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DIARY FOR JULY.

1. Friday..... { Trinity College, Easter Term ends. Long Vacation commences. Last day for County Councils finally to revise Assessment Rolls
3. SUNDAY... 2nd Sunday after Trinity.
4. Monday .... County Court term begins. Heir and Devisee Sittings commence.
9. Saturday.... County Court term ends.
10. SUNDAY... 3rd Sunday after Trinity.
14. Thursday... { Last day for Judges of County Courts to make return of appeals from Assessment.
16. Saturday... Heir and Devisee Sittings end.
17. SUNDAY... 4th Sunday after Trinity.
24. SUNDAY... 5th Sunday after Trinity.
29. Friday..... { Last day for Clerks of Counties to certify County rate to Municipalities in Counties.
31. SUNDAY... 6th Sunday after Trinity.

TO CORRESPONDENTS—*See last page.*

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 & Arbuigh, Attorneys, Barrie, for collection, and that only a prompt remittance to them will save costs.

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

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

The Upper Canada Law Journal.

JULY, 1859.

EQUITABLE JURISDICTION.—THE DIVISION COURTS.

There is a point of considerable importance upon which great diversity of opinion, and, what to the public is much worse, great diversity of decisions appear to prevail amongst the Judges of the local Courts, between whom the whole territorial inhabited surface of Upper Canada is divided. We mean as to whether the Division Court Judge has or has not equity jurisdiction—some Judges holding that they have, others that they have not.

Before entering upon this subject, we may be indulged perhaps with one preliminary remark, viz: that one of the worst faults of any system of jurisprudence—and a fault which every Judge and person entrusted with the administration of justice, should strain every nerve to counteract—is the want of universally applying comprehensive and certain rules, capable of producing under the same state of facts the same result in every instance. For it is apparent, whatever the rules may be, if only they be capable of being clearly understood and invariably followed; that people can calculate with certainty how they ought to act under any state of known facts, and so justice will in the end be attained and the business of the country be harmoniously conducted within those rules, which it is known must not be contravened. On the other hand, if the rules of decision are uncertain, no one can tell how he ought to shape his course; everything is left to accident, and there is no undisputed rule of right (or in other words of law) to measure the act by, and so prove how it ought to be decided. *Under such circumstances*, no matter what the business capacity or habits of the people may naturally be, it is impossible for them to have their affairs in any other condition than that of confusion and uncertainty, owing to there being no superior regulating power to appeal to, and no means of intercommunication amongst the several local Judges whereby they could exchange their ideas or communicate their experience on the numerous cases coming before them. This want or uncertainty until lately was unavoidable.

The *Law Journal*, however, gives a very simple and inexpensive way of obtaining that much to be desired universal rule of decision; and it is to be hoped that the several Division Court Judges will willingly avail themselves of it as a means of intercommunication, leading to the adoption of some general rule on the point alluded to. If such be done it will much weaken the effect of the sneers at their expense, for we have often heard it said that "in most Division Courts a knowledge of law is useless, as hardly any two Judges adopt the same rules of decision, or even themselves decide twice the same way on the same state of facts."

Doubtless, there is much exaggeration in this, but that the remark is not altogether groundless as applied to some localities, the information in our possession compels us to admit.

With the purpose then, partly of directing attention to the existing evil and partly to aid in removing it, we submit the following observations which our experience in the working of some of the Division Courts leads us to believe, open the way to a solution of the difficulty. At all events, administration on the principles we are about to mention has been attended with the happy results of uniformity of decisions on intelligible grounds.

The Division Court Act, as extended by 16 Vic., ch. 177, empowers "The Judge of every Division Court" to hold plea of all "*claims* and demands whatsoever of debt *account*, breach of contract, covenant, or money demand, whether payable in money or otherwise," and "all personal actions," with the exceptions, and to the amounts, mentioned in these enactments. It is provided also by the statute, that when deciding on such matters, the Judge "shall hear and determine the same, in a summary way, and shall have power to make such orders, judgments, and *decrees* thereupon, as shall appear to him to be just and agreeable, to *equity and good conscience*." Now to analize this provision, is it not apparent that it embraces the two divisions of legal actions such as debt, covenant, &c., &c., on which the Judge is to give a legal judgment according to the Common Law, unless such law-judgment would, under the circumstance, be wholly or in part, contrary "to

equity and good conscience?" but if it would, then the case assumes another aspect, as if such Common Law judgment was pronounced by the Queen's Bench or Common Pleas, Chancery would, on the ground of its being thought valid at law, yet contrary to equity and good conscience, grant an injunction restraining the person in whose favor it was, from attempting to enforce it, and make him pay costs for getting a legal judgment which it was unjust and contrary to good conscience for him to obtain.

So in order to attain the same end in the Division Court, by direct inexpensive means, as would, if the matters were in the Superior Courts, be attained by a roundabout, indirect, expensive way in Chancery; the Division Court Judge is commanded by the statutes, to decide it at once in the first instance, as it ought to be ultimately decided—that is to say, if the legal judgment be wholly unequitable—then not to pronounce any legal judgment, but an equitable "decree" instead. But if the legal judgment be in one part not opposed to, and in another part contrary to equity and good conscience, then, *in the first instance, to* pronounce a compound judgment and decree, which would have the effect of varying the legal judgment to the same extent, as if it was pronounced in a Superior Court of Common Law, and there varied in Chancery so as to make it square with "equity and good conscience."

This seems to us to dispose of the question, whether or not a claim originally legal may be modified by the rules of equity, in the same manner as in the Superior Courts of Common Law, can now, to a great extent, be done by equitable pleas and replications; but it leaves untouched the question, whether or not a plaintiff can sue for a purely equitable claim, which, apart from the fact of its being wholly equitable instead of legal, would come within the Division Court jurisdiction. On this point, the above enactments, when the equitable portion of them is separated from the legal, and the equitable is put together apart from the legal, are thus: The Division Court Judge has power over "all claims and demands WHATSOEVER," of "account, breach of contract, or money demand," to the amount specified in those actions; and he has power to make such orders and DECREES concerning them, as shall appear to such Judge "to be just and agreeable to equity and good conscience."

Now a claim, or demand, or breach of covenant, is as much so though an equitable claim, or demand, or an equitable breach, as if it were a legal one; and the word "whatsoever," will not receive its natural meaning, if instead of being construed to include every description of claim and demand, whether legal or equitable, it be construed to mean the same as if, instead of saying "all claims and demands whatsoever," the legislature used the words "all claims and demands which are purely legal, but no claim or demand which is equitable. And the word decree is so purely a technical chancery expression, that it has no common law application; for a Common Law Judge attending to common law principles, could not make a decree, under any circumstances whatever. It therefore follows, in our opinion, that the Division Courts are Courts of Chancery, as well as Courts of Common Law, within the limits as to value, &c., &c., assigned to them by the statutes, and that there is no doubt they, within those limits, have equitable or chancery jurisdiction, in matters of account, breach of contract, and money demand, though probably in any of the other branches of equity.

The great difficulty in the way, will doubtless be the reluctance of the Judges—very few of whom attempted the study of chancery law—to assume a jurisdiction, of the rules of procedure of which, they are wholly ignorant. This feeling, and that want of knowledge of chancery law, has rendered the equity jurisdiction conferred on the County Courts, in most Counties a dead letter, it being so hard to *get the Judges to act at all in any equitable matter; and* we fear that very often the action was so imperfect and slow, that the remedy was much worse than submitting to the wrong. Indeed with regard to the County Courts equity jurisdiction, nothing else could be expected, as instead of giving, as was wanted, equity principles of decision, with the simple, easily understood, expeditious common law means of enforcing them, such as was given to Division Courts, the Court of Chancery, when they made rules to regulate the practice of the County Courts equity jurisdiction, smothered, as it strikes us, the act, and rendered its provisions comparatively useless, by giving the County Courts the same circuitous, cumbrous, incomprehensible, never ending, never paying, yet in the end frightfully expensive, mode of procedure, as compared with the objects to be attained, which they themselves then had, and which there were found some bold enough to say they venerated, like Lord Eldon, with all that superstitious frenzy, peculiar to the votaries of false systems. But as regards the Division Courts, it is to be hoped that a different feeling will prevail, because in the Division Court, if its equitable jurisdiction is acknowledged and acted upon, the mode of procedure will be the same for enforcing the decree in equitable cases, as it always has been to enforce its legal judgments, a mode which last Session received legislative sanction, as applied to higher concerns.

Sir Thomas More was of opinion, that law and equity, might be beneficially administered by the same tribunal. He wished the Common Law Judges to relax the rigor of their rules, with a view to meet the justice of particular cases. The power to do so, we contend, was given to the Division Courts, and should be exercised.

MORTGAGORS AND MORTGAGEES—VENDORS AND PURCHASERS.

Some of the late decisions of the Courts on these subjects are not without interest to the profession and the public at large, and from the Reports which we have been enabled to lay before our readers in the *Law Journal*, as well as from other Reports, we select a few points:

A vendor on selling property for which he has not received the full amount of the purchase money, may or may not take a mortgage for the balance, and in either case equity will grant him relief. If he does not take a mortgage, and there is no endorsed receipt on the deed to the purchaser, equity will enforce the vendor's lien, and will create through the conscience of his purchaser, a mortgage on the land for the balance of the purchase money, and will not allow the purchaser, either by refusal to make a mortgage, or by selling to others, to defeat this original lien. But such a proceeding is beset with many dangers; for as against the land sold, the lien may be lost, if the vendee sells to a *bona fide* purchaser without notice of the non-payment of the purchase money; for the absence of an endorsed receipt on the deed, is, at most, only constructive notice. Nor will the vendor lose his lien, by taking as security for the unpaid purchase money, the joint and several notes of the purchaser and a surety, *Colborne* v. *Thomas* (4 Grant, 102).

The lien, however, may be lost in various ways. Thus if the vendor takes security on other lands with the intention to rely on that for his purchase money. Or should the vendor tender a mortgage to his purchaser, and either through delay or inadvertence, the mortgage be not executed nor registered for some time, and, in the interim, judgments be obtained and registered against the purchaser, then the vendor's lien is lost, and the mortgage ranks after the judgments, *Baldwin* v. *Duignan* (4 U. C. L. J., 232, 6 Grant 595). Where however the deed and mortgage are executed at the one time, and registered together, equity will retain the lien, even though judgments may have been registered against the purchaser before the registry of the deed and mortgage. But in law, a different rule has been established, and it has been held in *Ruttan* v. *Levisconte*, (16 Q. B. U. C., 495,) that where lands are conveyed to a purchaser against whom judgments are then registered, and executions against lands in the Sheriff's hands, and a mortgage is taken back on the same day for the balance of the purchase money, the judgments and executions attach before the mortgage. This rule is we think too strict, and may perhaps be modified should the question come before the Court of Appeal. The learned Chief Justice of the Queen's Bench, though differing from the other members of the Court, in the case of *Potts* v. *Meyers*, (14 Q. B. U. C., 499,) considered that case as governing the decision in *Ruttan* v. *Levisconte*, as the other judges continued to adhere to their decision in that case.

But the vendor's lien may arise in another way; thus, where a purchaser becomes a mortgagor, by giving a mortgage to his vendor, and then sells to a third party, leaving the mortgage to be paid by such party as the balance of his purchase money, and such party fails to pay the mortgage, and the mortgagor is sued at law, equity will enforce the contract against such third party, and direct him to pay, or will give the mortgagor a vendor's lien on the lands and authorize a sale to satisfy the mortgage. These rules have been laid down in *Roberts* v. *Rees*, (5 U. C. L. J., 41,) and *Joice* v. *Duffy* (*Ibid* p. 141). But in such cases another rule is held to apply, that of principal and surety, as laid down in 1 Hilliard on Mortgages, 238, and approvingly referred to by Mr. Vice Chancellor Esten, in his judgment in *Joice* v. *Duffy*. The passage is as follows:—

"Where the purchaser of mortgaged land assumes in the deed, or covenants to pay, the mortgage, especially if the amount is deducted from the price, he is liable to pay the amount of it to the grantor as part of the price: and as between them, the mortgagor becomes a surety in respect to the mortgage. As between him and the vendor, he makes the debt his own. But, the vendor still remaining liable to the mortgagee, the relationship of principal and surety arises between the vendor and purchaser, and may be illustrated by the analagous case of an undertaking by one partner to pay the debts of a dissolved partnership. Such debts are therefore regarded in equity between the partners, as the debts of the undertaking party; and the continuing liability of the others is, in the same point of view, a liability for the debt of another."

Thus the relief afforded to parties after their parting with what is in ordinary cases primarily liable for the debt, is full, and is clearly defined.

Not inappropriately may be referred to here the recent decision of the Court of Chancery in *Commercial Bank* v. *Bank of Upper Canada* (not yet reported) as it very materially affects the authority of the Banks to take mortgages. The Court held that under the Act 19 & 20 Vic., ch. 121 s. 27, the Banks were not authorized to take mortgages in anticipation of advances, but only to secure advances already made. The decision is a very important one, and in giving it the Chancellor regretted his inability to put a more liberal construction on the statute. It is we believe the intention of the parties to carry the case to the Court of Appeal, and the decision there will doubtless settle the question.

We may also refer to another judgment lately given in the same Court in the case of *Hurd* v. *Robertson*; and which, owing to the attention of our Reporter, we hope soon to lay before our readers. The judgment of the Chancellor was *viva voce*, and was one of the most learned and elaborate of all the learned judgments delivered by that distinguished judge, and well merited the encomium passed upon it by

Mr. Vice Chancellor Esten, whose "only regret was, that being *viva voce*, he feared it would not be preserved." The bill was filed by a purchaser praying specific performance against the vendor, or, in case of his failure, an alternative of a return of the deposit or a lien on the vendor's estate for the amount. The vendor was unable to make out a title, and the bill was accordingly dismissed; but the question of the jurisdiction of the Court as to the deposit or lien, came on to be disposed of. Lord St. Leonards had laid it down in Sugden's Vendors and Purchasers, that "if a bill by a purchaser for specific performance is dismissed, the Court cannot order the deposit to be returned, as that would be decreeing relief." The Chancellor, however, after an able review of the authorities, found the *dictum* of Lord St. Leonards unsustained by the cases in the English reports, and decreed the relief asked for.

Another case in the same Court bearing upon the question of specific performance, and of which we shall shortly have a report, is the case of *Bell* v. *Wood*, in which it was held that owing to the custom of this country in the purchase and sale of lands, the constant change of owners, fluctuation in value, and the small proportion of purchase money usually paid down, so different from the practice in England, the Court here will look more strictly at laches in filing a bill for specific performance, and will not be tied down by the same rules which govern the decision of cases in the English Courts.

We hope to be able to refer to the subject again in future numbers.

"IN FORO ECCLESIASTICÆ."

It is some time since the motion of a Church and State connection exploded in Canada. All ecclesiastical bodies are, by express law, now placed upon the same footing—all have to work, relish it as they may, upon the "voluntary principle." But the law allows them, under certain restrictions, to hold property, and to manage their own affairs. Among the important fruits of the voluntary principle, now adopted by the Church of England and Ireland in Canada, are the Church Societies and the Synods. The proceedings of these bodies at their recent meetings have been published by the daily journals, and they afford much matter for reflection on the parts of the general public, and some matters too, well worth the consideration of jurists. It is only of one point that we feel it proper at present on our part, to say a few words.

At the recent meeting of the Synod at London, the last step taken was this; one of the rules was agreed to be suspended in order to enable a motion to be put, which was then put and carried, in order to enable the Bishop to establish a Court in pursuance of the powers given by his patent, for the trial of offenders.

A question was asked to this effect—whether such a Court would, have the same powers as are possessed by similar Courts in England. His Lordship said they would, similar but not such extensive powers.

It is worth while to see that this matter is not misapprehended, and to us it seems sufficiently plain. The Church Courts in England have powers in many respects similar to the Civil Courts. They not only decide matters ecclesiastical but have power to issue processes, cite parties and witnesses, and enforce their decisions. In some cases parties have been incarcerated for non-payment of costs. Witnesses are examined on oath. This is naturally and almost necessarily the case where the Church forms part of the system of the State. But though a Bishop's patent appointing a Bishop in a colony runs in words similar to the patents appointing Bishops in England and Ireland, the most earnest opponent of "Church and State Connection" need not fear that any civil power—any power over the person except such as are about to state,—can be conferred upon or exercised by any Court in Canada, unless that Court be created by virtue of a Canadian Act of Parliament. This fact makes the Bishop's answer easily understood. The Court appointed by him will certainly not have such extensive powers as are possessed by the Courts in England. But it will have important powers. It will be able, subject to the appeal to the Bishop, to consider any alleged dereliction of duty on the part of *any clergyman* in the Diocese; and upon the finding of the Court the Bishop may or not suspend the accused or deprive him of the privilege of ministering in his mission. In short, the Court, like the Synod, has its powers limited to spiritual matters; like the Presbyterian Synods and Methodist Conferences. No privileges are held by the one which the other does enjoy, the wording of the patent, and the fact of the Anglican Bishop being appointed by the Queen, making no difference in the matter. This is so obvious to the mind of every lawyer and to many laymen that we should not find it necessary to enlarge upon it, but for this reason—we know a contrary opinion prevails in some quarters. One fact proves this clearly to us: we have known clergymen sitting to investigate cases, (under a commission issued by a Bishop) actually examine witnesses upon oath; and we have known witnesses attend under an impression that they were compellable to attend as if subpœnaed in a Civil Court! Now this is a matter of some importance, for every oath administered without the sanction of law is extra-judicial and the administering it is an offence; and, the evidence given under such an oath, though wilfully untrue is not perjury, and the law is thus broken and loose

swearing unintentionally but most undoubtedly encouraged and fostered. The fact is, that these Courts, in a country where there is no State Church, are simply for the purposes of church discipline and the enforcing thereof against those who choose to submit, which they must either do or run the risk of being deprived of their *clerical status*, whatever it may be. But after what we have learnt of the mistakes fallen into—administering oaths, &c.,—it does seem worth while to let the law be clearly understood both by clergy and laity, and we have many readers among both bodies. And we may state the law in very few words.

No Court which is not the creature of some Act of Parliament or law empowering it to take evidence on oath, can, without breaking the law administer an oath and take evidence upon it; and, there is no law enabling any ecclesiastical court or any court of clergymen to take evidence on oath, in Canada. And further—that no process can compel the attendance of any witness or affect any one's person or property, except it be the process of some Court which we can find, by the statute book, is the law of the land. And we hope we shall not see or hear more of extra-judicial proceedings.

The too prevalent practice, on the part of Commissioners of Queen's Bench, of administering oaths not sanctioned by any statute, may form the subject of remarks on a future occasion.—(*Communicated.*)

THE ENGLISH BAR.

It appears from the English papers, that the promised compulsory examination for the bar is to be established forthwith,—that is to say, it will probably commence with Michaelmas Term next.

The *Law Times* copies at length an article on this subject, "England in our Wake," which recently appeared in our pages. Our English cotemporaries give due credit to "*our colonies*" for the good example; and while according, as we did, to Sir Richard Bethell's perseverance, the accomplishment of this great reform, adds,—"The thanks of the profession will be due likewise to the Benchers who have resisted no small amount of hostility from those whose hopeful prospects of place will be annihilated. The amateur barrister will cease to carry off the honors and profits which are the proper rewards of the laboring lawyer."

"THE COUNTY COURTS CHRONICLE."

We are much gratified in being able to refer to a publication holding such a high position, and so ably conducted as the English *County Courts Chronicle* for an opinion of this Journal.

The *Chronicle* in the June number, thus refers to the *Law Journal*.

"We have received the number for April of the above well conducted publication, which quite maintains the character it has justly acquired, for its sound and practical leading articles, and for its carefully digested reports;" and after referring to various of our Editorials, thus speaks of our article as to robing in the Division Courts—tribunals which answer to the English County Courts—"the adoption of a distinctive costume by the advocates in County Courts, in favour of which we have more than once expressed our decided opinion, is also discussed in this number of the *Upper Canada Law Journal*, and meets with its strenuous support;" and adds, "on the whole this month's number is one of the most interesting that we have recently received.

A CURIOUS POINT.

The following decision, given in the Court of Exchequer *on Thursday, May 13th, before the Lord Chief Baron* and Barons Martin, Bramwell and Watson is worthy of note:

WRIGHT *v.* MILLS.

In this case a rule had been obtained, calling on the plaintiff to show cause why an order of Mr. Justice Williams should not be set aside under the following circumstances:—An action had been brought against the defendant, Thomas Mills, on a bill of exchange. Judgment was signed at eleven o'clock on the 28th of May, and defendant died at half-past nine the same morning. Execution was issued the day after the defendant's death, and his goods were seized. The question raised by the rule was, whether the judgment could stand, it having been signed subsequent to the death of the defendant in the action.

Mr. Lush now showed cause against the rule, contending that the judgment was void, and the ruling of Mr. Justice Williams correct.

Mr. Malcolm having been heard *contra*,

The Lord Chief Baron was of opinion that the signing judgment was a judicial proceeding, and, as such, must be considered as occurring at the earliest period of the day, so that the death of the party could not invalidate it. The rule must, therefore, be made absolute, on the ground that it was signed on the day in question.

The other learned judges concurred, and the rule was made absolute.

This was the last day of term.—*English Standard, May 13th.*

ATTORNEY'S LIEN ON COSTS.

In the Queen's Bench in England, a case has just been decided of some interest to attornies, a note of which we find in the *Law Times*. A plaintiff had obtained a verdict against a defendant, and the defendant against the plaintiff in a cross action. The plaintiff became insolvent; and a settlement was come to between them, without the knowledge of the attorney, by which, on payment of a small sum, they were to give each other mutual releases. By these means, the plaintiff's attorney was wholly deprived of

his costs, being unable to recover them from his client, who was insolvent. He now claimed to have a lien on the judgment for those costs, contending that the defendant had no right to make such an arrangement. But the Court held that although the attorney had a lien on costs, and when he recovered them, might apply them to the payment of what is due to him, the parties were at liberty to make an arrangement between themselves with respect to them, although the effect might be to deprive the attorney of his costs.

If, however, there were fraud or a "juggle," for the express purpose of depriving the attorney of his costs, it would be otherwise. (*Brunsdon* v. *Allard.*)

THE 91st CLAUSE.

Elsewhere will be found some communications, the herald we hope of many others, from Clerks of Division Courts, in reference to the working of the 91st clause of the Division Courts' Act. We repeat our call for information, and again state our conviction, that unless full information be laid before the public, and that without delay, the Judgment Summons clauses will certainly be swept off our Statute book.

There is little use in merely lamenting the want of correct views by the general public as to the value and actual working of the law. Give information to prove what has been asserted, that without the provision the just remedies of creditors would be seriously impaired, and fraud encouraged; and that the law has not been used as a means of *imprisonment for debt, but an engine of reasonable punishment* for fraud and dishonesty by unprincipled debtors.

Apropos to the subject is an article in the *Law Times*, which we copy:—

"A return moved by the Attorney General, states the number of persons committed by the County Courts during the year 1858. The total is 11,501, of whom 8,361 were committed for non-appearance, 1 for refusing to be sworn, 81 for refusing to answer questions to the satisfaction of the Judge, 69 for contracting debts under false pretences, 19 for making away with property to defraud creditors, and 2960 for not having satisfied the judgment and costs. The actual imprisonment for debt was therefore only 2960, all the others being for acts or neglects, which any Court must have the means of punishing, or it may as well close its doors.

The Attorney General has, it seems, referred the question to the Committee of County Court Judges, requesting them to institute enquiries into those imprisonments, and suggest any improvements in the law or practice which may appear to them desirable."

Here is a precedent, which, should the question arise again we hope will be followed. We hold that Legislative changes in matters of this kind should have as their basis full and correct returns, shewing the actual working of the existing law. In the words of our able cotemporary,—"while endeavouring to reform an abuse, reformers should beware lest they yield to the unwholesome sympathy for debtors and antipathy for creditors, which has marked modern legislation, which has resulted in a general relaxation of commercial morality, and the scenes of villany which have disgraced our country during the last five years."

THE BAR AND ITS PROSPECTS.

The following extract from the *Law Times*, though not at present strictly applicable to the Bar of Upper Canada, in its reference to "*back benches choked with wasting knowledge and wasted energies looking for employment but finding none*," is not without a moral to those preparing to enter the profession. The admissions to the Law Society have, within the last couple of years, been more than double those of previous years; and give promise of a future for our bar, not unlike the present of the English Bar, which is thus melancholy pictured in the article from which we quote. It would be well for some hundreds of those now within a foot of the bar, to consider well their chances, their fitness, and the prospects of an overcrowded profession, before they take the step of which they will "repent all their life long." However let them all read the following:—

"Dr. Johnston defined 'angling' as the triumph of hope over experience.' The same has been said of 'a second marriage.' A third must now be added: 'going to the Bar.'

"There was an immense 'call' this term. When the newly 'wigged' went to be sworn in at Westminster on Saturday, Lord Campbell, surveying the crowd of aspirants for forensic honors slyly remarked that 'it was consolatory to feel that in times to come there was no likelihood of counsel being wanted to protect the rights of the Crown, and the liberties of the subject.' A suppressed titter went round the Court, whose back benches were already choked with wasting knowledge and wasted energies looking for employment but finding none, and bitterly lamenting the folly that tempted them into an overcrowded profession, having but a few great prizes, but a multitude of blanks.

"The impending compulsory examination will do something towards restoring to the profession a better apportionment of supply and demand. A man will not be permitted to call himself a lawyer, and to be dubbed with the title of learned gentleman, without some knowledge of the calling he professes. This will exclude the amateur barrister, and to some extent give more room to the real barrister. But even thus weeded we fear that the call days will continue to exhibit an excess of competitors for a steadily declining business. It matters little to the public what becomes of all this wasted ability; but it is of the utmost moment to the aspirants, who pine away, in discontented idleness, the lives which, if devoted to any other pursuit, would have been crowned with the pleasure of success, and the substantial comforts of fortune.

"No prudent man will now go to the bar, or send a son thither, unless he possesses one of the following qualifications, and we place them in the order of their importance:—

"1. Unless he is the son or brother of an attorney, or has married the daughter of an attorney, or has been himself an attorney.

"2. Unless he has influential connections which can insure a place for him, fit or unfit.

"3. Unless he has private property to the amount of £250 per annum, at the least.

"4. Unless he has extraordinary aptitude for advocacy—that rare combination of faculties found only in one man in a million.

"*And if he possesses any of these qualifications he must not* attempt the bar unless he enjoys also good health, a hide of leather and a face of brass.

"Any other man who 'goes to the bar,' commits a folly of which he will repent him all his life-long."

SHERIFFS' ADVERTISEMENTS OF LANDS.

Amongst our general correspondence will be found the letter of "A Sufferer," in respect to Sheriff's advertisements of lands to be sold under *fi. fa.* and detailing a grievance which very many of our readers are doubtless also aware of. We have been ourselves frequently asked the question if it were necessary to give a detailed description of the property to be sold, and have heard many bitter complaints of the great and unnecessary expenses so often entailed on unfortunate debtors and creditors, for where the property is not worth much more than the claim against it both parties suffer; the creditor in being unable to obtain the full amount of his claim after paying expenses, and the debtor in having a liability still hanging over him which his property ought to have been sufficient to wipe off.

It is the duty, as well as to the advantage of the Attorneys in a suit to lessen such expenses as much as possible, and the only remedy which at present occurs to us to suggest must proceed from them or rather from the attorney of the plaintiff; and in case he should neglect the matter, the defendant's Attorney should see to it, that is, either himself to prepare the advertisements, or instruct the Sheriff how he wishes it to be done. We should think that the Sheriff would not object to this, and in fact he would have no right to do so; as we believe that the Attorney in such cases would be doing his duty quite as much within the bounds of his authority as any other act he ordinarily does in the course of a suit.

LAW OF LIBEL.

We commented the other week on the law of newspaper libel: (see *Law Times*, May 14, 1859.) Connected with that subject, and curious in itself as an illustration of the doctrine of privileged communication, is a case of *Henderson* v. *Bramhead*, decided during this term in the Exchequer Chamber. It was an action by an attorney's clerk for a libel alleged to be contained in an affidavit made by the defendant in an action of trover brought against her by a third person. It charged the plaintiff with having corruptly delayed to destroy a will which the testator had made in favour of the plaintiff in the former action, and which it was alleged that the testator had desired the plaintiff in the second action to destroy. In consequence of the omission of the plaintiff to do so, it was stated that such claim as the plaintiff in the first action possessed had arisen. Apart from the privilege there was no doubt that the affidavit was libellous in its language; and it is also noticeable that it was a statement concerning matters irrevalent to the issue in the former action, and that evidence of express malice was tendered and rejected by the judge. Notwithstanding these two magnifying ingredients, the Court held unanimously that the affidavit was privileged on the established principle that no action will lie for words spoken or written in the course of a judicial proceeding.

This case is remarkable, as asserting, if not for introducing, virtually a new principle of law. Undoubtedly a long series of cases has established that an action will not lie for words spoken in litigation *relevant* to the subject of litigation (*Lake* v. *King*, Wms. Saunders, 131 b, n. 1; *Cutler* v. *Dixon*, 4 Rep. 14 b.; *Astley* v. *Young*, 2 Burr. 809, when Lord Mansfield, C. J. asked in vain for an authority to the contrary); but untill the case of *Revis* v. *Smith*, 18 C. B. 126, it had not been held that the privilege was so extensive that, unlike all other cases of privileged communications, even evidence of express malice would not destroy it. In *Revis* v. *Smith* the ground of action was substantially the same as in *Henderson* v. *Bramhead*, and the declaration charged that the plaintiff had been joined with several others as plaintiffs in a chancery suit, in which the defendant was one of the defendants; that the court had ordered some of the property in dispute to be sold, and had entrusted the plaintiff, as auctioneer, with the sale; and that thereupon the defendant falsely, maliciously and without probable cause, filed an affidavit imputing fraud to the plaintiff, in order to prevent him from having the conduct of the sale. On demurrer to this declaration the Court held that the declaration disclosed no ground of action, and that the affidavit was privileged, although made falsely, maliciously and without probable cause. In this case it seems to have been assumed that the affidavit was relevant to the cause, and therefore the case falls within previous authorities. In *Henderson v. Bramhead*, which virtually is an appeal from the judgment in *Revis* v. *Smith*, the relevancy was by no means apparent, and it might have been thought that the privilege of relevant evidence given maliciously would have been held to be widely distinguishable from the case of irrelevant evidence given maliciously. The judgment of the Ex. Ch., although not stating clearly that no such distinction exists, contains such a statement by implication. Certainly we are startled by the proposition, even while we bow to it. As law, we have nothing to say against it; but, as a question of jurisprudence, it may be worthy the attention of the Legislature. There is no more salutary principle of law than the doctrine of privileged communication. It is the life of business: and its extinction would be the extinction of ordinary commercial security. But how wide is the difference between statements by responsible persons, made *bona fide* for the benefit of others, although injurious to the individuals concerning whom they are made, and similar statements made by such persons, with a knowledge of their falsehood and their malicious intent to injure.

Reports of parliamentary and judicial proceedings are understood to be privileged while they are *verbatim* reports of words actually uttered during the proceedings; but the moment commentary is introduced the privilege ends; it is

irrelavent matter, which of itself raises a presumption of malice, by which the privilege is destroyed. How much more is this so when the matter is not only irrelevant, but knowingly false and malicious. In the case of public meetings, reports of the proceedings are not privileged, although *verbatim* and *bona fide*. If they were privileged a public meeting would be a mere advertisement room for defamation; (cf. *Davidson* v. *Duncan*, 26 L. J. 104, Q. B.) It is possible—and we have seen many instances which confirm the theory—that after the decree in *Henderson* v. *Bromhead*, a court of justice will be made the medium of sending forth to the world all the ill-natured, spiteful, groundless and irrelevant slander which hostile litigants never find it difficult to discover or invent against each other.

BREACH OF PROMISE OF MARRIAGE.

The most disgusting, disgraceful and iniquitous proceeding in our law is the action for breach of promise of marriage. There is none so open to abuse—so much abused in fact—in which justice is so rarely done. The reason is that it is never resorted to by those who have really suffered a wrong, but only by speculators in marriage, who first deliberately design to commit the great sin of marrying a man for some other object than love of him, and, failing in that speculation, pursue their victim in a still more profitable suit. Wounded love does not console itself with "damages." Marriage ought not to be where love is not. The very fact, then, that a woman brings an action for breach of promise is conclusive proof that she could not have loved; and not having loved, she was not in a moral condition to marry; and not being in a state to perform a contract of love, she is not in a position to sue for the breach of it, and, certainly, is entitled to no damages, for she has incurred none.

AUTHORITY OF COUNSEL TO BIND CLIENTS TO COMPROMISE.

Again, with the memory of the great battle in *Swinfen* v. *Swinfen* fresh in our minds, we are troubled, in a somewhat different form, with the same vexed question and perplexing doubt. It would seem that the case of *Fray* v. *Voules*, 33 L. T. Rep. 133, has arisen out of *Swinfen* v. *Swinfen*, although *Swinfen* v. *Swinfen* was not cited in *Fray* v. *Voules*. It will be remembered that *Swinfen* v. *Swinfen* decided virtually that, in the opinion of the Court of Common Pleas, counsel have an implied authority by virtue of their office to bind a client by a compromise of a suit or action. The same case in the equity courts decided that counsel have no such authority. Now in *Fray* v. *Voules*, the action was against an attorney for having compromised an action against the positive instructions to the contrary of the plaintiff, for whom he had acted in a former action. The defendant pleaded that he had made the compromise under the advice of counsel. On demurrer to this plea the Court gave judgment to the plaintiff. Lord CAMPBELL, C.J. said: "The plea confesses that the defendant having express orders from the plaintiff not to compromise, did compromise; but then it says that such compromise was made by the advice of counsel, and was for the benefit of the client in all respects. Is that a good defence to the action? I am of opinion that it is not. I think in this case there is no reason to say that the defendant did not act *bona fide* but I think that when he received direct instructions not to enter into a compromise, he had no right to do so. He was not to carry on his business under his client's directions as to do what would be absurd; neither was he to listen to any instructions if they required him to do a dishonorable act; but it was his duty not to do an act contrary to his client's directions, when those directions conduced to no absurdity or impropriety. A compromise of an action was a matter upon which the client had a right and power to direct an attorney." So ERLE, J. said: "As a general principle the attorney has a right to compromise an action without communicating with his client; but when express directions are given him to the contrary, he has no right to do so. The client is *dominus litis*, and not the attorney; and it seems to me to follow from this, as a corresponding proposition, that the *dominus litis* has power to prohibit a compromise."

This case is an important counterpart to *Swinfen* v. *Swinfen*. As in *Swinfen* v. *Swinfen* the main question was as to the authority of counsel to bind a client, as to third parties, by a compromise; so in *Fray* v. *Voules* the single question was whether, as between attorney and client, the former has a right to set up his discretion in the conduct of an action against the discretion of the client. In *Swinfen* v. *Swinfen* it was doubtful whether counsel was acting under the attorney's instructions, or on his own independent authority: and the Court seem to have given their judgment according to the latter view. In a late case, indeed (*Thomas* v. *Harris*, 27 L. J. 353 Ex.) POLLOCK, C.B. seems to have thought that counsel cannot compromise in defiance of an express prohibition from his client; but this view, although said to be supported by *Swinfen* v. *Swinfen*, appears to be opposed to the construction put on that case by the Court of Common Pleas in *Chambers* v. *Mason*, 28 L. J. 11, C. P., where the Court seemed disinclined to enter into the question of counsel's authority to make a compromise. If the views thrown out in these latest cases be correct, it appears that counsel is vested with a much larger power of compromise than belongs to an attorney; and that the courts of common law, although not the courts of equity, will uphold an arrangement made by counsel in spite of the original client's express prohibition, and perhaps, also, in spite of the attorney's prohibition to counsel. The courts of common law appear to hold that nothing, even to the absolute abandonment of his client's case, is beyond counsel's implied authority; and that such authority cannot be limited even by the absolute veto of the principal in the action.

But *Fray* v. *Voules* makes out a much more limited authority for an attorney from his client. In his ordinary character, and in the absence of an express prohibition, the attorney has, as such, an implied authority to bind his client by a compromise; and not only has he such an implied authority, but he has also authority, in spite of an express prohibition from the client, to bind the latter, *as to third parties*, by any compromise made with them in his office of attorney; but in this latter case he is liable to his client in an action for negligence. Thus in *Filmer* v. *Delby*, 3 Taunt. 486, the plaintiff had expressly instructed her attor-

ney not to consent to a reference; but he did so notwithstanding the prohibition. She was held to be bound by this act; but the attorney was said by the court to be liable for negligence; (cf. *Latuche* v. *Parker*, 1, Salk. 86; *Griffith* v. *Williams*, 1 T. R. 170: *Fawill* v. *Eastern Counties Railway*, 2 Exch. 344; *Chambers* v. *Mason*, 28 L. J. 10, C. P.) It is to be remarked, however, that in *Fray* v. *Voules* it was doubted by some members of the court whether the client is bound, even as to third parties, when the attorney has acted clearly *ultra vires*, as in compromising, notwithstanding an express prohibition from the client. If this be so, then, according to common law doctrine (*Swinfen* v. *Swinfen*), if counsel compromise, notwithstanding the express veto of the client or his attorney, or both, the principal client is bound by the counsel's act. But if the compromise be by the attorney, it is void, if made against the client's instructions.

It is clear from these cases that while the courts of common law are indisposed to admit any limit of counsel's authority, they are ready to enquire strictly into the extent of the attorney's authority to bind his client. It is assumed that the client is bound, as to third persons, in all cases by his attorney's act, unless clearly beyond the scope of his authority. But what makes an act beyond the scope of an attorney's authority? Not the client's express veto: for until the attorney be changed by order of the court, there are numerous well-known cases in which a client cannot stultify his attorney's discretion. But an express veto by a client is a dangerous thing for an attorney to disregard; and if that veto be directed against a contemplated compromise, *Fray* v. *Voules* shows that even the sanction of counsel will not save the attorney from a liability at least for nominal damages to the client, and perhaps even for substantial damages: (*Riley* v. *Steward*, 23 L. J. 148, C. P.) How far counsel would be liable in such a case is a very different question, which may perhaps be settled if the action of *Swinfen* v. *Lord Chelmsford* should ever be tried.

DIVISION COURTS.

OFFICERS AND SUITORS.

The Jurisdiction of the Division Courts.

The subject of jurisdiction in the Division Courts is in no small degree complicated from the number of enactments and the want of logical arrangement in all. Although the consolidation is not yet proclaimed, the work as it passed both Houses may be relied on for a correct exposition of the law as it is. We shall therefore be doing good service to suitors and officers in these Courts by exhibiting to them the subject in the clear and intelligible shape in which it is presented by the Report as adopted by the Legislature.

Cases in which the Courts have no Jurisdiction, or have only a Qualified Jurisdiction.

The Division Courts shall not have jurisdiction in any of the following cases:

1. Actions for any gambling debt; or
2. For spirituous or malt liquors drunk in a tavern or ale house; or
3. On notes of hand given wholly or partly in consideration thereof.
4. Actions of ejectment, or actions in which the right or title to any corporeal or incorporeal hereditaments; or any toll, custom, or franchise, comes in question; or
5. In which the validity of any devise, bequest or limitation under any will or settlement may be disputed; or
6. For malicious prosecution, libel, slander, criminal conversation, seduction, or breach of promise of marriage.
7. Actions against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto.

Cases in which the Courts have Jurisdiction.

The Judge of every Division Court may hold plea of, and may hear and determine in a summary way, for or against persons, bodies corporate or otherwise.

1. All personal actions where the debt or damages claimed do not exceed ten pounds; and
2. All claims and demands of debt account or breach of contract, or covenant or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed twenty-five pounds; and except in cases in which a jury is legally demanded by a party as hereinafter provided, he shall be sole judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto, and he may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience, and every such order, judgment and decree shall be final and conclusive between the parties.

Special Provision as to Jurisdiction.

Upon any contract for the payment of a sum certain in labor, or in any kind of goods or commodities, or in any other manner than in money, the Judge, after the day has passed on which the goods or commodities ought to have been delivered, or the labor or other thing performed, may give judgment for the amount in money as if the contract had been so originally expressed.

No privilege shall be allowed to any person to exempt him from sueing and being sued in a Division Court, and any executor or administrator may sue or be sued therein, and the judgment and execution shall be such as in like cases would be given or issued in the Superior Courts.

A minor may sue in a Division Court for any sum not exceeding twenty-five pounds, due to him for wages, in the same manner as if he were of full age.

A cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court and no greater sum than £25 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds fifty pounds.

A judgment of the Court upon a suit brought for the balance of an account shall be a full discharge of all demands in respect of the account of which such suit was for the balance, and the entry of judgment shall be made accordingly.

CORRESPONDENCE.

To the Editors of the Law Journal.

MILTON, 21st June, 1859.

GENTLEMEN,—In answer to the general invitation contained in your last issue, to furnish information on the working of the 91st clause of the Division Courts Act, I beg to submit the following as the result in this Division;—the amount of business done here is not large, the County being a small one, with six divisions therein: the proportion of Judgment Summonses I presume is small also, yet, sufficient perhaps, to illustrate the principle you wish to evolve.

During a period of eighteen months past, the number of Judgment Summonses issued is twenty-six (whole number of suits for the same period 780).

Aggregate amount at issue, in cases of Judg. Sum.		£189 10 0
Of which amount at issue has been paid.....		64 11 1
In 3 cases	(of the 26).	No order was made.
In 5 cases	(of the 26).	Order not obeyed, no further action.
In 3 cases	(of the 26).	Order partially obeyed, "
In 3 cases	(of the 26).	A settlement between the parties has been brought about, previous to, or on Court days.

During the above period (18 months) no order of commitment has been made.

The existence of such a clause as the one in question, is essential to the interests of the creditor, and by no means can it clash with those of the HONEST debtor: in the absence of the power to garnishee, were the Division Courts Act deprived of the 91st clause, there would be too many "loop holes of retreat" for the dishonest debtor, the Act would be deprived of a large amount of its usefulness.

The cases of hardship alluded to by you, which were paraded in some of the Journals a few weeks ago, with a view to excite a feeling against the clause were very extreme cases, I should hope far-fetched; or, if they existed at all, were isolated instances, showing mal-administration, which should not be an argument against the principle which is embodied in said clause, and, to suppose *such* an application of it to be at all general, would be, in my humble opinion, a libel on the good sense, the *justice* and *mercy* of our County Judges; but, even admitting that it may have been abused, the repetition of such harshness will in future be checked by the Act of last Session, which will prevent the vindictive creditor from gratifying his ugly temper, in submitting his victim to the indignity of unnecessarily frequent summonses of the kind; and those who formerly complained of the existence, and possible abuse of the 91st clause, should, *with this corrective, be satisfied that its intention absolutely necessary.*

I remain Gentlemen,
Yours respectfully,
JOHN HOLGATE,
Clerk, 1st Division Court, Halton.

To the Editors of the Law Journal.

BEAMSVILLE, 30th June, 1859.

GENTLEMEN:—On reading your article in the June number, headed "The Judgment Summons," I thought, as my Court is so small it was not worth troubling you with a statement of our judgment summonses; but upon more mature consideration, I think, although few in number, they will be a very material aid in showing forth the great value of the 91st section of the Division Courts' Act, or Judgment Summons. I therefore annex them:—

1. *Hill* v. *Clines*, £14 1s. 1d., in which cause the defendant did not appear; was ordered to 40 days imprisonment, but settled with plaintiff.

2. *Sufford* v. *Henry*.....	£6	19	7	Set. with plaintiff	before	Ct.
3. *Shepherd* v. *Gross*.....	6	9	1	"	"	"
4. *Kew* v. *Culp*.....	13	19	10	"	"	"
5. *Henry* v. *Terryberry*..	11	19	7	"	"	"
6. *Henry* v. *Stevenson* ...	18	17	4	"	"	"

In cause, *Kew* v. *Culp*, the defendant gave up property which he had previously alleged to be under chattel mortgage. You will observe that our Court is very small, from the fact that the total number of suits from the 1st December, 1857, (which was the commencement of this Court), to the 1st June, 1859, a period of 18 months, is only 230 suits.

I remain your obedient Servant,
JOHN C. KERR,
Clerk 4th Div. Court, Lincoln.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law.*

EASTER TERM, 1859.

REGINA v. OXENTINE.

The Courts are not authorized to grant a new trial in criminal cases on the discovery of new evidence or for the misconduct of the jury.

The prisoner was convicted at Chatham, before *Burns*, J., of a rape committed upon Isabella Steinhoff, at Raleigh, on the 4th of August, 1858.

McCrea obtained a rule *nisi* for a new trial, on the grounds that the verdict was against law and evidence, and the charge of the judge who tried the case; that the jury were influenced in their evidence by matters not sworn to before them; and on the discovery of fresh evidence.

R. A. Harrison shewed cause and cited *Bently* v. *Fleming*, 1 C. B. 479; *Straker* v. *Graham*, 7 Dowl. 223; *Harvey* v. *Hewitt*, 8 Dowl. 598.

ROBINSON, C. J., delivered the judgment of the Court.

The statute 20 Vic., ch. 61, allows an application to be made for a new trial upon any point of law or question of fact, in as full and ample a manner as any person may now apply to such superior court for a new trial in a civil action.

We do not think we can, under these provisions, entertain an application on affidavits setting forth the discovery of new evidence or the misconduct of the jury, for these are not "points of law," which we take it means legal questions that have been or may be raised on the indictment or on the evidence, and they are not questions of fact, which we understand to mean questions of fact arising from or suggested by the evidence given.

The alleged discovery of new evidence refers to the affidavits of witnesses who ought to have been subpœnaed, if the prisoner had reason to suppose that evidence would be material, as they must have known that they would speak to most of the facts they now refer to, because what they do speak of occurred in the prisoner's presence.

One of the witnesses was subpœnaed, as the prisoner's counsel swears, but did not attend because she was ill. The witness herself, however, does not state that she was ill, or what reason she had for not attending, and the other witness is said not to have been subpœnaed, and does not swear whether he was required to attend the trial, or why he did not attend.

What is complained of in the conduct of the jury is, that one of the jurors in the jury room said that the prosecutrix was a person of good character. No testimony as to her character was given at the trial. The evidence of the girl, who was about fifteen years of age, was positive and distinct in proof of the offence, and if believed, conclusive.

There was evidence of several witnesses (children) which was calculated to raise great doubt of the truth of the story, but there

was some evidence in corroboration of the positive statement, and it was for the jury to determine whether the evidence of the prosecutrix was true or not.

Rule discharged.

THOMPSON v. MCDONALD.

Promissory note—Giving time to surety—Equitable defence.

Action on a promissory note made by defendant payable to W. or bearer, and by him delivered to the plaintiff. *Plea*, on equitable grounds, that the note was made by defendant as surety, jointly and severally with one C., to secure a debt due from C. to W., as W. well knew: that W. transferred to the plaintiff after it became due, and without consideration; and that W. after it fell due and before the transfer, and the plaintiff after such transfer, without defendant's consent, *gave time to C.* to the prejudice of defendant. *Held*, no defence.

Action, on a promissory note made by defendant payable to one James Ward or bearer, and by him transferred to the plaintiff

Plea, on equitable grounds, that the said note was made by defendant jointly and severally with one C., to secure a debt due from the said C to the said James Ward; and that the said James Ward, at the time he received the said note so made as aforesaid, well knew that the defendant received no value or consideration therefor, and that the same was made by the defendant as security for the said C., and that the said James Ward transferred and delivered the said note to the plaintiff after the same became due and payable, without any consideration or value given by him for such transfer and delivery thereof; and that the said James Ward, after the said note became due and payable, and before the transfer and delivery thereof to the plaintiff, and the plaintiff after such transfer and delivery, without the consent or knowledge of the defendant, gave the said C. time for the payment of the said note, and hath forborne for a long period of time to enforce payment of said note, to the prejudice of the defendant.

Demurrer.—That the plea does not deny that the said James Ward gave consideration for the said note, nor shew any want of consideration for the making of the note, but, on the contrary, does shew consideration: that it does not appear by the said plea but that the said James Ward received consideration for the transfer of the said note; and that it does not appear by the said plea that there was any binding contract to give time to either of the said makers, or that there was any consideration for such forbearance.

McMichael for the demurrer. *Hector Cameron*, contra. *Perley* v. *Loney*, 17 Q. B. U. C. 279, was referred to.

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

We are of opinion that this plea is insufficient. It states only that the holder of the note has given time to the principal debtor, not that he has by any agreement bound himself to do so. What is set up is a mere forbearance or indulgence shewn to the principal debtor, and this alone has never been held to discharge the surety.

It is unnecessary therefore to consider the sufficiency of the plea in other respects as an equitable defence.

Judgment for plaintiff on demurrer.

SCOTT v. KELLY.

Contract—Assignment—Payment by mistake—Money had and received—Trover.

M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection, he assigned all the wood that belonged to him with other property, to the plaintiff for the benefit of his creditors. He at the same time made over his interest in the contract to the defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords, as well as for what he had himself supplied.

Held that the plaintiff might recover this sum as money had and received, but that he could not maintain trover, there having been no conversion by defendant.

Held, also, that defendant could not object that the assignment to the plaintiff was not properly filed.

DECLARATION. First count, for money payable by defendant to plaintiff for goods bargained and sold, for money received by defendant for the use of the plaintiff, and for money found to be due from defendant to plaintiff on an account stated. Second count, in trover, for 152 cords of wood.

Pleas. 1. To first count, never indebted. 2. To the second count, not guilty. 3 and 4, to the second count, the wood not the plaintiff's property, and that the plaintiff was not lawfully possessed.

At the trial at Sarnia, before *Burns*, J., the facts appeared as follows: A person of the name of Minty had a large contract with the Great Western Railway Company for supplying them with wood. He had got out and delivered 952 cords, of which 800 cords had been accepted and paid for. The remainder, 152 cords, on the 4th May, 1858, had been delivered at the station, but had not yet been measured, inspected, or accepted by the company. It was proved by Minty that after the wood once was delivered by him on the premises of the company he could not remove it without permission from the company, but that the delivery to the company was not complete until the wood had passed inspection, and was measured by their agent, according to the specification in the contract with the company. While these 152 cords remained still not inspected or measured, and as yet unaccepted by the company, Minty made an assignment of his property to the plaintiff for the benefit of creditors, and in that assignment included these 152 cords of wood. The assignment was executed on the 4th of May, 1858, and filed in the county clerk's office on the same day. No affidavit was made by the bargainee therein mentioned. Minty was indebted to the defendant, and for his benefit at the same time assigned to him the contract with the company, in order that he, the defendant, might fulfil the residue of it. The defendant did complete the contract, and delivered 390 cords, and received payment for that quantity. The company, subsequent to the assignment of the 152 cords to the plaintiff, accepted the wood, and in July after, when they accepted the 390 cords, from the defendant, not knowing or overlooking the fact of a portion of the wood being assigned to the plaintiff distinct from the assignment of the contract, paid for the whole quantity to the defendant. The defendant admitted he had received payment from the company for these 152 cords, and that it was an error on the part of the company, but said that as he had received the money he should keep it, as he was a creditor of Minty's.

The defendant's counsel, at the trial, made the following objections to the plaintiff's recovery, either in assumpsit for money had and received or upon the count in trover. 1. That upon the count in trover there was no taking of the wood by defendant proved, and therefore that count could not be sustained. 2. That upon the count in assumpsit there was no privity between the plaintiff and the defendant established. 3. That the amount due from the company for the wood might be looked upon as a debt due, and then it could not be assigned so as to give the plaintiff a right to maintain a suit in his name. 4. That the assignment to the plaintiff, not having an affidavit of the bargainee attached, was not in accordance with the statute.

The learned judge overruled the objections, holding that the facts entitled the plaintiff to recover either upon the count in trover or in assumpsit, and that the facts taken separately might perhaps support either view. The plaintiff might take an assignment from Minty of his title in the wood, subject to the right of the Great Western Railway Company to accept or reject it, and if the defendant afterwards pretended to the company that these 152 cords of wood were his, and he sold it as such, trover might have been maintained against him, upon the inference that such conduct amounted to a taking on his part; or if the defendant merely received payment for it in error on the part of the company, without his contributing to that error, then the money received by the defendant was so much money belonging to the plaintiff in the defendant's hands. As to the objection that the bill of sale did not contain an affidavit of the bargainee, the judge held that the defendant was not in a situation to raise such an objection to prevent the money from being recovered from him.

The jury gave a verdict for the plaintiff, £96 15s., and leave was reserved to the defendant to move the court to enter nonsuit, if the court should think the objections ought to prevail.

Davis obtained a rule *nisi* accordingly, or for a new trial.

Prince shewed cause.

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

The objection to the count in trover I take to be correct; there was no conversion of the wood by the defendant. But for the money had and received by the defendant, I think the plaintiff was clearly entitled to recover.

The defendant was proved to have admitted that he had received

from the company more money than he had any claim to for the wood which he had himself delivered, and that he supposed the company had made a mistake in paying it to him. He offered to give up half of the money to the plaintiff, and only gave as a reason for keeping any portion of it, that he was himself a creditor of Minty's.

As to the objection taken to the written assignment under which the plaintiff claims—namely, that it had not been duly filed according to the Chattel Mortgage Act, for want of a proper affidavit made by the assignee—nothing can turn upon that, because the provisions of that act can only create difficulty where the assignment is disputed by a person claiming under a subsequent assignment, or by a judgment creditor of the party making it.

As to the plaintiff's right to the money, the wood must have belonged in the eye of the law to Minty until the property in it had vested in the company as vendees, which it could not do until it was inspected and measured It was in the meantime so far under the control of the company, that they could and probably would have prevented its being taken out of the yard, and would have kept it till they had examined and measured it, rejecting any that did not come up to the contract; yet the wood must in the meantime belong to some one, and as it was not yet the wood of the company, it must have been the property of Minty who took it there, and who could assign it subject to the company's claim. About the company's claim to the wood there can be no difficulty, because they have got the wood and have paid for it. Minty makes no claim to the money which has thus got by mistake into the wrong person's hands, and he admits that the plaintiff is the person entitled to it, and supports his claim by his evidence.

We think the plaintiff was properly allowed to recover, and that this rule must be discharged.

Rule discharged.

HAGGART v. KERNAHAN.

Replevin—Right to recover for part.

In replevin under 14 & 15 Vic., ch. 64, the verdict is divisible, so that the plaintiff may recover whatever part of the goods he proves himself entitled to, and the defendant the rest.

"From lots 1 to 13" excludes both 1 and 13.

REPLEVIN for 277 pieces of white pine timber.

Pleas.—1. *Non cepit.* 2. That the timber was not the property of the plaintiff.

At the trial at Perth, before *Richards*, J., it appeared that on the 11th of January, 1858, a license was granted by the government to the plaintiff, under 12 Vic., ch. 30, and regulations made on the 8th of August, 1851, to cut red and white pine and all other timber upon the lands thus described, To extend from lots No. 1 to 13 in the 1st range, and 2nd, 3rd, and 4th ranges of the township of Olden, the half of adjoining road allowance included with each lot, if vacant Crown lots at this date; Canada Company, Clergy lots excepted, and Indian lots; and lots Nos. 8 and 2 in the 1st range, 9, 10, 12 and 16 in the 2nd range, west half of Nos. 1, 2 and 8 in the 3rd range, and Nos. 2, 3, 6 and 12 in the 4th range also excepted.

The license expressed that it was to be in force till the 30th of April, 1858, and that by virtue of the said license the plaintiff had right, by the Provincial Statute 12 Vic., ch. 30, to all timber cut by others in trespass on the grounds thereby assigned, with full power to seize and recover the same any where within this Province.

The plaintiff gave evidence of 277 pieces having been cut on lots which the plaintiff claimed to be within her license but 146 pieces of that number had been taken from lot 13 in the 4th range, and the defendant contended that that lot was not included in the license. The plaintiff offered to give evidence as to what was intended in that respect, but the learned judge held that such evidence was inadmissable.

The defendant's counsel also objected that the evidence was not sufficient to establish the identity of the timber seized with that which had been discovered to have been taken from the plaintiff's land; and that it was not proved that the timber had been cut within the period covered by the license, and so that it was not shewn that the plaintiff had certainly a right to it.

The learned judge left to the jury these questions of fact upon the evidence, and by consent leave was reserved to the defendant to move to enter a verdict in his favour, if the court should be of opinion that there was no proof of identity to go to the jury; or if the court should be of opinion, as the defendant contended, that 146 peices appearing to have been cut upon lot 13 in the 4th range, were not cut on land covered by the license, and that the consequence of the plaintiff not being entitled to recover for that portion of the timber claimed would be to entitle the defendant to a verdict in his favour as to all.

J. S. Macdonald, Q. C. obtained a rule *nisi* to enter a verdict for defendant, or for a new trial.

Deacon shewed cause, and cited *Provincial Insurance Company* v. *Maitland*, 7 C. P. 426; *Crawford* v. *Thomas*, 7 C. P. 63; *Mennie* v. *Blake*, 2 Jur. N. S. 953; *Neilson* v. *Harford*, 8 M. & W. 806, 823; *Sills* v. *Hunt*, 16 U. C. R. 521; Jur. July, 1858, p. 616; 14 & 15 Vic., ch, 64, secs, 1, 7, 8; 12 Vic., ch. 30, secs. 2, 7, 8.

ROBINSON, C. J.—The evidence, in my opinion, was sufficient to go to the jury, both in regard to the timber being cut within the period covered by the plaintiff's license and the identity of the timber which had been cut on that land with the timber replevied under the plaintiff's writ. Looking at the whole evidence, and at the defendant's conduct in the matter, I think the jury came to a proper conclusion upon both points.

As to the lot 13, it was not included in the license, the words "*from lots* 1 *to* 13" excluded both 1 and 13, and gave only the privilege upon lots between.

There is therefore only the question whether the plaintiff's claim is divisible, so that in this form of action the plaintiff can recover for the quantity of timber cut upon the land, rejecting the 146 pieces proved to have been cut on lot 13.

I think it cannot be held that the verdict in replevin under our statute is not divisible, since replevin is allowed to be brought generally in cases where trespass or trover would lie. If the party is intended to be favoured by having the means provided of getting the very chattels he claims, instead of damages according to their value, the effect would fall far short of the intention, if any mistake in regard to a single article among many that have been replevied, must turn the verdict against him for everything.

In a late case in this court of *Sills* v. *Hunt*, cited in the argument, we held in a case like this, where lumber had been replevied, that the plaintiff might recover for a portion which he proved had been cut off his land, though as to another portion he failed to satisfy the jury that it had been taken from his land.

The verdict must be entered for the plaintiff, for 131 pieces, and for defendant for 146 pieces.

BURNS, J.—The plaintiff is not entitled to recover for the timber cut on lot No. 13, for that certainly was not granted by the Crown license to the plaintiff. It does not appear to me the defendant can claim that the remedy by replevin cannot be sustained, because he has himself caused such a mixture of the plaintiff's property with his own that it is difficult to identify the plaintiff's property. Undoubtedly either trespass or trover would lie, notwithstanding the defendant had so acted, and it may be asked, is his conduct to free him from the specific remedy of replevin?

No doubt there must have been a possession or a constructive right to the possession of the property in order to enable the plaintiff to sue out the writ. Here the plaintiff had the right of the Crown to the timber while it was standing, and also had the right of the Crown to seize and take it after being cut any where within the Province. A plaintiff must satisfy a jury as well as he can what quantity of goods or property taken from a larger quantity of like goods or property is his.

The defendant asks for a new trial as respects the whole quantity of goods, because the verdict cannot be entered distributively, and for that the bond given contemplates a delivery back of the whole property replevied. How the plaintiff's bond may be framed we do not know; it is not before the court; but however that may be, I apprehend it can make no difference. The 4th section of the Replevin Act, 14 & 15 Vic., ch. 64, enacts that the condition of the bond is to be altered to correspond with the writ authorised by the act.

The same rule must prevail in an action of replevin as in others where the right of property is involved, namely, that the verdict may be distributive.

In actions for the recovery of damages it is otherwise, for the plaintiff will only recover damages for such property as he proves to be his. When a question is made as to title, either as to land or goods, there, in order to dispose of the whole question submitted, it may become necessary that a verdict may be given one way as to part and another way as to other part. It is correct to enter in that way, and the defendant should have a verdict entered for him as to the timber cut upon lot No. 13.

McLean, J., concurred.

Rule accordingly.

COMMON PLEAS.

Reported by E. C. Jones, Esq., *Barrister-at-Law.*

EASTER TERM, 1859.

Appelby v. Withall, et al.

Trover—Conversion—Interpleader.

Held, that where the claimant, under an interpleader order, (after first directing a sale and then countermanding it,) accepted part of the proceeds of the sale of the goods, he thereby adopted the sale, and cannot hold the execution creditor liable for a conversion.

Trover—Pleas—not guilty, and leave, and license. Tried at Belleville, in October, 1858, before *McLean*, J.

It appeared that the defendants had recovered a judgment against Fred. R. Warwick, and Andrew B. Stewart, and had issued an execution thereon, directed to the sheriff of Hastings, who seized the goods and chattels, for which this action was brought, in the possession of the plaintiff, who claimed them. In consequence of this claim the sheriff applied for and obtained from the *Chief Justice* of Upper Canada an interpleader order, directing that, upon payment into Court by the now plaintiff of £120, or upon his giving, within three weeks, security to the satisfaction of the sheriff for the payment of that sum according to any rule of court or judge's order, to be made in that behalf, the sheriff should withdraw from the possession of the said goods. That in the mean time, and until such payment be made or security given, the sheriff should continue in possession of the goods, and that the claimant should pay possession money for the time the sheriff should so continue, unless the claimant should desire the goods to be sold, in which case the Sheriff was to sell and pay the proceeds, after deducting the expenses and the possession money from that date (29th May, 1857), into court, and the cause to abide further order therein. The interpleader order then directed an issue in the usual manner. It was tried, and a verdict rendered for the plaintiff.

The plaintiff did not either pay the money into court, (£120,) or give security within the three weeks. But on the 11th of June, 1857, he addressed to the sheriff's bailiff in possession the following notice: "*Withall et al.* v. *Warwick et al.* As required by the interpleader order in this cause, I hereby desire you to proceed to a sale of the goods and chattels, or a sufficient portion thereof, to satisfy the said execution, the proceeds of the said sale to be paid into court as directed by the said order" This was signed by himself and served on the bailiff to whom it was directed, on the day it bears date. In consequence of that notice the goods were sold on the 6th of July, 1857. About a fortnight before this sale, and after the expiration of three weeks limited by the interpleader order, a bond for the security of the payment required was prepared and shewn to the deputy sheriff, and by his direction was left at the office of Mr. Bell, attorney for the now defendants, for their inspection. It was returned before the sale, with an intimation that it was too late, no objection being stated to the form of the bond, or to the surety proposed. It was not shewn that it was executed either by the plaintiff or the proposed surety. The goods sold for £79 7s. 5d. They had been valued, according to the invoice prices of them, at £236 4s. 1d.; but the witness who made the estimate said that though some of them were worth more than the invoice prices, taken the whole together he would not give these prices, and that he thought they were well sold. Some of them would not have depreciated by being kept. £50 of the proceeds of the sale was paid over to the plaintiff after the decision of the interpleader suit. The sheriff's fees and the expense of taking stock amounted to £12 7s. 6d. The balance still remains in the sheriff's hands. It does not appear that any rule of court or judge's order has been made in the interpleader, since the first order of the 29th of May, 1857.

A nonsuit was moved for on the ground that no conversion by the defendants was shewn; that they might be responsible in trespass, but that would be for the entry and seizure, not for the subsequent sale. It was agreed that defendants might move for a nonsuit, and the jury found for the plaintiff, damages £100.

Bell of Belleville obtained and supported a rule *nisi* on the leave reserved, citing *Buckland* v. *Johnson*, 15 Com. B. 145.

Walbridge, Q. C., shewed cause.

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

We have to determine the plaintiff's right of action for an alleged conversion of his goods by the defendants. Whether they were trespassers, or no, in causing the sheriff to seize them, is not the question. Probably they directed the seizure of the plaintiff's goods, conceiving that they belonged to the execution debtors Warwick and Stewart, but if so, the mere act of seizure would not, followed by a conversion, entitle the plaintiff to recover the value of the goods.

By the terms of the interpleader order, there were two alternatives given to the plaintiff to have the possession of these goods restored to him, on his complying with either, the sheriff was directed to withdraw from possession, or the plaintiff might direct the sale of the goods, the money to be brought into court subject to the determination of the interpleader suit. Before the time expired, within which he must comply with one or other conditions for the restoration of the goods, he gave the sheriff a notice to sell them. And after the expiration of that time, he countermanded the notice and offered security, which was one of the alternatives. Clearly he had no strict right under the interpleader order to insist on the security being then accepted, and to have the goods returned to him. If he had a right to countermand the sale, the result would have been that the sheriff would have remained in possession. But the sale which did take place was, so far as it appears, the sheriff's act, not the defendants, for though the bond was submitted to Mr. Bell, who was the defendants' attorney, it is not proved that he took upon himself to give any direction on behalf of the defendants. He may have expressed himself content or not content with the security, with which, however, as defendants attorney, he had nothing to do, for it was to be to the satisfaction of the sheriff. But he is not shewn to have directed the sale, which was a matter resting on the terms of the interpleader order. So far, therefore, I see no proof of a conversion. And if the sheriff, though erroneously, persisted in selling, because he considered the plaintiff had no right to countermand the direction to sell, the defendants could not thereby be made guilty of a conversion, and if the sale was properly to be considered as a sale directed by the plaintiff, there was no conversion at all.

But it appears that since the sale the plaintiff has received £50—part of the proceeds: and this, I think, affords strong if not conclusive, evidence that he adopted the sale as made under his direction; that he affirmed the original order to sell, and disaffirmed the countermand.

On the ground that there was no evidence of a conversion by the defendants, I think the rule for nonsuit should be made absolute, and this makes it unnecessary to consider the grounds urged for a new trial.

Per cur.—Rule absolute to enter a nonsuit.

Haacke v. Marr.

Distress—Replevin—School rates.

Held, that a party avowing for distress in the levying of a school rate, the by-law for sanctioning such levy requiring to be passed upon the request or with the consent of certain persons, must shew such request to have been made, or such concurrence or consent obtained.

Held also, that upon such avowry, the avowant must set forth the conditions precedent required by law to be complied with before the passing a by-law to levy a rate for school purposes.

Replevin for a bay horse.

Avowry.—That defendant was collector of school rates for school section No. 11, Township of Markham, within which plaintiff resided, and was liable to be and was rated on the assessment roll for the year 1857, as a rate-payer. That by a by-law of the town-

ship, passed the 28th September, 1857, it was enacted that there should be levied and collected from the ratable property in the said school section, for school purposes for the said year, the sum of £68 5s, and that the clerk of the municipality should make provision on the collector's roll for that purpose, and that the collector for the east half of the township should collect the same with the other township rates, and when so collected should pay the same over in to the hands of the trustees of the said school section after retaining thereout four per cent. on the sum so collected to defray the expense of collecting. That in pursuance of the by-law, the clerk did, in the month of September, duly make provision on the said collector's roll for the rate aforesaid, and thereby plaintiff was rated and required to pay £5, which was his fair and proper rate. That defendant was the collector of rates for the east half of the said township, and as such the roll was delivered to them that he might collect the rate. That during the year 1857, he called on plaintiff and requested him to pay, which plaintiff refused. Wherefore, within sec. 11, where plaintiff resided, as and in the name of a distress for the said school rate remaining unpaid, he seized the said horse, &c., to levy the said rate.

Demurrer.—Because it is not shewn that the municipal council was requested to levy the rate in the by-law mentioned, nor for what purpose it was levied, nor that the council had authority to pass it. There were other objections suggested, but not argued.

Eccles, Q. C., for plaintiff, cited *Ness* v. *Municipality of Salfleet*, 13 Q. B. 408; *Brown* v. *The Municipality of York*, 8 Q. B. U. C. 586.

M. C. Cameron, contra, *Dennis* v. *Hughes*, 8 U. C. 444; *Brown* v. *Municipality of York*. 9 U. C. Q. B. 453; 13 & 14 Vic., ch. 48, sec. 18, ch. 1; 11 Ad. & E. 993 *Charlton* v. *Adway*.

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

If the authority of the municipal council to pass this by-law was to be exercised directly and immediately under the statutes of the province, without any condition precedent necessarily interposing before the authority could be lawfully exercised, then the by-law passed immediately under such authority, and within its scope, would by itself protect and justify these officers whose duty it was to carry it into effect. In such a case, it would not, I think, be necessary, even in an avowry to set out more than the by-law, and to shew that the act complained of was authorised or commanded by it.

But, although authority be given to pass a by-law for any particular purpose, if that authority can only be exercised, either upon the request, or with the concurrence or consent of other parties, then I apprehend, that a party avowing for a distress taken to enforce payment of any rate imposed by the by-law, must shew not merely that the by-law was passed, but that it was passed upon such request, or with such concurrence or consent.

A distinction is taken between a justification to an action of trespass, and an avowry. In trespass it is sufficient for the defendant to allege in his plea matter to excuse the trespass, but in replevin, the avowal is in the nature of a plaintiff, for he is to have a return, and therefore the avowry, which is in the nature of a declaration, must shew a good title *in omnibus*, and contain sufficient matter to entitle him to a return. Thus, in trespass, if the defendant justify for an amerciament in a court he must set forth a warrant, for he is a wrong-doer unless he acted by virtue of a warrant; but it is not necessary to aver the matter of the presentment, because as to him, it is immaterial whether the offence was committed or not, so there was a presentment, and his plea is only to excuse the wrong; but in an avowry the defendant ought to aver in fact that the plaintiff committed the offence for which he was amerced, because he is an actor, and has to recover, which can only be upon the merits. 1 Wm. Sanders, 347, note 3, citing *Godman* v. *Ayliff*, Yelv. 148; *Matheus* v. *Carey*, Carth. 74, 1 Salk. 107; 7 Co. 25 *a*.

Mr. Eccles argued that replevin would not lie for such a distress, but for our act, which gives replevin wherever trespass or trover will lie; and therefore this action was to be treated as if in form an action of trespass, and as a consequence, that whatever would be a good plea in justification, in trespass would constitute a good avowry.

I cannot accede to the argument, first, because I do not see that the nature of a replevin is altered, because the statute may extend it to cases where it was not considered that it would lie before. The avowant is still an actor, and if successful, is still entitled to a return; and therefore it must be as necessary for him to make a good title *in omnibus* in cases under the act as in cases at common law. And, secondly, I think the weight of authority shews that replevin would lie in this case, although our statute had not been passed. I refer to *George* v. *Chambers*, (11 M. & W. 149,) affirmed in *Allen* v. *Sharp* (2 Exch. 352,) and in *Jones* v. *Johnson* (5 Exch. 862,) which last case was upheld in error, (16 Jur. 840; 7 Exch. 452,) *Morell* v. *Harvey* (4 A. & E. 684,) *Morrell* v. *Martin* (3 M. & Gr. 581,) *Selby* v. *Bardons*, (3 B. & Ad. 2,) *Governor of Poor of Bristol* v. *Wait* (5 A. & E. 1.) *Fenton* v. *Boyle* (2 N.R. 399.)

The only remaining question is, whether the by-law as pleaded shews a sufficient authority.

Upon the best consideration I can give the matter, I think it does not. I look upon the powers conferred upon municipal councils to levy rates for school purposes within school sections as auxiliary to the carrying out of the school acts.

The language of the 12 Vic., ch. 81, sec. 31, 3rdly, may seem to confer an entirely independent authority for the purposes specified. But during that same session, a school act was passed (ch. 83.) by the 30th section whereof (3rdly) the exercise of this authority was plainly limited, for though no rate could be levied for building a school house, or for purchasing a site for a school house, except by a by-law of the Municipal Council, that body could not impose the rate, unless a memorial praying for it was signed by a majority of the land-holders and house-holders of the section, and was submitted to the council. And (6thly) the powers to pass a by-law to support the common school, or as expressed in 12 Vic., for the establishment and support of schools according to law, is not to be exercised, unless the majority of the land-holders and house-holders have determined to support the common schools by a tax. Other limitations are imposed by sec 33 of that act. And the only duty to levy a rate that was unrestrictedly imposed in that act, was for raising a sum for teachers equal to that given by government for the same purpose. This latter act, ch. 83, was repealed in the following year, but restrictions on the power of the municipal councils were contained in the substituted school acts, as in 13 & 14 Vic., ch. 48, sec. 12, (9thly.) by implication, in sec. 18, of the same act, (1stly) and in sec. 17, of 16 Vic., ch. 185.

It appears to me, therefore, that this avowry does not go far enough, but that the condition precedent to the exercise of the power to pass a by-law to levy a rate for school purposes within the section, should have been set forth, and that the plaintiff is entitled to our judgment on this demurrer.

It becomes unnecessary to consider any further the grounds of the plaintiff's application for a new trial. The verdict for the defendant cannot create any absolute bar to the plaintiff's recovery, when the avowry on which it is founded is insufficient in law. It will be for the plaintiff to consider what course he must adopt to get rid of the effect of the omission to assess contingent damages on the demurrer; if he had done that and had treated the avowry as his demurrer treated it, as containing no legal answer to his action, he might have moved for judgment *non obstante*. We do not, however, discharge the rule for a new trial. It is better to leave that pending until plaintiff takes some step to get the benefit of the judgment in his favour on the demurrer.

Judgment for plaintiff on demurrer.

See 12 Vic. ch. 81, sec. 31, 3rdly, and sec. 155; 13 & 14 Vic., ch. 48, sec 12 sub-sec. 9; 13 & 14 Vic, ch. 64, sch. A., No. 26 14 & 15 Vic., ch. 109, sch A No. 21; 16 Vic, ch. 182, sec. 39; and ch. 185, secs. 17 and 25; 22 Vic., ch. 99, sec. 259; *Wilson* v. *Welder*, 1 B & B. 57; *Pearson* v. *Roberts*, Willis, 608; *Fletcher* v. *Wilkins*, 6 Ea 283; *Banks* v. *Brand* 3 M. & S. 525; *Fenton* v. *Boyle*, 2 N. R. 399; *George* v. *Chambers*, 11 M. & W. 149; *Allen* v. *Sharp*, 2 Exch. 352.

STAYNER v. APPLEGATE.

Conveyance—Certificate—Married woman.

Held, that a certificate of a married woman on the back of a deed, which stated that she had been "duly" examined instead of the words "apart from her husband," was insufficient, even although it was proved as a fact *dehors* the conveyance that the woman *was* examined apart from her husband.

EJECTMENT for land in Warwick. Trial at the last Sarnia assizes. Plaintiff's title was—

1. Patent to Elizabeth Hawley, wife of Samuel Hawley, dated the 16th of November, 1835.

2. Deed from Samuel Hawley and Elizabeth his wife, to George Boulton, dated the 16th of June, 1840.

3. Deed from George Boulton to the plaintiff.

The certificate on deed No. 2, stated that Mrs. Hawley was "duly examined," &c., but did not state that such examination was apart from her husband.

On the trial, at London, before *Burns*, J., one of the certifying magistrates, and the subscribing witness, proved that Mrs. Hawley was examined *apart from her husband*, and that all needful formalities were complied with. The jury so found these facts.

It was objected for the defence that the deed was inoperative for want of the words in the certificate, "*apart from her husband.*"

A verdict was taken for plaintiff, subject to the opinion of the court on this point.

Beecher, Q. C., for plaintiff, cited *Jackson* v. *Robertson*, 4 C. P. U. C. 272; *Allison* v. *Rednor* 14 Q. B. U. C. 459; *Tiffany* v. *McCumber*, 13 Q. B. U. C. 159.

S. Richards for defendant, referred to *Jolly* v. *Hancock*, 7 Exc. 820.

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

By 43 Geo. III., ch. 5, the deed of a married woman was to have no force or effect whatever, unless she appeared in open court in B. R., or before a judge thereof at chambers, or before a judge of assize, and was examined, and gave her consent without coercion. Sec. 3 provides for the giving of a certificate, but does not make the validity of the deed to depend upon its being given. The force and effect of the deed is derived upon the examination, the certificate merely supplies evidence of it. By this act the examination was required to be within six months after the execution of the deed.

The 59 Geo. III., ch. 3, only altered the law as regarded deeds executed in Upper Canada, by extending the time within which the examination might be made to twelve months.

The 2 Geo. IV., ch. 14, enacts that it should be lawful for any married woman, having real estate in this province, to appear before the quarter sessions of the peace in the district in which she may at the time be resident, or before the general quarter sessions of the peace in any district in this province, in cases in which the party resides out of this province, (see 3 Atk. 503, as to the word party in a statute.) at any time within twelve months after her execution of the deed conveying away her real estate, and being examined by the chairman of the quarter sessions, in open court, touching her consent to alien and depart with her real estate, as in such deed may be mentioned; it shall and may be lawful for the said chairman to certify the same in like manner, as the same may at present be certified by the Court of King's Bench, or any judge thereof, and the said certificate shall have the same force and effect, and be as valid in law, as any certificate given under and by virtue of the act of 43rd Geo. III.

The 1st Will. IV., ch 3, sec. 5 repeals the 43rd Geo. III. Sec. 1 enables any married woman above the age of twenty-one years, residing within the province, and seized of real estate therein, to alien and convey such real estate by deed, to be executed by her jointly with her husband; provided always, that such deed *shall not be valid or have any effect, unless* such married woman shall execute the same in presence of one of the judges of the Court of Queen's Bench, or in the presence of a judge of the District Court, or a judge of the Surrogate Court of the district in which such married woman shall reside, or of two justices of the peace for such district, *and unless* such judge or two justices of the peace, (as the case may be,) shall examine such married woman apart from her husband, respecting her free and voluntary consent to alien and depart with her estate as mentioned in the deed, *and shall* on the day of the execution of the deed, certify on the back of the deed, in some form of words to the following effect: "That on the day mentioned in the certificate, such married woman did appear before him or them at the place to be named in the certificate, and being examined by him or them apart from her husband did appear to give her consent to depart with her estate in the deed mentioned, freely and voluntarily, and without any coercion or fear of coercion on the part of her husband, or of any other person or persons whatsoever."

The 2nd Vic., ch. 6, (passed the 11th of May, 1839,) refers to the foregoing statute, and by section 2 enacts that the certificate to be indorsed on any deed, pursuant to the said act, shall be to the following effect: —— do hereby certify, that on this —— day of —— at —— the within deed was duly executed in the presence of —— by —— wife of —— one of the grantors therein named, and that the said —— at the said time and place, being examined by —— apart from her husband, did appear to give her consent to depart with her estate in the lands mentioned in the said deed, freely and without coercion, or fear of coercion, on the part of her husband or of any other person or persons whatsoever," and that such certificate shall be deemed and taken to be *primâ facie* evidence of the facts contained therein.

The certificate is declared by this last act to be *primâ facie* evidence of the facts contained therein. None of the preceding acts contained and similar provision. The term *primâ facie*, imports at least that the truth of the facts therein contained may be controverted; that it may be shewn that the assertions therein contained, or some part of them, are not true. If, however, evidence to impeach the truth of the certificate be admissible, so must evidence to sustain it, and the facts whether the married woman was examined apart from her husband, and appeared to consent voluntarily, and whether the certificate was endorsed on the day the deed was executed, and whether the married woman executed it, will be at large on the evidence for the jury.

It is, however, a very different question, whether evidence *dehors* the certificate is admissible to supply the existence of a fact essential to be stated in the certificate, and assuming such evidence to be admissible, and the fact to be found by the jury, the question still remains, whether the defect in the certificate can be thus supplied, and the certificate treated as if the essential fact were contained in it.

If the whole object of the certificate were merely to supply evidence that the formalities of examination as set forth in the act had been complied with, and this apparently was the whole object under the 43rd Geo. III., I should have less difficulty in answering the question affirmatively.

But the statute 1 Wm. IV., enacts that the deed *shall not be valid or have any effect*, unless, 1st. The married woman execute it in the presence of certain judges or justices. 2nd. Unless the judge or justices examine her apart from her husband. 3rd. Unless such judge or justices certify on the back of the deed to the effect, as given in the latter act of 2 Vic.

In the absence of any one of these conditions, the deed is invalid and of no effect, and it must be remembered that but for the statutes the deed would, as to the married woman, be wholly ineffectual. It is an enabling act: but the ability is given on certain conditions. Before the 43rd Geo. III., a married woman, in Upper Canada, was not capable of transfering real property without being a party to a record. Hence the legislature passed that and the succeeding acts to substitute the mode of proceeding pointed out in them.

Now this certificate does not state that the married woman was examined apart from her husband, but it contains a word not employed in the statutes; it says that, "being *duly* examined," she did appear to give "her consent," &c. The word "duly" not being in the form of certificate contained in the statutes.

I think the fact of examination apart from the husband essential. I think also, that as a fact it must be certified in some form of words, and I think, further, that unless by the word "duly" we can hold that fact to be incorporated in the certificate, the deed must be held of no effect.

Can we then properly hold that the interpretation of the word "duly" will supply the omission of any fact essential to the examination: that the words "*duly* examined," are *to the effect* (2 Vic., ch. 6, sec. 2,) of "apart from her husband?" If so, then the same word might with equal reason represent the facts that the wife was examined on the day of the execution of the deed, and at the place where it was executed, both which particulars are required to be certified in relation to the examination of the married woman. And then the further question would arise whether a certificate following the statute in other respects, but which

simply stated that the married woman was duly examined by the certifying officer, and did appear to give her consent, was *primâ facie* evidence of time, place, and the absence of the husband; these facts being held to be contained in the certificate, by the strength of the word duly.

I think we must treat the words "to the following effect," in the 2nd section of the 2nd Vic, ch. 6, as giving no greater latitude than to authorise a change of the form of expression, as for example, that "in the absence of her husband," might be used in lieu of "apart from her husband," and the like, but that we cannot construe them as authorising the omission of one or more essential particulars, and substituting a word or phrase, which might, by implication, more or less strong, be held to import that such particulars had been fulfilled. To allow such an effect to the word "duly," would be to substitute the unexpressed opinion of the party certifying of what he thought the statute required, for a certificate expressing what he had actually done.

I am of opinion we must award the *postea* to the defendant.

Postea to defendant.

NOTE.—The above case has been appealed to the Court of Error and Appeal. It was argued last month, and now stands for judgment.

ANDREW DONOGH *qui tam.* v. JOHN LONGWORTH, ESQ.

Held. that a justice of the peace is liable under the statute to a separate penalty of £20 for each conviction, of which a return is not properly made to the quarter sessions; and,

That an action for the penalty would lie, on proof of the conviction and fine imposed, although no record thereof had been made by the justice.

The plaintiff sued as well for himself as for the receiver-general. The declaration set forth a by-law of the town council, of the town of Goderich, and stated that one Robert Gibbons was convicted by and before the defendant, then, and from thence hitherto being one of her Majesty's justices of the peace, of a breach of the by-law, and was adjudged by the defendant to pay a fine of 10s., with 14s. 6d. costs, and it thereupon became the defendant's duty to make a due return of the said conviction, in writing, under his hand, to the then next ensuing general quarter sessions of the peace, for the United Counties of Huron and Bruce; yet defendant neglected to make such return, contrary to the statute, whereby and by force of the statute, the defendant hath forfeited £20, and an action hath accrued. The second count was of a similar character, for not making a return of the conviction of one Andrew Johnston, for a breach of the same by-law, whereby Johnston was adjudged to pay a fine of 10s., and 14s. 6d. costs. The third count was of a similar character, for not making a return of the conviction of the plaintiff for the breach of the same by-law, whereby plaintiff was adjudged to pay the sum of £5, including all costs; and the plaintiff claimed for himself and Her Majesty's receiver-general £60, being the amount of the three several sums of £20 each. Plea—Not guilty.

The case was tried at the last assizes for the united counties of Huron and Bruce, before *Burns*, J. The fact that the three parties named in the three counts of the declaration were severally convicted (all on the same day) by the defendant, as alledged, was proved. Neither of them appealed against the conviction. Each of them was committed to gaol, and then paid the amount adjudged. No return of these convictions, for publication, was made according to the act. The convictions themselves were sent by post to the office of the clerk of the peace in Goderich, and were filed on the 30th of June, 1857, and all bear date on the 20th of May, 1857. The warrants of commitment were dated also on the 20th of May, 1857. It was objected, that as there was no seal to the convictions produced, they did not prove the fact of any conviction; that there is no proof that the defendant acted as a justice of the peace. And the suit was improperly brought by the plaintiff *qui tam* for himself and the receiver-general.

The learned judge overruled all the objections, reserving leave to defendants to move, and the jury gave a verdict for the plaintiff for £20 on each count.

In Michaelmas Term, *C. Robinson* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial, on the ground that the defendant was only bound to make one return of all these convictions—one schedule in the form given by the statute, which would include the whole, and therefore that he only became liable to one penalty of £20 for not making this return.

S. Richards shewed cause. He argued that the word "conviction," in the statute, meant the act of convicting, the adjudicating upon the matter before the justice. The record of such act might be made at any time afterwards. The statute requires, not the mere return of a record, but a return of the fact of a conviction being made. When the justice receives the fines, he cannot say there has been no conviction. Any defect in the record of conviction which was returned, would only tend to establish that the justice had not, so far at least, made a return; but the fact of a conviction might be established, without producing a formal record. In *O'Reilly q. t.* v. *Allan*, 11 U. C. Q. B. 411, the court held that the justices were bound to make a return pursuant to the act, though the conviction itself could not legally have been made. As to the argument that only one return was necessary, the defendant should make his return of each sum as he receives it, and therefore should return each conviction.

C. Robinson, contra, urged, that the statute should not be construed strictly, in order to subject the defendant to a penalty; that there must be something amounting, in law, to a conviction, before the defendant became bound to make a return of it; and that the evidence did not go far enough to establish this. But he relied mainly on the objection that only one penalty of £20 could be recovered. The statute only required a return of convictions, made before a single justice, to be made to the next ensuing court of general quarter sessions; whereas the return is required to be immediate, if the conviction be before two or more justices. A single justice might therefore wait till the last moment, and make up one schedule or return, including all the convictions had before him since the last preceding general quarter sessions. He referred to *Metcalf, q. t.* v. *Reere and Gardner*, 9 U. C. Q. B. 261; Paley on Convictions, 126, 16 Vic. 178.

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

The preamble to the act 4 & 5 Vic. ch. 12, shows that the return required to be made was a distinct thing from the convictions themselves. It recites that it is necessary that justices "shall, together with the convictions, make a due return thereof to the general quarter sessions of the peace of the district in which such penalties, fines and damages have accrued, in the manner and form set forth in the schedule hereunto annexed."

The first section enacts, that it shall be the duty of every justice of the peace before whom any trial or hearing shall be had under any law, now or hereafter to be in force, giving jurisdiction in the premises, and imposing any fines, forfeitures, penalties or damages upon the defendant or defendants, in case any conviction shall ensue thereon, to make a due return thereof in writing, under his hand, to the next ensuing general quarter sessions of the peace for the district in which such conviction shall have taken place, and of the receipt and application by him of the moneys received of any such defendant or defendants; such return to be filed by the clerk of the peace with the records of his office.

By sec. 2, in case any justice or justices before whom any such conviction shall have taken place, or who shall have received any such moneys, shall neglect or refuse to make such due return in the manner and form, &c., or shall wilfully make a false, partial, or incorrect return, or shall wilfully receive a larger amount of fees than is by law authorized, such justice or justices, and each and every of them, so neglecting, &c., or, &c., shall forfeit and pay the sum of twenty pounds, together with full costs of suit to be recovered by any person or persons who sue for the same, by bill, complaint, or information, in any court of record; one moiety of which sum of £20 shall be paid to the party sueing, and the other moiety shall be paid into the hands of her Majesty's receiver-general for the public uses of the province.

By sec. 3, all prosecutions for penalties under this act shall be commenced within six months after the cause of action shall have accrued, and shall be tried in the district wherein such penalties shall have accrued; if plaintiff fail, defendant to recover costs, as between attorney and client.

I have no doubt, that whether the justice had made up a record of the conviction or not, an action for the penalty would lie if he did not make the return required by the statute, and that the proof of his trying a party on a charge within his jurisdiction, and

adjudging him to pay a fine, &c., would be sufficient. In the present case there is evidence of that fact by each of the parties tried, and in addition thereto that they were committed in default of payment, and actually did pay; and although, to constitute a formal conviction according to the statute 16 Vic. ch. 178, sec. 13, it must be under the hand and seal of the justice, I do not at present see that the instrument drawn up in the form of convictions, though without a seal, on proof of the defendant's writing or signature thereto, would not be evidence as against him of the facts therein contained.

I have felt more doubt as to the recovery of the three separate penalties, because I am convinced that if the defendant had made one return in the form given in the schedule to the act, including therein each of the three convictions mentioned in the declaration, with the details called for by the form, this would have been a compliance with the statute; and if one such return would be enough, it may be asked why more than one penalty for the not making it should be incurred.

But in answer, it must be remembered, that the omission of any one conviction from the return, would subject the justice to the penalty, though he had returned all but one, for he is to make a return of "any" (which I construe every) conviction had before him. And though "he incurs a like penalty for making a false, partial, or incorrect return," I think these words do not point to a return from which a conviction is wholly omitted, but to some wilful defect or mistatement in regard to the conviction or convictions of which a return is made in apparent compliance with the statute.

Besides, in the present instance, if each of the parties convicted, (or any other party,) had brought an action charging only one conviction, and the absence of any return thereof, and claiming one penalty on that account, I do not see how the defendant could avail himself of the pendency of any one of such actions, or even the recovery therein, in bar of any other of them, for the breach of duty alleged in each would be different, but if the due return of one would be no bar to an action for not returning another, which I think it would not, then I do not see how, being sued for not making a return of one conviction could be any answer to another action for not making a return of another, and if not, I do not see why any number of penalties for distinct breaches of duty may not be recovered in one action.

I think the rule must be discharged.

Per cur.—Rule discharged.

COMMON LAW CHAMBERS.

Reported by C. E. English, Esq., M.A., *Barrister-at-Law.*

Crombie v. McNaughton.
Warnock v. McNaughton.

Sheriff—Payment of money into Court—Order on Sheriff to pay over.

When sheriff has improperly paid money into court, a judge will not order sheriff to pay the costs of such payment into court, but the proper application is for the sheriff to pay over the money returned by him as made without reference to the payment into court.

Quære—Should an application for an order on the sheriff to pay over money be made to the full court, or to a judge in chambers?

The particulars of these cases sufficiently appear in the judgment.

Richards, J.—Summons calling on George Davidson, Esquire, Sheriff of the County of Waterloo, to show cause why the money paid into court in this cause by the sheriff should not be paid out to the plaintiff, and why the sheriff should not pay the costs, expenses and per centage arising from such payment into court, and the costs of rule for the sheriff to return the writ of *fieri facias* in this cause, and the costs of this application.

In *Stockdale v. Hansard*, 8 Dowl. N. P. 529, S. C. 11 A. & E., Lord Denman says, "I think it is the clear practice of the court, flowing out of the relation between this court and its officers, that when a sheriff has money in his hands and does not pay it over, we are bound to interfere; and if the sheriff shows any authority not legal and sufficient to warrant him, that we are bound to say that he must pay it over." In the same case, Littledale, J., says, "The question here is, how is the plaintiff to get his money? He had two remedies, by action, or by motion. He has adopted the latter, and it was competent to him to do so." There is no doubt, I think, that a sheriff may be ordered to pay over to a plaintiff money which he has made on an execution, when he returns that he has made such money according to the exigency of the writ. *Bittan v. Tomlinson* (16 L. J. C. P. 138), *Wood v. Wood* (4 Q B. 397), are also to the same effect. *Shuter v. Leonard* (3 O. S. 314) is an authority to show that it is the duty of the sheriff to pay over money to the party entitled thereto, and that he cannot return the writ to the crown office, and pay the money into the hands of the clerk, and thereby discharge himself from liability to the plaintiff in the original suit. *Gladstone v French*, in U.C. C B. Hil. Term, 22 Vic., also confirms the case in 3 O. S.

It therefore appears to me that the sheriff's course was irregular in paying the money into court.

If the sheriff has made the money, and has so returned, which from the papers produced I understand is the case, the proper course is either to sue him for the money, or apply to the court for an order directing him to pay it over to the plaintiff.

If the plaintiff assents to the paying of the money into court, and the sheriff does not claim to be discharged from liability to others who may claim the money from him, but consents to its being paid over to the plaintiff, there is no reason why an order may not go to that effect; in which event I do not see why the plaintiff, from recognizing the payment into court, should not pay the clerk's charges therefor. If he elects so to do, he may with the sheriff's consent take an order on this summons, without costs, otherwise the summons will be discharged without costs. The plaintiff may then apply to the court or a judge in chambers for an order to pay over the money, if the sheriff's return warrants such an application, or he may sue the sheriff for money had and received.

The practice shows that if the sheriff returns the writ within the time mentioned in the rule for that purpose, he is not liable for the costs of the rule.

The affidavits filed for plaintiff show a course of conduct on the part of the sheriff in relation to the paying of the money into court on this writ not quite satisfactory, and in discharging the summons it will be without costs.

Summons discharged.

In *Warnock v. McNaughton*, the money was not accepted by the clerk of the crown, but was returned to the sheriff after he had informed the plaintiff that he had paid it into court; so that the summons in that case cannot be made absolute. But for the same reason as already mentioned, it will be discharged without costs.

If the plaintiffs in these suits should be advised to apply for an order directing the sheriff to pay over the money, they must consider, after referring to *Stockdale v. Hansard*, if the application should be to the full court or a judge in chambers.

Summons discharged.

Blackman v. O'Gorman.

Practice—Bail—Render.

Where there is any doubt as to the validity of the render of bail by their principal, a judge in Chambers will not order an exoneretur to be entered in the bond, but will leave the bail to plead it in bar of the action against themselves.

The particulars of this case appear in the judgment.

Robinson, C. J.—Summons to shew cause why an exoneretur should not be entered on the recognizance of bail in this cause, and the bail discharged from all liability, on the grounds that they have rendered their principal to the Sheriff, upon the writ of *Ca. Sa.* issued in this cause.

The Sheriff's certificate is produced dated 30th April, 1859, in which he certifies that on 18th April, 1850, O'Neil and O'Donohoe, bail for defendant, rendered him, the said defendant, into his custody as Sheriff, in their discharge; and that he did by virtue of a *Ca. Sa.* issued in this cause, and before the return day of the writ, receive the said defendant O'Gorman, and held him in custody in satisfaction of such writ, and before the return day thereof.

And he further certifies that the said O'Gorman was on the 26th

day of April aforesaid, and after the return day of the said writ, discharged from custody by the order of Mr. Justice Burns, a copy of which order he annexes to his return.

The venue in this action is in the County of York.

Special bail was entered on the 1st July, 1858, the bail being Peter James O'Neil, and John O'Donohue.

Judgment was entered on the 14th April, 1859, for £253 12s. 3d besides costs.

On the 15th April, 1859, a *Ca. Sa.* was issued and placed in the Sheriff's hands, to which the Sheriff has returned that the defendant was in his custody, on the 25th April, the return day of the said writ, having been surrendered by one of the bail (P. J. O'Neil) on 18th April; and that the said defendant was on the 20th April, discharged by order of Mr. Justice Burns.

It is shown by affidavits that O'Gorman was on 16th April, residing in the city of Buffalo, in the State of New York, that on that day O'Neil, one of the bail, without producing any warrant, or authority, violently took him, against his will, from the city of Buffalo, across the river to Fort Erie, in Upper Canada; and from thence through several counties of Upper Canada, to the gaol of the counties of York and Peel.

A writ of *Habeas Corpus* was obtained to release him from custody, and he was discharged by Mr Justice Burns, on 20th April. On 27th April, the second day after the return day mentioned in the *Ca. Sa.*, the Sheriff made his return to writ.

On the 27th April, 1859, the bail were sued on the recognizance.

No notice of the render had been served on the plaintiff's attorney before the defendant was discharged, (*Archb. Prac.* 818, 819, 820, 12 E. 254, 3 B. & P. 13.)

If the debtor was sufficiently rendered, notwithstanding the illegal manner of his arrest, he was rendered in time; and then the only question can be what is the consequence of his being discharged by order of a judge. Whatever took place that can be relied on as a render, took place in time to enable the bail to be discharged ex debito, justiæ, and if what was done amounts in law to a discharge of bail, the bail could and can plead it in bar of the action against themselves.

If an exonceretur be necessary in order to their perfect discharge, I will allow them to move for that in term; and the Court can take care that the bail shall not be prejudiced by the delay.

Summons discharged.

CHANCERY.

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

(IN BANC)

PYPER v. MCDONALD.

Assignment for benefit of creditors—Limitation of Time—Assent.

A creditor entitled to an assignment, who does not execute it, but who does some act which amounts to acquiescence, is entitled to the benefit of the deed.

(28th April, 1859.)

This was a bill filed by the plaintiff as assignee for one John Henderson, who was a creditor of one Jeremiah Riordans, for whom the defendant was assignee. The bill set out the facts, and that the plaintiff went to the defendants office to execute the assignment, but his attention being called off to something else, he left under the impression that he had executed it. The answer stated that the plaintiff did call at the defendant's office, that the deed was produced, but that plaintiff never signified his assent to it; and that before the first dividend, defendant wrote to the plaintiff informing him of the fact and advising him to apply to this court for relief; but that he did not apply until some time after the dividend was declared.

Strong for the plaintiff.

A. Cro ks for the defendant.

The judgment of the court was delivered by

THE CHANCELLOR.—This is a bill by the assignee of a creditor to be allowed to come in and execute the deed of assignment in behalf of the party for whom he is assignee, although the time limited by the deed had elapsed—he having assented to the deed within the limited time. I have consulted the authorities bearing upon the point. In *Collins* v. *Reece*, 1 Coll. 675, Lord Justice Knight Bruce seems to hold parties strictly to the limitation in the assignment; but in *Rowarth* v. *Parker*, 2 K. & J. 163, Vice Chancellor Wood takes the opposite side, and refers to *Spottiswoode* v. *Stockdale*, Coop 102, and *Daneh* v. *Kent*, 1 Ves. n. 260. In the former case, Lord Eldon held, that if creditors who have not signed a deed, act under it, they treat it as valid, and equity will also act under it and treat it as valid; and in *Daneh* v *Kent*, the bill was filed by creditors who came in after the time limited, and it was held they should have the benefit. The exact point however does not seem to arise there, but I think as in *Spottiswoode* v. *Stockdale*, the creditor may be bound by parol, though the deed be not executed,—that his assent is expressed by his acting under it. In *Field* v. *Lt. Donoughmore*, 1 Dru. & W. 227, Sir Edward Sugden held, that it is not absolutely necessary that every creditor should actually subscribe the deed, if he assents to it. And in *Baron* v. *Mount* 24 Beav. 642, the same rule was acted upon,—and there it was laid down that a creditor who does not execute but does some act which amounts to acquiescence, is entitled to the benefit of the deed. It appears to me then, on the authority of these cases, that if there is a clear assent to the deed, the creditors may be bound by it although they may not have signed it within the time specified. But in the present case the evidence is not very clear, and if there could be further light thrown upon it, I would let the cause stand over and go on to a hearing. The plaintiff states that he went to the office of the assignee to execute the deed, and applied for it—that it was produced to him, that he resolved to execute it, but that his attention was called off to something else, and that he left the office under the impression that he had executed it. On the other hand the defendant states that he recollects no such application for the special purpose of executing the deed. It is clear that if a man in the first instance assents, but does not execute, he differs from one who by an afterth ught comes in, and claims a benefit. On the whole, it is more equitable that we should decree him entitled to come in and execute the deed.

WALKER v. PROVINCIAL INSURANCE COMPANY.

Contract for Insurance—Principal and Agent.

A party made a proposal for insurance but did not pay the amount of the premium on the ground that the Agent of the company agreed to take his note for the amount. The loss occurred a few days afterwards, and the bill was filed to enforce the contract.

Held that there was no contract, and that the agent was not authorized to bind the company, as alleged.

(28th April, 1859.)

This was a bill filed to compel the defendants to issue a policy. The facts of the case appear in the judgment of the Court.

Roaf for the plaintiff.

Barrett and *Burns* for the defendant.

The following cases were cited during the argument: *Prince of Wales Insurance Company* v. *Harding*, 4 Jur. N. S., 851; *Carpenter* v. *Mutual Safety Insurance Company*, 4 Sand Ch., 408, *Budle* v. *Chenango Mutual Insurance Company*, 2 Com. N. Y., 53; *Goodall* v. *New England Mutual Fire Insurance Company*, 5 Foster, N. H., 169; *Patteson* v. *Mills*, 2 Bligh, N. R, 519; *Wing* v. *Harvey*, 5 DeG. M. & G. 265; *Morteaux* v. *London Assurance Company*, 1 Atk 545; *Mead* v. *Davidson*, 3 A & E. 303; *Todd* v. *Read*, 4 B. & Ald. 211; *Russell* v. *Bangley*, *Ibid.* 410; *Bartlett* v. *Pentland*, 10 B. & C., 760; and *Arnould* on Marine Insurance, 1329.

THE CHANCELLOR.—This is a case for loss on a ship. It appears that on the 7th November, application was made to the company for an insurance on the plaintiff's vessel; and on the 16th November, the agent of the company informed the plaintiff that his application was approved and the risk accepted. The loss had occurred on the 6th November, but information of it did not reach the parties until the 14th or 15th November. The plaintiff had not paid the premium, but proves that it was the custom to pay the premium by a promissory note, and meets the difficulty by saying that the agent had agreed to so charge the amount to him. The answer of the defendants denies this, and replies that the agent had no authority to give credit, and that the agent applied to the plaintiff three or four times for the amount of the premium but that it was not paid. The plaintiff, in short, says "I insured;

I did not pay, but you accepted."—to which the defendants answer that they "did not accept."

Anderson's evidence is apparently that of a more than usually candid witness. He is called by the plaintiff, but is employed by the defendants. On his cross-examination he states that the agent had no authority to give credit for premiums, and that when the agent wrote to the head office, they directed him to send up the premium at once. The same witness states that he brought a receipt for the premium to the plaintiff, but found him engaged and left the receipt; that he called again, and asked for the money but could not get it; and then did not call any more. The plaintiff's clerk proves that he would have given a cheque for the amount, which shows that no special agreement was made by the agent for giving credit, or for taking a note. These facts clearly establish the defence, and disentitle the plaintiff to the relief he seeks. This case is different from *Penley* v. *Beacon Insurance Company*, for there the premium had been paid. The bill is therefore dismissed with costs.

SPRAGGE, V. C., concurred.

COMMERCIAL BANK v. WATSON.

Power of Sale—Judgment Creditors of Mortgagee.

Where a mortgagee against whom judgments are registered exercises a power of sale, his judgment creditors have such an interest in the due exercise of the power that the Court will grant them relief against the mortgagee exercising it to their disadvantage.

(31st May, 1859.)

In disposing of a motion for a decree in a redemption suit, it was stated by

ESTEN, V. C.—Where a mortgagee exercises a power of sale in his mortgage, the judgment creditors of such mortgagee have such an interest in the due exercise of the power that the Court will grant them relief against such mortgagee exercising it to their disadvantage. I may also add that the other members of the Court whom I have consulted on the point, go further, and think that the power of sale should not be exercised at all without the concurrence of the judgment creditors.

MANLEY v. WILLIAMS.

Practice—Injunction—Defendant showing cause after order pro confesso.

An injunction had been obtained against a defendant, and after the limited time for putting in his answer had expired an order pro confesso was taken out against him. He then gave notice of motion to dissolve the injunction.

Held, that the statements of the bill having been confessed by his allowing the order *pro confesso* to stand, precluded him from moving. (28th June, 1859.)

In this case an injunction had been obtained against the defendant, and after the four weeks for putting in his answer had expired, an order *pro confesso* had been taken out;

Blevins for the defendant, now moved on notice to dissolve the injunction.

G. Boulton, contra, objected to the motion as irregular. An order *pro confesso* had been taken out against the defendant.

ESTEN, V. C.—I must refuse the motion. The defendant has confessed to the statements in the bill, by allowing an order *pro confesso* to be taken out against him, and I cannot therefore hear any affidavits which contradict the Bill as confessed. The defendant should have moved to set aside the order *pro confesso*, before he gave notice of this motion.

(IN CHAMBERS.)

NOBLE v. LINE

Practice—Mortgagee filing bills on each mortgage—costs.

The Court will not compel a mortgagee who holds several mortgages from the same party on the same land to proceed only on one bill filed for the foreclosure of one of the mortgages, as the decree for redemption and reconveyance is at the mortgagee's risk; but his filing more than one bill may influence the discretion of the court as to costs.

(30th May, 1859.)

In this case two bills were filed against the same defendant; the first bill was filed 26th March, 1859, to foreclose a mortgage made by defendant to the plaintiff, the mortgage money being payable on the 10th March, 1859. The second bill was filed on the 1st April, 1859, to foreclose another mortgage given by same defendant to the same plaintiff, which matured on the 31st March, 1859. Both mortgage debts were secured on the same property.

Roaf, for defendant, moved that the plaintiff's second bill be dismissed with costs, or that it be referred to the master to enquire whether the two bills were filed to obtain the same relief; and if *the master should find that they were so filed, that the said* bill might be dismissed with costs, and cited *Anon.* Mosley 179, and *Gage* v. *Ld Stafford*, 1 Ves. Jr. 511. The decrees would be inconsistent. If a decree were made on the first bill the defendant would be entitled to an absolute conveyance on payment of the amount found due on the mortgage, and so the plaintiff would lose the security of the second.

Snelling, contra. The debt in the second mortgage had not become due when the first bill was filed, and the two mortgages could not have been included in one suit as there was not then any breach under the second mortgage. They were distinct causes of action and could not be included in the same record. There was also a third mortgage between the parties to fall due to morrow.

ESTEN, V. C. If a party chooses to risk the security of his other mortgages by taking a decree on the first bill, I do not see that I have *any power to prevent him, but such a proceeding may influ*ence the discretion of the Court in regard to the costs of the second suit. But as it appears that another mortgage will shortly mature, and as the first bill was filed before the second mortgage became due, I would suggest that on filing the bill on the third mortgage the plaintiff should also pray for the relief he seeks in these suits; and let the order be that these suits being thus consolidated in the third suit, the proceedings in the other two be stayed. The costs of the present motion to be costs in the cause.

JAMES v. WERTHEIMER.

Practice—Foreign Service—Pro confesso.

Where there is an inconsistency in the endorsement of the bill and the order under which foreign service is effected, the Court will not grant an order *pro confesso.*

(20th June 1859.)

Ince moved to take a bill pro confesso against an absent defendant for want of answer. The affidavit of service stated that the defendant, Wertheimer, had been served in New York with an office copy of the bill endorsed that an answer should be filed in four weeks, while the order authorising such service, served at same time, allowed six weeks for answer to be filed.

ESTEN, V. C.—I must refuse the order. I have consulted my brothers on the subject and we have decided that the inconsistency shown by the affidavit of service is fatal to the motion. The defendant might have imagined that he was required to answer in four weeks, while the time allowed him by the order was longer. The endorsement on the office copy of the bill served should in all cases state the real time allowed for answering.

RAINEY v. DICKSON.

Practice—Substituted Service—Amended Bill.

It is necessary to take out a new order for substitutional service on an agent whenever the original bill is amended.

(25th June 1859.)

In this case the original bill was filed in July, 1858, and *amended*, by adding defendant Scott, (who is out of the jurisdiction) 5th September, 1858. An order for substitutional service, on an agent for Scott, was obtained same day, and Mr. *Ince*, as agent, was served with office copy of the bill on 9th September. Bill amended again in November, 1858, and copy of amended bill served on *Ince* for defendant Scott, 6th Dec. 1858, under the former order.

It was now moved to take the bill *pro confesso* as against defendant Scott for want of answer.

Ince, for defendant Scott, objected that the order authorising substitutional service, allowed the defendant two months to answer, while the endorsement on the bill served, limited the time for answering to four weeks; cited *James* v. *Wertheimer*. (See *ante*.) Also that the amended bill, served 6th Dec., contained material alterations, and as no authority had been procured for substituting the service thereof on him, the latter should be treated as no service.

ESTEN, V. C.,—As to the first objection, the agent upon whom substitutional service had been ordered being a solicitor of the Court, it could not be urged that he would be misled by the inconsistency between the order and the endorsement of the office copy of the bill served; I must therefore overrule that objection. But as to the second objection, I consider it is fatal to the motion to take the bill *pro confesso*. A material amendment of the bill was made, and the order for substitutional service was granted on the ground that Mr. Ince was the agent for the absent defendant in respect of the subject-matter of the suit as appeared by the bill when first ordered to be served on him; but it was not shown that the subject matter of the suit had not been so much altered as to authorize service upon him of the amended bill. Care should be taken in a case of this kind when amending the bill, to do so without prejudice to the right to serve the agent under the first order. Also, it is not shewn that Mr. Ince had special authority to accept service of the bill for defendant Scott in this suit. The service therefore is bad.

VANSICKLER V. PETTIT.

Master's office—Consideration of Mortgage.

The decree, and the grounds for making it, have been already reported in a previous number of the *Law Journal*, ante p.41. The facts of the case are briefly these:

The plaintiff conveyed a property in Reach, to his son Robert, in 1849, and took a mortgage back, which he did not register until 1858. Before the registration of that mortgage, Robert sold the property to defendant Pettit, and Pettit gave him a mortgage back, to secure the balance of the purchase money. Both this mortgage and the deed to Pettit were registered in 1858, before the plaintiff had registered his mortgage.

Plaintiff brought a suit to foreclose his mortgage, and Pettit, then the owner of the land, defended on the ground that he had no notice or knowledge of the mortgage to plaintiff, and subsequently set up the Registry laws: but the Court, on the grounds already reported, without further evidence than the production of the mortgage, made the usual decree, ordering a reference to the master at Whitby, to take an account of what was due to the plaintiff under his mortgage, and to tax his costs.

In the master's office, the plaintiff made the ordinary affidavits in support of his claim. In opposition to this defendant made affidavit, that from documentary evidence in his possession he had good reason to believe, and did believe, that there was nothing due to plaintiff. And he endeavoured by the cross-examination of the plaintiff himself, to show that there never was anything due on the mortgage, although it purported to have been made for £400.

Plaintiff persisted in saying, on his cross-examination, that the mortgage was made to him by his son to secure the payment of the purchase money of the property (£400) and for no other purpose; that the property was sold by him to his son for £400; and that there was no other consideration, and that the £400 was payable absolutely. Upon which he was confronted with an affidavit made by himself in 1854, in which he had stated that the consideration for the conveyance by him to his son, was natural love and affection, and also services rendered by son to father after the former had arrived at full age.

It also appeared from answers to interrogatories administered in 1854, to the plaintiff, in a Common Law suit, that he had stated he never held a mortgage on the property in question, and that he had no claim or demand against this property, which he contradicted on cross-examination.

From these contradictions, and from the general nature of the evidence given by plaintiff on his cross-examination, the master decided that the plaintiff, having laid a very grave suspicion on the mortgage, he could not report in his favor, and he accordingly reported that the plaintiff, having failed to prove that there was anything due to him on his mortgage, he had found that there was in fact nothing due to him, and that by reason thereof he had not proceeded with the taxation of the costs, nor with the other references under the decree.

The plaintiff served a notice of appeal from this report, on the 6th of April last, and the appeal now stands for a hearing.

COUNTY COURTS, U. C.

In the County Court of the United Counties of Frontenac, Lennox & Addington, before His Honor Judge McKENZIE.

KAIN V. BARRAGAN.

The defendant in this case was arrested under a *ca. sa.*, issued on an order made by Mackenzie, J., under the 13th section of 22nd Victoria, chap. 96.

The defendant had been orally examined before His Honor, touching his estate and effects and as to the property and means he had when the liability, the subject of the action on which judgment was obtained against him, was incurred, and as to the property and means he had, at the time of his examination, of discharging the said judgment, *and as to the disposal he might have made of any property since contracting such debt.* Upon the examination it appeared that defendant had, before judgment was obtained in the cause, paid a sum of one hundred dollars to his mother, who was re-married to a tavern keeper, at whose house defendant had boarded for some time previously.

It was principally on this ground that he was arrested.

On June 20th *Draper* and *Kirkpatrick* applied to His Honor Mackenzie, J., for a summons calling on the plaintiff to show cause why the order directing the *ca. sa.* to issue should not be re-considered, why the defendant should not be re-examined, or why he should not be discharged from custody or admitted to bail, on the grounds that the defendant had never received any consideration for the note sued upon, that the defendant was not worth five pounds, and that the defendant had made no fraudulent disposal of his property.

The summons was argued on 25th June by *Kirkpatrick*, when His Honor decided that he had no power to reconsider his order, and that therefore defendant must remain in custody. His Honor also decided that he had no authority to order the Sheriff to admit the defendant to bail.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

TERM KEEPING.

KINGSTON, May 30th, 1859.

GENTLEMEN,—It is hardly possible to conceive a greater humbug, than the present system of compulsory attendance of law students on the lectures in Toronto. To students inhabiting Toronto, or its immediate vicinage, the present arrangement is merely apparent as an absurdity, but to those residing in remote sections of the Province it assumes a graver aspect, and partakes of the character of an absolute outrage. Just fancy the injustice inflicted upon students resident in Kingston, and still more remote parts of the Province, in compelling them to attend Term, as it is called, in Toronto. For what? to listen to a brief, desultory lecture each morning, of about an hour's duration, upon, perhaps, some principle of law which is more profoundly discussed and perspicuously illustrated, in some of the authorized text books they are commanded to read. The institution of these lectures was doubtless with a commendable motive, with a view to facilitating the student in acquiring a knowledge of his profession, and as such a most decided advantage, when the superiority of oral discourses over books for conveying instruction in the elementary principles of any science is considered; but the making the attendance upon these lectures compulsory, is wherein lies the farce of the matter. A student, under the existing order of things, is obliged to keep two terms for Attorney, and two for Barrister,

and produce certificates thereof to the Law Society upon application for admission. Now if these certificates conferred any exemption or privilege, or implied any qualification on the party producing them, a reason would perhaps be furnished for possessing them; but when it is considered that the certificates of attendance of the required number of terms, confers no privilege or guarantee of qualification, and the candidate is nevertheless subjected to a rigid examination in the various legal authors prescribed for him to read, their use, other than to certify that their possessor has spent so much of his money, and squandered so much of his time in Toronto, is totally undiscoverable to the writer, or any one else with whom he has conversed on the subject.

The attendance at the law lectures should be optional with the students, who would not fail on that account to bestow upon them that amount of attention, which as a source of information and instruction, they justly merited, and if the writer might be permitted to offer a suggestion, the lectures should be increased in number and delivered with, say hourly intervals throughout term, in order that parties attending term, should have as great a possible equivalent for their expense and trouble. Yours truly,

A LAW STUDENT.

To the Editors of the Law Journal.

GENTLEMEN,—I would earnestly call your attention to the increasing grievance to which poor debtors, and I may add, their creditors are subjected, by the unjustifiable expenses imposed upon them by sheriffs, in the advertisement of lands for sale under executions. I would refer you to the 2 Geo. IV. chap. 1, sec. 20, which only requires the advertisement to state the particular property to be sold, the names of the plaintiff and defendant, and the time and place of the sale, to be published six times in the *Canada Gazette*, and three months in a public newspaper of the County where the lands lie, or in the office of the Clerk of the Peace or the Court House door, with a *proviso* that *nothing* shall prevent the *adjournment* of the sale to a future day. I will now refer you to the *Canada Gazette* of the 11th June, page 1436, at the bottom. You will there find an advertisement of one hundred and ten lines, which deprived of its repetitions and unnecessary parts, could have been contained in 28 or 30 lines. I send you herewith the advertisement mentioned with the corrections which I have made to it. There is no necessity for inserting the boundaries to the land in the advertisement, those must be described in the Sheriff's deed. There is no necessity for putting "Sheriffs sale" at the top, or "County of Lincoln" in the margin; in fact the following form of advertisement would have complied with the law and answered the purpose designed. No person will purchase at a Sheriff's sale without *first* ascertaining the *title* of the defendant, the boundaries and quantity contained, as well as all appurtenances thereto. At the time of the sale, the boundaries if necessary, will be mentioned by the Sheriff.

"By virtue of several writs of *fierie facias* against lands in the suit of John Doe against Richard Roe, I have seized Lot number ten in the third Concession of ——, and all those premises known as the Grantham Mills, with the appurtenances, all which I shall sell by auction at my office at the Court house, in the town of ——, on the 23rd July 1859, at 12 o'clock noon."

"16th April, 1859." "W. K., Sheriff."

I often see a long advertisement inserted the six times required, and then the same advertisement with several *postponments* appended; thus the poor debtor's property is eaten up by unnecessary expenses, and the creditor is deprived of his debts to the same amount; there is no necessity for advertising an adjournment, all who attend the sale are made aware of it. If the attorney is a party to the infliction he deserves to be punished. I am yours,

A SUFFERER.

SHERIFF'S SALE OF LANDS.

COUNTY OF LINCOLN, } BY VIRTUE OF SEVERAL WRITS OF
To Wit: } FIERI FACIAS, issued out of Her Majesty's Court of Queen's Bench, and Common Pleas, *and to me directed, as Sheriff of the county of Lincoln*, against the lands and tenements of the following defendants:

The Honorable Lewis Renaud *et al*, plaintiff, vs. W. D. King, defendant;

William H. Bull, plaintiff, vs. W. D. King and W. N. Hutt, defendants;

Ann Maria Rykert, Executrix, and other Executors of the last will and testament of George Rykert, deceased, plaintiff, vs. William Wright, Joseph Upper, and William D. King, defendants;

The Niagara District Bank, plaintiff, vs. William Dyson King, defendant;

Richard Irvin, plaintiff, vs. William Dyson King, defendant;

I have seized and taken in execution all the right title and interest of the said defendants in and to those certain parcels or tracts of land *known as follows:*

1st.—That property known as the Grantham Mills, *commencing at the distance of ninety feet above the said mills, north eighty-six degrees thirty minutes, east one hundred and ninety-four feet more or less, to the north bank of the Welland Canal; thence bounding along said bank of the Welland Canal with the stream, sixty-three feet more or less to the northern boundary line of William C. Chace's lot; thence, south sixty-six degrees thirty minutes, west ninety-seven feet more or less to the corner of John F. Mittleberger's lot; thence, north eighty-five degrees thirty minutes, west one hundred feet along said lot; thence, north eight degrees forty-five minutes, east eighty-one feet more or less to the place of beginning.*

2nd.—*Again commencing at the stone at the south corner of Edward McArdal's lot; thence, easterly forty-one feet to the Grantham Mill Race: thence, northerly, bounding along the said mill race fifty-nine feet or within six feet of Samuel Hill's lot; thence, easterly, bounding at the same distance from Samuel Hill's lot eighty-eight feet to Merritt's race; thence, south, bounding down the north side of Merritt's Race one hundred and fourteen feet more or less to the line of the Grantham Mills; thence, westerly, along said Mill line one hundred and fourteen feet to a stone; thence, northerly, sixty-three feet to the place of beginning.*

3rd.—*Again commencing at the distance of thirteen feet from the stone walls of the warehouse of the Grantham Mills or north-west part thereof; thence, north-westerly, along the bank of the race of the said mill one hundred and five feet, more or less; thence, along the boundary of Samuel Hill's lot, forty-two feet more or less to the Welland Canal; thence, following the windings of the water along the edge of the Welland Canal to the western corner of the Grantham Mills wharf; thence, south-westerly forty-two feet more or less to the place of the beginning.*

4th.—*Again commencing at the southern intersection of King and Queen streets; thence, easterly, along Queen street forty feet; thence, north-easterly, parallel to King street, one chain and fifty links to a lot formerly belonging to Rolland Macdonald; thence, westerly, along the line of said lot forty feet to King street; thence, south-westerly, along the line of King street, one chain and fifty links to the place of beginning.*

5th.—All *and singular* that other parcel *or tract* of land being in the town of St Catherines, in the county of Lincoln *and Province of Canada*, containing by admeasurement one fifth of an acre, be the same more or less, being composed of part of lot number 18 in the sixth concession of the township of Grantham, *which said parcel or tract of land and premises is butted and bounded or may be otherwise known as follows, that is to say: commencing on the north-westerly side of King street, in the town of St. Catherines aforesaid, at the northern limit of the land formerly belonging to the estate of the late Paul Shipman; thence, north sixty degrees, west along said line one chain seventy-five links more or less to a lot formerly belonging to Patrick Grant Beaton; thence, north thirty degrees, east, along said last mentioned lot seventy feet; thence, south sixty degrees, east one chain seventy-five links more or less to King street aforesaid; thence, south thirty degrees, west along said King street seventy feet, more or less, to the place of beginning.*

6th.—All *and singular* those *certain* parcels *or tracts* of land *and premises* situate, *lying and being* in the township of Grantham, in the county of Lincoln *and Province of Canada* aforesaid, containing by admeasurement one hundred and sixty-eight acres, *be the same more or less*, being composed of part of lots number twenty-two and twenty-three, in the tenth concession, and part of lot number twenty-three, in the ninth concession of said township, and is generally known as the Crown Mill property, *said property being more particularly described in a mortgage made by C. R. Perry to Samuel Becket.*

All of which lands, together with the buildings and erections thereon, I will offer for sale at my office, in the Court House, in the Town of Niagara, on SATURDAY, the TWENTY-THIRD day of JULY, 1859, at the hour of TWELVE o'clock noon.

WM. KINGSMILL, Sheriff.
By J. T. KERBY, Deputy Sheriff.

Sheriff's Office,
Niagara, 16th April, 1859.
[First published 21st May, 1859.]

[The portions of the above which we have italicised are what we agree with "A Sufferer" in considering to be unnecessary. —EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. DUNSTON *v.* PATERSON. *January* 12.

Costs on demurrer—County Court Act—Common Law Procedure Act, 1852 s. 81.

In an action for tort the plaintiff had a verdict for £5, and the Judge did not certify for costs. There was a demurrer on the record upon a new assignment previously argued, on which judgment had been given for the plaintiff.

Held, (confirming the decision in *Abley* v. *Dale*, 11 C. B. 889) that the plaintiff was not entitled to his costs of the demurrer.

In this case it was argued that 3 & 4 Wm. IV, c. 42, clearly and distinctly would give damages.

But it was held that it depended on the construction of the County Court Act, and not on such an enactment as that in 3 & 4 Wm. IV, c. 42.

WILLIAMS, J. Did not think the Common Law Procedure Act could alter the effect of the County Court Act. On consideration of the decision in *Abley* v. *Dale*, it does not seem to me, said the learned Judge, that it is affected by the C. L. P. A. I do not think the C. L. P. A. could alter the County Court Act.

C. P. FITZGERALD *v.* DRESSLER. *Jan.* 13, 14, 19.

Statute of Frauds—Warrants.

A being the ultimate purchaser of goods, of which B was the original seller, applied to B for them, B refused to deliver them unless A undertook to pay the amount of his lien for the purchase money, which B accordingly did.

Held, that this undertaking need not be in writing, as it was not a contract to answer for the debt of another within the Statute of Frauds.

This action was brought to recover money which it was alleged the defendant had agreed to pay the plaintiffs in consideration that the plaintiffs, at the request of the defendant, would, with the consent of the purchasers from the plaintiffs, deliver to the defendant certain goods upon which the plaintiff had a lien. It was contended that here was a clear guarantee of the original purchaser's debt.

The COURT—I think that the case is not within the statute. The defendant is substantially the owner of goods upon which the plaintiffs have a lien. I think if the defendant, in order to get rid of the incumbrance, promises to pay the amount of the lien, that is, pay off the lien at that price, that is not a case within the statute. The case *Williams* v. *Leper* appears to me to proceed on the principle that the defendant had an interest in the property incumbered. The promise is to pay a debt to which the property is liable.

Q. B. OLIVER & OTHERS *v.* MUGGERIDGE & ANOTHER. *Jan.* 18.

Indorsee of a Bill of Lading—Liability under charter—Party—18 & 19 Vic., c. 111, s. 1.

The indorsee of a bill of lading is only liable to be sued on so much of the contract in the charter-party as is expressly incorporated in the bill of lading.

In this case it was contended that a consignee who takes the goods adopts the contract in the charter-party, and a recent statute makes the indorsee of the bill of lading subject to all the consignee's liability. Moreover, by the terms of the bill of lading, freight is to be paid as per charter-party, and demurrage is but an extra freight.

The COURT—There was no evidence of undue delay on the part of the defendants. We think the indorsee of a bill of lading is only liable upon so much of the contract in the charter-party as is *expressly* referred to and incorporated in it.

C. C. R. *Nov.* 13, 1858, *Jan.* 15, 1859.

REGINA *v.* FREDERICK HIPPINSTALL.

Misdemeanor—Administering poison with intent to do bodily harm—14 & 15 Vic., c. 19, s. 4—Inflict.

The first count in the indictment alleged that the prisoner unlawfully and wilfully administered poison to F with intent to do bodily harm, by means of which administering F suffered bodily harm. The second count, founded on 14 & 15 Vic., c. 19, s. 4, charged the prisoner with inflicting grievous bodily harm by administering poison with intent to do bodily harm.

It was proved that the prisoner, being about to leave his situation as manager of a shop, put into a sugar basin which he knew would be used by F (his successor) for his tea a quantity of croton oil, (an acid poison), that F used some of the sugar and immediately became ill, and suffered so much agony as to cause alarm for his life.

Quære, whether the prisoner had been guilty of any misdemeanor, either at common law or by statute. Much discussion arose as to whether the facts of this case brought it within the statute, which provides, that if any person shall unlawfully and maliciously *inflict*, &c.

The COURT stated that in consequence of the defendant having died since the argument it had become unnecessary to deliver any judgment.

EX. BIDDEY *v.* CARTER. *Jan.* 12.

Pleading—Injury to Messuage—Allegation of right to support—Reversionary estate.

The declaration stated, that at the time of committing the grievances, a messuage and land was in the possession of tenants thereof to the plaintiff, the reversion thereof belonging to the plaintiff, and that it in fact received lateral support from the land adjoining,

yet the defendant wrongfully and negligently made excavations in the land so adjoining without sufficiently propping and protecting the said messuage and land, and thereby deprived it of its said support whereby it sunk and swagged, &c.

Held, that the declaration was good, although it did not contain any allegation that the right to the support had been acquired by grant or prescription, since in was to be taken that the defendant was not the owner of the adjoining land, but a stranger.

Argued, that the second and third counts are bad for not alleging that the digging of the excavation, whereby the damage happened, was the act of a stranger. For the plaintiff, it was shown that both are good. The second count alleged that the messuage and land in fact received lateral support from the land adjoining, it is not stated that the defendant was the owner of the adjoining land, and the case of *Jeffries* v. *Williams*, 5 Exch. 192, is an *express* authority that on such a count as this, it must be taken, that the defendant was a stranger and a mere wrong doer, and therefore responsible, although a right to the support for the house had not been acquired against the owner of the adjoining land.

C.P. *Jan.* 15.

STUART AND ANOTHER v. CAWSE AND ANOTHER.

Staying proceedings—Sum under 40s.

A debtor sent his creditor a banker's draft, payable at seven days after sight, for a sum less by 5s. than the whole debt. The creditor retained the draft, which had been presented by his clerk and accepted by the bankers, and subsequently, and before the expiration of the seven days, brought an action for the whole amount of the debt. The Court stayed the proceedings on payment of 5s. without costs.

CROMPTON, J., said this was really an action for 5s. It is contended that this was an action brought for the whole amount of the bill, but the defendants sent a draft on Lubbocks, which the plaintiffs' clerk takes to Lubbocks, where it is accepted. The plaintiffs write to defendants, unless you send me 5s., the draft shall be returned; it was accepted at that time and he does not return it.

EX. TARLINGTON v. STUREY AND OTHERS. *Jan.* 12.

Notice of action—Question of bona fides—New trial when verdict under £20. Statute 59, G. IV., c. 39.

The defendant, to whom a warrant to distrain for rates on the goods of A was directed, distrained on the goods of B, in the house of B, by whom he was informed that the goods were his. Persons acting pursuant to the act under which the warrant was granted, were entitled to notice of action. B having brought an action for the seizure of his goods, without giving notice of action, the judge left the question to the jury whether the defendant was *bona fide* acting under the warrant when he made the seizure, and the jury returned a verdict for the plaintiff, with £5 damages.

Held, that the question having been left to the jury, the rule that a new trial will not be granted when the damages are under £20, on the ground of the verdict being against evidence, applied, and the verdict could not be disturbed.

Q.B. PARR v. WINTERINGHAM. *Jan.* 14

Horse race—Decision of Stewards.

The stewards of a Horse race are not arbitrators in a legal sense, and therefore their decision given apart from each other without previous consultation, is binding.

EX. PHILIPS ET AL v. CLIFT. *Jan.* 24.

Apprentice—Dismissal—Misconduct no justification.

In an action for breach of covenant in an indenture of apprenticeship, the defendant pleaded that the apprentice conducted himself in so improper, unfaithful, and dishonest a manner in the defendant's business, and defrauded and robbed the defendant so that it became unsafe for the defendant to continue him in his service.

Held, that it afforded no justification for dismissing the apprentice before the expiration of the apprenticeship.

EX. ALTER v. WILSON. *Jan.* 21.

Practice—Interrogatories—Fishing application.

In an action for the wrongful detention of a document, the plaintiff applied for liberty to deliver interrogatories with the declaration upon a suggestion that the defendant must have obtained a copy of the original from the plaintiff's Clerk as he had shown it only to him; and a paragraph had appeared on the following day in the defendant's newspaper containing matter leading to the inference that the writer had used the document in writing the paragraph.

Held, that there was not sufficient foundation for the application.

EX.C. SANDON v. JERVIS ET AL. *Feb.* 4.

Arrest—sufficiency of—Sheriff—Escape—Touching by officer—Breaking of dwelling house.

To effect a good arrest it is not necessary to have the power of actual capture, and therefore, where defendant, a bailiff, put his hand through a broken pane in a window of plaintiff's dwelling house, and touched him saying, "you are my prisoner."

Held, (affirming the judgment of the Queen's Bench) a good arrest, the window not having been broken by the Bailiff, and that the Bailiff was consequently justified in breaking open the outer door and taking plaintiff to prison.

Semble, such an arrest is not sufficient to render the Sheriff liable for an escape, should plaintiff under the circumstances, have evaded the ultimate capture.

Q.B. SENIOR v. WARD. *Jan.* 13.

Master and servant—Negligence of both—Liability of Master in case of accident—Right of Servant's representative to sue.

A minor employed in a coal mine was descending the shaft in the morning as usual, when the rope broke and he was killed; the breaking of the rope was owing to a fire at the Colliery the night before. There was a rule of the Colliery, made pursuant to Act of Parliament, that before any one went down in the morning a loaded cage should be run down to test the rope; but this rule was habitually disregarded to defendant's knowledge, who was the owner and manager of the mine, and it had not been done on the morning of the accident to the knowledge of the defendant.

Held, that though the defendant was guilty of great negligence, yet as the deceased by his own negligence had contributed to his death, he could not have maintained this action, nor therefore could his representatives.

Q.B. CARR v. MARTINSON. *Jan.* 21.

Horse Race—Return of Stakes.

The plaintiff agreed with H that the plaintiff should place £7 and H £11 with the defendant, and that both sums should be paid to the winner of a pony race to be run between ponies of the plaintiff and H. They also agreed to trot the match at a named time and place, W. C. to be the starter and J. S. the judge; the money to be given up by the decision of the judge.

The parties met at the time and place, but W. C. was absent, whereupon H refused to run the race, but the judge appointed another starter, and the plaintiff's pony having walked over the course was declared by the judge to be the winner. The plaintiff demanded both sums from the defendant on the ground that the plaintiff's pony was the winner.

Held, that the judge had no right to appoint a starter instead of W. C., and that therefore the race was neither run nor won, and *held*, also, that the plaintiff was entitled to recover his stake.

METROPOLITAN SALOON OMNIBUS COMPANY v. HAWKINS.

Joint Stock Company—Libel, Action against Shareholders.

An Action will lie by a Joint Stock Company Incorporated under 19 and 20 Vic. ch. 47 against a shareholder in same Company for libel.

CHANCERY.

L.J. MORRIS v. MORRIS. *Dec.* 16

Tenant for life—Equitable waste—Pulling down Mansion-house.

A tenant for life of settled estates (without impeachment of waste), pulled down the mansion-house and rebuilt it on another part of the property, using the old materials for that purpose. The settlement contained powers of leasing, and sale, and exchange, which extended over the whole estate.

Held, that under the circumstances the tenant for life was not chargeable with equitable waste.

Semble, it would have been otherwise if the materials of the old mansion-house had been sold and the money appropriated by the tenant for life.

V.C.K. HOWARD v. ROBINSON. *Jan.* 17.

Production of documents—Mortgagee—Notice of fraud—Application of mortgage money.

A plaintiff has a right to inspection of any document in the defendant's possession which will assist him (the plaintiff), and a mortgagor has the same right although ordinarily speaking the mortgagee is not compellable to produce his deed except upon payment of principal, interest and costs.

When, by the ordinary rule, a plaintiff has no right to the production of a deed or reference to that deed in the answer, "for greater certainty," does not entitle him to such production; but when the defendant sets up this deed and refers to it, the plaintiff has such right if it will assist his case.

A mortgagee who advances money to a trustee to pay debts and general and not specific legacies, is not bound to see to its application unless he knows of a fraud by the trustee.

When a plaintiff (not mortgagor), charges a mortgagee with knowledge of a fraudulent purpose to which the money advanced by him was applied and the mortgagee denies that, but admits possession of the mortgage deed, and craves leave to refer to it, the plaintiff is not entitled to the production of that deed. A prior mortgagee has no right to see the deed of a subsequent mortgagee.

V.C.K. ARCHER v. HALL. *Jan.* 25.

Agreement by parol—Statute of Frauds—Set off—Mortgagee.

A and B enter into a contract in writing to sell and purchase certain lands, for a sum and subject to conditions specified, and to the same conditions under which the same were offered for sale by auction. The purchaser then set up a parol understanding whereby a sum secured by a bond given by the vendor to him, was agreed to be set off against the purchase money.

Held, that such parol agreement was valid, and that the conditions of sale referred to in the written agreement might be proved in chambers.

V.C.K. COLLINS COMPANY v. WALKER. *Jan.* 26.

Trade mark—Injunction—Costs.

When A is ordered by B to manufacture an article and stamp it with a trade-mark, not B's, that alone leads to suspicion but B having caused the article to be manufactured, and admitting having casually heard of the party entitled to use such trade-mark, must submit to a perpetual injunction and pay the costs.

V. C. W. ADAMS v. SCOTT. *Jan.* 22.

Mortgagor and mortgagee—Power of sale—Redemption suit—Undervalue.

In the absence of any allegation that a power of sale in a mortgage deed has been improperly or collusively exercised by the mortgagee, the averments that the property was sold at great undervalue and ought to have been sold in lots, that the mortgagee while in possession had by a mismanagement of the property, rendered himself liable to an account for wilful default and that the sale had been made pending a suit by the mortgagor to redeem, which suit was duly registered as *lis pendens*, raise no equity to support a bill to set the sale aside and enable the mortgagor to redeem.

L.C. ESPIN v. PEMBERTON. *Jan.* 27, 29,

Equitable mortgage—Solicitor and client—Title deeds—Negligence—Notice.

When a mortgagor is a solicitor, and himself prepares the mortgage deed no other solicitor being employed in the transaction, he is not to be considered as the solicitor of the mortgagee for the purpose of affecting the latter with notice, unless he consents that the mortgagor should act as his solicitor in the transaction.

When *bona fide* enquiry for the title deeds is made by a mortgagee and a reasonable excuse is given for their non-production, the mortgagee, is not affected with notice of what he might have learned on further enquiry.

V. C. K. KINGSFORD v. SWINFORD. *Jan.* 31st

Injunction—Equitable plea—Common Law Procedure Act.

Where an action is brought for breach of covenant and the defendant at law has only an equitable defence he is not compellable under the C. L. P. Acts, to make that defence the subject of equitable plea.

When an arrangement between debtor and creditor amounts to an actual bankruptcy that may be pleaded as if the debtor were actually bankrupt, but on bill filed to restrain an action for damages for breach of covenant in a deed prior to such arrangement, the Court will not compel the defendant to plead an equitable plea, but will grant an injunction on the terms of the defendant, giving a judgment applicable to the case of an action for damages.

M.R. GEORGE v. WHITMORE. *Jan.* 31.

Chancery Amendment Act 1858—*Jury trial.*

A jury will not in general be directed except at such a stage of the suit, and under such circumstances that an issue might have been directed under the old practice.

APPOINTMENTS TO OFFICE, &c.

COUNTY ATTORNEY.

ALEXANDER D. McLEAN, of Chatham, Esquire, Barrister-at-Law, to be County Attorney for the County of Kent, in the room and stead of George Duck, Junior, Esquire, deceased.—(Gazetted, 4th June, 1859.)

CLERK OF THE PEACE.

ALEXANDER D. McLEAN, of Chatham, Esquire, Barrister-at-Law, to be Clerk of the Peace for the County of Kent, in the room and stead of George Duck, Junior, Esquire, deceased.—(Gazetted, 4th June, 1859.)

CORONERS.

ISAAC JONES HAWKS, Esquire, M.D, Associate Coroner, United Counties of Huron and Bruce.

HENRY SHOEBOTTOM, Esquire, M.D., Associate Coroner, County of Lambton.—Gazetted, June 18th, 1859.)

NOTARIES PUBLIC.

JOHN HOLDEN, the younger, of Goderich, Esquire, to be a Notary Public in Upper Canada.

CHARLES GEORGE MORGAN, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.

THOMAS G. MATHESON, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, June 11th, 1859.)

JOHN WILLIAM HENRY WILSON, of Bradford, Esquire, to be a Notary Public in Upper Canada.

RICHARD WILLIAM ERRETT, of Mullross, Esquire, to be a Notary Public in Upper Canada.

ALLAN SMITH FISHER, of Clinton, Esquire, to be a Notary Public in Upper Canada

GEORGE A WALKEM, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, June 18th, 1859.)

REGISTRAR.

NATHANIEL HAMMOND, Esquire, to be Registrar of the County of Bruce.—(Gazetted, June 18th, 1859.)

TO CORRESPONDENTS.

JOHN HOGATE—JOHN C. KERR.—Under "Division Courts."

A LAW STUDENT—A SUFFERER.—Under "General Correspondence.

"A READER."—We do not answer or insert any communication which comes to us unaccompanied by the writer's name.