to my son, who is now in Ottawa, to pay to Mr. F. the amount of his costs, as charged. That amount was refused, unless an additional 17s. 9d. was paid. No explanation was given for what the latter charge was made. My son paid the amount demanded.

My principal object in thus applying to you is to know if these people have both a right to make demands upon me. If so, I am in a fearful position, in the event of unforeseen difficulties, which I shall endeavour in future to avoid. Would it be advisable to tax the costs, *although paid? I paid under* protest that I would seek advice. Gentlemen, I have a large family depending on me. My all is sunk in endeavouring to make a home for them, and it is only by the strictest frugality that I can bear myself and family respectably. If I am to be persecuted by unprincipled men, better we had been engulfed in the Atlantic, where our troubles would have ceased. Your opinion will be looked for with interest, *in your next publication* of the *Law Journal*. Trusting you will pardon one who is almost distracted,

I remain, with gratitude, yours most respectfully,

FORTUNATUS HUGHES.

[We often receive communications such as the above. They display the amount of ignorance prevalent among laymen, as to the rights of mortgagor and mortgagee. All the difficulties into which our correspondent fell, arose from his ignorance of these rights. *His case appears to be one of great hardship;* and for his benefit, as well as for the information of those circumstanced in like manner, we propose to make some remarks.

1st. The three months' grace, about which our correspondent writes, are, we presume, not intended to be such. They are, we imagine, three months allowed by the mortgagee to the mortgagor, *before the mortgagee or his assignee can exercise a power of sale.* They are not intended for any other purpose, or to have any other effect. They do not dispense, so far as the covenants in the mortgage are concerned, with the necessity for payment of instalments and interest on the days limited in the mortgage for such payments. The mortgagee or his assignee was bound to wait three months before selling the mortgaged property, but not to wait one day before suing on the covenant for the payment of the mortgage money, or bringing an action of ejectment to get possession of the land.

2nd. The mortgage debt is what is termed in law a "chose in action." Although assigned, the assignee cannot sue the mortgagor for the debt or interest in his own name, but must make use of the name of the mortgagee for that purpose. But as the assignee, under a properly drawn assignment, acquires the legal estate in the land, he may maintain an action of ejectment in his own name, to recover possession of the land. These remedies are concurrent. The assignee in the case put, chose to exercise both, at one and the same time. He sued in the name of the mortgagee, but for his own benefit, for the amount of money alleged to be due on the mortgage, and he brought an action of ejectment in his own name to recover possession of the land mortgaged. His writs were served by by a sheriff's officer from Perth, and mileage was the result. He could not have sent them to Mr. Torney, unless Mr. Torney, under the express instructions of the mortgagor, had previously undertaken to accept service, and to appear to them in order if necessary to defend the actions.

3rd. If the costs were paid under protest, they are still liable to be taxed. If more than one-sixth should be disallowed on taxation, the attorneys would be in all probability compelled

not only to refund the excess, but to pay the costs of the application and of the taxation.

4th. A word of advice to our correspondent. Had he paid the instalment and interest on the days fixed by the mortgage for payment, he would not have been put to any trouble. He should have made every possible exertion to do so, rather than allow law costs to be heaped upon him. Were he not able to do such was his misfortune. The assignee of the mortgage, upon default, had a legal right to resort to his legal remedies. These remedies entailed expenses, which our correspondent was liable to pay.—Eds. L. J.

MONTHLY REPERTORY.

CHANCERY.

V.C.W. CHARLTON v. THE N. & C. RAILWAY CO. *Aug.* 1.

Railway company—Amalgamation—Illegal agreement.

A shareholder in a railway company is entitled to restrain the directors from carrying into effect an agreement with another railway company for the amalgamation of their lines, which has not received the sanction of Parliament,—such agreement containing clauses as to throwing the receipts into one common fund, and dividing the profit and loss in certain proportions, and also as to handing over the entire management and control of the one company to the other.

L. C. & L. L. J. COLLARD v. ROE. *July* 2.

Vendor and purchaser—Specific performance—Concurrence of dower trustee—Costs—Appeal.

Purchaser held to be entitled to concurrence of dower trustee, and objection, that he was not a necessary party to conveyance allowed; but a suit for the purpose deemed frivolous.

COMMON LAW.

Q.B. NEWCOMBE v. DE ROS. *Nov.* 5.

Prohibition—County Court Jurisdiction.

The defendant residing out of the jurisdiction, wrote and sent a letter giving an order to the plaintiff which order was received and executed by the plaintiff entirely within the jurisdiction of the County Court of L, by the leave of the resgistrar process was issued out of that Court and served upon the defendant out of the jurisdiction.

Held, that as the letter was no request until it reached its destination, the cause of action arose within the jurisdiction of the County Court of L., and that the process was rightly issued.

EX. TAYLOR v. BURGESS. *Nov.* 3.

Pleading—Accommodation notes—Equitable plea.

A plea to equitable grounds to an action upon a joint and several promisory note, setting out that it was an accommodation note, and that the defendant gave and the plaintiff took the note as surety for B., was held to be a good answer to an action brought upon the note.

Q. B. PERRINS v. MARINE & G. T. INSURANCE CO. *Nov.* 11.

Policy of Assurance—False statement—Description of assured.

The proposal for a policy of assurance require the name residence occupation or profession of the intended assured, and was filled up "Isaac Thomas Perrins, Esq., Saltley Hall."—The policy contained a proviso that if any statements in the proposal should be untrue the policy should be void. The assured was an ironmonger as well as an esquire, but this fact was immaterial.

Held that the omission to state his trade did not avoid the policy.

C.P. LAW. v. PARNELL. *Nov.* 2.

Bill of Exchange—Indorsement in blank.

If the drawer of a bill of exchange indorse it in blank and hand it over to the manager of a company for the company, the manager may, with the authority of the company, sue on it in his own name and declare on it as having been indorsed to him by the drawer.

EX. CORNFORTH v. SMETHURST. *Nov.* 4.

Statute of limitations—Debt—Acknowledgment.

The following words in a letter written by a debtor to his creditor in answer to an application for the debt before the statute had barred the remedy,

Held, to take the case out of the statute of limitations. "In reply to your statement of account, I am ashamed it should have stood so long. I must beg to trespass further on your kindness till a turn of trade takes place, as trade continues very dull."

Q.B. HAIGH v. LONDON & N. W. RAILWAY COMPANY. *Nov.* 5.

Negligence—Liability of Railway Company to fence.

The defendants Railway crossed the plaintiff's land on a level, and there was an accommodation road over the railway. Two descriptions of fastenings were provided by the defendants for the gates leading from the road to the railway, and it was arranged between the plaintiffs and defendants, that one should be used by day and the other by night. The former was insufficient, the latter sufficient. Complaints had been made to the defendants of the insufficiency of the day fastening, of which no notice was taken. The plaintiff's servants notwithstanding its insufficiency continued to use it. A pony strayed through one of the gates on the line and was killed, and in an action against the defendants to recover the value of the pony, the jury found that the defendants had not provided sufficient protection but that the plaintiff's servant had not used the precaution he ought.

Held, that upon this finding the verdict was rightly entered for the defendants.

C.P. BLACKIE v. STAINBRIDGE.

Shipping—Liability of Captain for damages done to goods while being loaded, a "Stevedore" having been appointed by the Charterers.

Where the charterers of the vessel employed a "stevedore" who was to be under the orders of the Captain and to be paid by him.

Held in an action against the Captain by the Charterers for damage done to some of the goods while being loaded, that he was not liable, there being no contract between him and the charterers for making him answerable for any wrong done by him or his crew.

Q. B. COX v. MITCHELL. *Nov.* 2.

Staying proceedings—Action for same cause pending in foreign country.

The Court will not stay the proceedings in an action here because an action for the same cause is pending in a foreign country.

REVIEW.

THE UPPER CANADA LAW LIST for 1860-61, by J. Rordans; printed by Maclear & Co. Price, 75 cents.

This annual publication is now too well known to the profession for whose use it is intended, to need any recommendation from us. It is a careful compilation, and its arrangement almost perfect.

The copy before us opens with a very interesing dissertation on the Legal Profession of Upper Canada. Then follows the Judicary, Courts of Error and Appeal, Queen's Bench, Chancery, Common Pleas, Probate Court and Chambers, Heir and Devisee Commission, County Courts, Surrogate Courts, Courts of Quarter Sessions, Recorders Courts, Insolvent Debtors Courts, officers of the Courts, Circuits of the

Courts, County Court and Quarter Sessions Sittings; List of practising barristers throughout Upper Canada, with dates of call. Similar list as to Attorneys and Solicitors; List of Barristers and Attorneys in Toronto, with places of residence and business; List of practising Barristers and Attorneys in the different towns and cities throughout Upper Canada, with their agents in Toronto. List of Coroners; List of County and Judicial officers, &c,; List of Queen's Counsel; Commissioners for taking affidavits to be used in Lower Canada: Same for Upper Canada; Legal holidays; Law Society for Upper Canada benchers, &c; Rules of Law Society, as to Barristers and Attorneys, &c.

We would suggest to the compiler that in his future editions, he should prevent the *jumble* that exists in the present edition, as to Toronto, Common Law, and Chancery agents, of country practitioners. There should be two tables—the one giving the names of Common Law agents, the other the names of Chancery agents. Unless some such arrangement be made, great difficulty will be experienced in making a proper use of the information given.

THE NORTH BRITISH REVIEW, May 1860; Leonard Scott & Co., New York.

This number contains, as usual, several able papers. That on the origin of species, is one of the most difficult and the most able. The well known work of Professor Darwin is candidly and at at great length reviewed. Quakerism Past and Present, is also a paper of much interest. The remaining papers are Redding's Reminiscences, Sir Harry Lawrence, Australian Ethnology, Church and State, British Lighthouses, The State of Europe.

THE LONDON QUARTERLY, for April: Leonard Scott & Co., New York.

By far the most interesting paper in this number is that headed "Labourers Home." Its humanizing tendencies deserve all praise. The article is more suited to the older countries of Europe, where the population is excessive, and the comforts of the laborer little cared for. In new countries, like ours, where, in ordinary times, wages are high and land cheap, the comforts of the laboring class much exceed those of a similar class in older countries. The Souveniers and Correspondence of Madame Recamier will be found acceptable to those fond of literary reminiscences. A singular article is that headed "The Vicissitudes of Families." The references made to Irish families are almost fabulous. The whole article is not only entertaining but presents much food for the mind, in the shape of abundant materials for thought. Our legal friends will, no doubt, read "The Bar of Philadelphia," and though it is not equal to other papers in the same number, owing to its affinity to our profession, it deserves a perusal. The remaining papers do not require any special notice from us.

BLACKWOOD'S, for June: Leonard Scott & Co., New York.

As usual, "Old Maga" abounds with much to entertain. Not the least entertaining tit bit is "The Fight for the Belt." A vein of rich humour, but combined with a spirit of fair play, pervades this production. It begins with the departure of the Benicia Boy from the United States, and gives a full narrative of all that occurred up to the fight, and closes with a graphic description of the fight. We give the first verse as a specimen.

> The fancy of America,
> By all creation swore.
> A British champion round his loins,
> Should gird the belt no more
> With strange, great oaths they swore it,
> And chose a man straightway,
> And felt his arm, and saw him hit,
> And loafed and chewed and cursed and spit.
> And sent him to the fray.

THE ECLECTIC MAGAZINE, for July; W. H. Bidwell, No. 5, Beekman Street, New York.

The July number opens with a familiar face—that of Lord Elgin. We pronounce the likeness an excellent one. In every line and lineament we behold our former Governor General. The letter press is most instructive. An article on orators and oratory, selected from the *British Quarterly Review*, is truthful. It traces the progress of British oratory, with the struggles of liberty, and shows how close the relation of the one is to the other. Lord Macaulay and his writings, now that the great historian is no more, will be widely read. The sketch is an admirable one. A paper on the origin of species, a review of Professor Darwin's Work, is learned and instructive. This paper is selected from the *British Quarterly Review*. It is, however, we think, inferior to the article on the same subject in the *North British Review*, to which we have already referred.

GODEY'S LADY'S BOOK, for July; Louis A. Godey, Philadelphia.

This is *the* Ladies Magazine of America. No expense is spared to make the *Magazine* all that it professes to be. We are never disappointed with Godey. Each number is, if possible, better than its predecessor. In the number now before us, we find an account of Modern Coaches, with which we are delighted. Coaches were first introduced into England by Guilliam Boonier, a Dutchman, in 1564. His coach was a ponderous structure. The gradual improvements effected in successive years are traced in the pages before us. It is strange to observe how indicative the coach of each century was of the manner and habits of the people. No mention is made of the 2-40 vehicles of Yankeedom. We presume the omission is intentional

APPOINTMENTS TO OFFICE, &c.

CORONERS.

JOHN RICHARD FLOCK, Esquire, M D, Associate Coroner, County of Middlesex. (Gazetted 2nd June, 1860.)

ALEXANDER J BELL, Esquire, M D, Associate Coroner, City of London.—(Gazetted 2nd June, 1860)

JOSEPH CARBERT, Esquire, M D, Associate Coroner, County of Wellington.—(Gazetted 16th June, 1860.)

JOHN REEVE, Esquire, Associate Coroner, United Counties of York and Peel.—(Gazetted 16th June, 1860.)

ISAAC JOHN DALLAS, Esquire, M.D, Associate Coroner, City of Hamilton.—(Gazetted 16th June, 1860)

PETER JOHNSON MUTER, Esquire, Associate Coroner, County of Perth.—(Gazetted 16th June, 1860)

NOTARIES PUBLIC.

JOHN SOUTHERAN, of Caramville, Esquire, to be Notary Public in Upper Canada.—Gazetted 2nd June, 1860.

JAMES DUNNE, of Hamilton, Esquire, Barrister-at-law, to be Notary Public in Upper Canada.—(Gazetted 9th June, 1860)

WILLIAM JAFFRAY, of Waterloo, Esquire, to be Notary Public.—(Gazetted 16th June, 1860.

REGISTRAR.

SAMUEL SHERWOOD, Esquire, to be Registrar of the City of Toronto, in the room and stead of the Honorable Joseph C. Morrison, resigned.

TO CORRESPONDENTS.

JAMES STANTON—LAW STUDENT—F. HUGHES—Under "General Correspondence."

A DIVISION COURT CLERK—TREASURER OF A NEW TOWNSHIP—Too late for this number.