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DIARY FOR OCTOBER.

1. Thursday .... Clerk of Municipality to deliver Collection Rolls to Collector.
3. Saturday ..... Last day for notice of Trial for York and Peel.
4. SUNDAY..... 18*th Sunday after Trinity.*
5 Monday ..... County Court and Surrogate Court Term begins.
10. Saturday..... County Court and Surrogate Court Term ends.
11. SUNDAY. ... 19*th Sunday after Trinity*
12. Monday ..... York and Peel Fall Assizes.
18. SUNDAY .... 20*th Sunday after Trinity.*
25. SUNDAY .... 21*st Sunday after Trinity.*
31. Saturday..... Articles, &c., to be left with Secretary of Law Society.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

OCTOBER, 1863.

THE UNITED CHURCH OF ENGLAND AND IRELAND IN CANADA.

A large proportion of the people of Canada are members of the Church of England. Other denominations assert that the Church of England possesses privileges in Canada not possessed by them; while there are not wanting members of the Church of England who as sincerely assert that their Church has not equal privileges with those of other denominations.

We purpose, for the benefit of all concerned, briefly to explain the system by which the Church of England is maintained, governed and upheld in this Province.

In England the Church of England is the State Church, of which the Queen is the recognized head, and which is in other respects closely connected with the Crown. In Canada, at one time, some such connection existed.

Canada, formerly, was a French colony. In 1760 it became a British colony, by conquest. On the 10th February, 1763, the definitive treaty of peace between the Kings of Great Britain and France was concluded at Paris. The colony thereupon became subject to the rule of the British Crown, and to the legislative power of the British Parliament. At the time of the conquest, the prevailing religion of the lower or eastern part of the Province was, and still is, the Roman Catholic religion. The upper or western part of the Province was then very thinly populated.

On the 7th October, 1763, George III. issued a proclamation, by which provision was made for the government of the Province, through a Governor-General and Council. Provision was made for the summoning of a General Assembly, so soon as the state and circumstances of the colony would admit thereof. By an ordinance of the Governor and Council, passed on the 17th September, 1776, courts of justice were constituted. But nothing had yet been done towards the summoning of a Parliament. The consequence was a very general agitation throughout the Province. This brought about the passing of the Imperial statute 14 Geo. III. cap 83. It was passed for the purpose of making more effective provision for the government of the Province. It authorized the King, by warrant under his sign manual, with the advice of the Privy Council, to constitute a Council for the affairs of the Province, to consist of not more than twenty-three nor less than seventeen residents of the Province. To the Governor and Council was committed power to make ordinances for the peace, welfare and good government of the Province. No power to levy taxes, except for the purpose of making roads or erecting and repairing public buildings, was given. No ordinance touching religion was to have any force till approved of by the King. No provision was made for a system of representative government by the election of the people. Increased agitation was the consequence, and the result of this was the passing of the 31st Geo. III. cap. 31, commonly called the Constitutional Act.

By this act the Province, then called Quebec, was divided into two Provinces, called respectively Upper and Lower Canada. Provision was made for the constitution of a Legislative Council, appointed by the Crown, and a Legislative Assembly, elected by the people, in each of the Provinces. Power was given to the King, through the respective Governors of the Provinces, by and with the advice and consent of the Legislative Council and Legislative Assembly of the Provinces, to make laws for the peace, welfare and good government thereof. Whenever any bill, passed by the Legislative Council and Assembly in either Province, should be presented to the Governor-General for the King's assent, the Governor was authorized to declare, according to his discretion (but subject to the provisions of the act, and to such instructions as might from time to time be given in that behalf by the King), that he assented to the bill in His Majesty's name, or that he withheld assent, or that he reserved the bill for the signification of His Majesty's pleasure thereon. Provision was made for the transmission to England of all bills assented to by the Governor, and for the disallowance thereof within two years after the receipt thereof. Bills reserved for the King's pleasure were not to have any force till His Majesty's assent was communicated to the Legislative Council and Assembly.

Provision was made for the preservation of the Roman Catholic Church in all its integrity, with its rich endowments; but as since the conquest the Upper Province had become settled chiefly by Protestants, and as in Lower Canada also many Protestants were resident, provision was made for the support of "a Protestant clergy" in the Provinces. The King was authorized to empower the Governor-General to make out of the Crown lands situate within the Provinces such allotment of lands within the same, "for the support and maintenance of a Protestant clergy," as should bear a due proportion to the amount of such lands as were at any time granted by or under the authority of the Crown. It also enacted that whenever any grant of lands within either of the Provinces should thereafter be made, there should at the same time be made a proportionate allotment of lands "for the above mentioned purpose," and that no such grant should be valid unless the same should contain a specification of the land so allotted—the lands allotted for the support of a Protestant clergy to be, as nearly as the same could be estimated, of one-seventh the value of the land granted for other purposes. Lands thus allotted were called "Clergy Reserves." The King was by the same act empowered to authorize the Governor-General of each Province from time to time, with the advice of his Executive Council, to constitute and erect within every township and parish, parsonages and rectories, "according to the establishment of the Church of England;" and from time to time, by an instrument under the great seal of the Province, to endow every such parsonage or rectory with so much of the lands so allotted as the Governor and Council should deem expedient. The King was also empowered to authorize the Governor-General to present to every parsonage or rectory an incumbent or minister of the Church of England, who should be duly ordained according to the rites of that Church, and from time to time to supply such vacancies as might happen therein. And it was declared that every person so presented to any such parsonage or rectory, should hold and enjoy the same, and all rights, profits and emoluments thereunto belonging or granted, as fully and amply, and in the same manner, and on the same terms and conditions, and liable to the performance of the same duties, as the incumbent of a parsonage or rectory in England.

Lands were afterwards set apart, both in Upper and Lower Canada, for the support of a Protestant clergy. So rectories were established and endowed. In process of time it was discovered that a large proportion of the land so set apart, without a power of sale, would be of little benefit to those for whose benefit it was intended. Power to sell, therefore, was invoked, and that power was given by Imperial statute 7 & 8 Geo. IV. cap. 62. The Governor-General of each Province was authorized to alienate and convey in fee simple, or for any less estate or interest, a part of the Clergy Reserves not exceeding one-fourth of the Reserves within the Provinces. The quantity to be sold in one year in either Province was not to exceed in the whole 100,000 acres; the moneys to accrue therefrom to be paid over to such officer within the Provinces as the King should appoint, and by that officer to be invested in the public funds of Great Britain and Ireland, as the King should from time to time be pleased to direct; the dividends and interest accruing from the funds to be appropriated, applied and disposed of for the improvement of the remaining part of the Clergy Reserves, or otherwise, for the purposes for which the lands were reserved, and for no other purpose.

Under this act, large quantities of the clergy lands were from time to time sold, but still leaving a greater portion unsold and unproductive. The proceeds of the lands sold became a source of dispute between different religious denominations. The lands unsold were found to be stumbling-blocks in the way of improvement of the several townships in which situate. The result was a two-fold agitation—religious denominations contending for a division of the proceeds, and the people contending for the sale of the entire clergy lands. The religious denominations argued that the expression "Protestant clergy" was not by any means restricted to Church of England clergy. The people contended that whether so restricted or not was to them, in a temporal point of view, a matter of indifference, so long as the lands were sold and passed into the hands of men who would by industry improve them, and thus improve the localities in which situate. Both agitations to some extent prevailed. The Provinces of Upper and Lower Canada having been, by the Imperial act 3 & 4 Vic. cap. 35, reunited, the Imperial Legislature, during the same session, passed the 3 & 4 Vic. cap. 78, which authorized the Governor of Canada to alienate and convey all or any of the Clergy Reserves. The same act made provision for the distribution of a large portion of the proceeds, in certain proportions, among the Churches of England and Scotland, and the remainder for purposes of public worship and religious instruction in the Province.

The whole of the lands (excepting those set apart for glebes) were, under the operation of this act, rapidly brought into the market. The proceeds were considerable, and a feeling arose among the people that some portion of the money should be devoted to local improvements and other secular purposes. This feeling grew with such intensity that the Imperial Legislature passed the 16 & 17 Vic. cap. 21, authorizing the Legislature of Canada, from time to time, by any act or acts to be passed for that pur-

pose, subject to certain conditions, to vary or repeal all or any of the provisions of the 3 & 4 Vic. cap. 78, for or concerning the sale, alienation and disposal of the Clergy Reserves, and for or concerning the investment of the proceeds of all sales then made or thereafter to be made, and to make such other provisions for or concerning the sale, alienation or disposal of the Clergy Reserves and investment, as to the Legislature of Canada might seem meet; but that it should not be lawful for the Canadian Legislature to annul, suspend or reduce any of the annual stipends or allowances assigned and given to the clergy of the Churches of England and Scotland, or to any other religious bodies or denominations of Christians in the Province, during the natural lives or incumbencies of the parties then receiving the same, or to appropriate or apply to any other purposes such part of the proceeds as might be requisite for the payment of such stipends and allowances; impliedly authorizing the Canadian Legislature to deal with the overplus in such manner as they should deem best.

When it became generally known that the Canadian Legislature was possessed of full authority to deal with the Reserves, the agitation for what was called "the secularization of the Clergy Reserves" became so general and so fierce, that the Canadian Legislature was forced to pass a statute on the subject (18 Vic. cap. 2). The proceeds, under the operation of this statute, were divided into two funds—the one called the Upper Canada Municipalities Fund, and the other the Lower Canada Municipalities Fund. The fund in each section of the Province is made to consist of all moneys arising from the sale of Clergy Reserves in that section of the Province, after deducting therefrom the actual and necessary expenses of sales and management. The annual stipends or allowances preserved by the Imperial act 16 Vic. cap. 21, are made a first charge on the fund. The amount of the fund in either section of the Province, remaining unexpended on the 31st December in each year, was by that act required to be apportioned equally among the several county and city municipalities in the same section of the Province, in proportion to the population of such municipalities respectively, and to form a part of the general funds of each such municipality. By a subsequent act, so far as the amount of the Upper Canada Municipalities Fund is concerned, after paying off the charges already mentioned, it is required to be yearly divided among the several city, town, incorporated village and township municipalities in Upper Canada, in proportion to the number of rate-payers appearing on the assessment roll of the municipality for the year next before the apportionment (19 & 20 Vic. cap. 16)

One provision of the statute 18 Vic. cap 2, deserves particular attention. We mean the 3rd section. It recited that it was desirable to remove all semblance of connection between church and state, and to effect an entire and final distribution of all matters, claims and interests arising out of the Clergy Reserves, by as speedy a distribution of their proceeds as might be. It therefore empowered the Governor-General, whenever he might deem it expedient, with the consent of the parties and bodies severally interested, to commute with such parties the annual stipend or allowance already mentioned for the value thereof, to be calculated at the rate of six per cent. per annum upon the probable life of each individual; and in the case of the bodies particularly mentioned, at the actual value of the allowance at the time of the commutation, to be calculated at the same rate. It was also expressly provided, that in case of commutation with either of the said bodies or denominations, it should not be lawful for them to invest the moneys paid for commutation, or any part thereof, in real property of any kind whatsoever, under penalty of forfeiting the same to Her Majesty; and that the said bodies and denominations should lay before the Legislature, whenever called on to do so, a statement of the manner in which the money shall have been invested or appropriated. Commutation shortly afterwards was effected with the parties and bodies interested, including the clergy of the Church of England, in the manner and upon the terms prescribed and directed by this enactment.

Thus it will be seen that the Church of England, like other religious denominations of the Province, is at length thrown upon the exertions of its members for its support. It is true that as yet the glebe lands have been spared to the Church. These, however, are of little support to the general body of the clergy.

We shall now proceed to show in what manner these temporalities of the Church are, under existing law, managed.

The soil and freehold of each church, and of the churchyards and burying grounds attached or belonging thereto, respectively, is vested in the parson or other incumbent thereof for the time being. All pew-holders of a church, whether holding the same by purchase or lease, and all persons holding sittings therein by the same being let to them, and holding a certificate of such sittings, form a vestry. An annual meeting is held, on Monday in Easter week, for the purpose of appointing churchwardens for the ensuing year. No persons are eligible to the office of church warden, except members of the Church, of the full age of twenty-one years, and members of the vestry. The church wardens, during their term of office, are as a corporation to represent the interest of the church, and of the members thereof. It is their duty to sell, lease and rent pews and sittings, upon such terms as may be settled and

appointed at vestry meetings to be held for that purpose. (Stat. U. C. 3 Vic. cap. 74.)

Both in Upper and Lower Canada, associations at an early period were formed for the following among other objects: the encouragement and support of missionaries and clergymen of the United Church of England and Ireland within the dioceses of Quebec and Toronto; for creating a fund towards the augmentation of the stipends of poor clergymen, towards making a provision for those who may be incapacitated by age and infirmity, and for the widows and orphans of the clergy of the Church; for the encouragement of education, and the support of day and Sunday schools in conformity with the principles of the Church; for granting assistance, where it may be necessary, to those who may be preparing for the ministry of the gospel in the Church; for circulating the Holy Scriptures, the Book of Common Prayer, and other good books and tracts; for obtaining and granting aid towards the erection, endowment and maintenance of churches according to the establishment of the said Church in the said respective dioceses; the creation and maintenance of parsonage houses and rectories, and the management of all matters relating to such endowments.

These associations were, by statute 7 Vic. cap. 68, passed by the Legislature on the 9th December, 1843, and assented to by Her Majesty on the 23rd May, 1844, incorporated. The one was styled "The Church Society of the Diocese of Quebec," and the other "The Church Society of the Diocese of Toronto." The respective corporations are authorized from time to time to hold assemblies and meetings, to be called together in such manner and at such times and places as may be directed by the by-laws, rules, and regulations of the same. No constitution, by-law, rule or regulation of either of the Church Societies, nor any abrogation, repeal, change or alteration of the same, is to have any force or effect until sanctioned and confirmed by the Bishop of the diocese for the time being, under his hand.

The Church Societies in each diocese afterwards became patrons to the rectories. This was effected by the Provincial Statute 14 & 15 Vic. cap. 175, which repealed so much of the Imperial Statute 31 Geo. III. cap. 31, as authorized the Governor-General to exercise the right of presentation to rectories, and vested that right in the Church Society of the diocese within which the rectory is situate, or in such other person or persons, bodies politic or corporate, as the Church Society, by any by-law or by-laws to be by them from time to time passed for that purpose, should or might think fit to direct or appoint in that behalf.

The Church Society Act was the first step taken by our Legislature towards having assemblies of Churchmen for the purpose of deliberating on matters appertaining to the welfare of the Church. When all connection between church and state was removed by express declaration of the Legislature, and the success of the Church made to depend in a great measure on the support of its members, it became necessary to affirm the principle of laymen being consulted in matters relating to the Church, and to extend the operation of that principle. Accordingly the Provincial Legislature passed the statute 19 & 20 Vic. cap. 121. It recites that at the time of the passing of the act, doubts existed whether the members of the United Church of England and Ireland in Canada had the power of regulating the affairs of their Church in matters relating to discipline, and necessary to order and good government, and that it was only just such doubts should be removed, in order that members of that Church might be permitted to exercise the same rights of self-government that are enjoyed by other religious communities; and enacts that the Bishops, clergy *and laity* (see 22 Vic. cap. 139, as to mode of election), members of the United Church of England and Ireland in the Province, may meet in their several dioceses, which *are now or may hereafter* be constituted in this Province, and, in such manner and by such proceedings as they shall adopt, frame constitutions and make regulations for enforcing discipline in the Church; for the appointment, deposition, deprivation or removal of any person bearing office therein, of whatever order or degree, any rights of the Crown to the contrary notwithstanding; and for the convenient and orderly management of the property, affairs and interests of the Church in matters relating to and affecting only the said Church and the officers and members thereof, and not in any manner interfering with the rights, privileges or interests of other religious communities, or of any person or persons not being a member or members of the said United Church of England and Ireland; *provided that such constitutions and regulations shall apply* only to the diocese or dioceses adopting the same. So far, it will be seen, provision is made only for meetings *in the several dioceses*. But the act in the next section proceeds much farther, and enacts that the Bishops, clergy and laity of the United Church of England and Ireland in this Province may meet in general assembly, by such representatives as shall be determined and declared by them in their several dioceses, and in such general assembly frame a constitution and regulations for the general management and good government of the said Church in this Province; provided that nothing in the act contained shall authorize the imposition of any rate or tax upon any person or persons whomsoever, whether belonging to the said Church or not, or the infliction of any punishment, fine or penalty upon any person, other than his suspension or removal from any office in the said Church, or exclusion from the meet-

ings or proceedings of the diocesan or general synods; and provided that nothing in the constitutions or regulations, or any of them, shall be contrary to any law or statute now or hereafter to be in force in this Province.

This act, it will be observed, is of a most sweeping character. The assemblies authorized, so far as members of the United Church of England and Ireland are concerned, are second only to the Legislature. In each diocese an assembly is authorized, having power, among other things, to make regulations for the appointment, deposition, deprivation or removal of *any* person bearing office in the Church, of *whatever order or degree.* This apparently includes not only inferior clergy, but Bishops and all others holding office in the several dioceses of the Church. The right of the Crown to appoint to such offices would thus appear to be transferred to the Synods in the several dioceses. It is worthy of remark that no provision is made for the appointment of persons to office in the Church by the General or Provincial Synod, though the power of removal is in express terms mentioned.

The existence of Church Societies, independent of the Synods, appears to be superfluous. The lesser ought surely to be included in the greater; and the sooner the Church Societies are merged in the Synods, the better for the simple and efficient government of the Church. Too much machinery is sometimes worse than none at all; and under any circumstances, the more simple the machinery, the more likely it is economically to accomplish the object of its creation.

The assemblies authorized in the several dioceses of Canada met and framed constitutions and regulations, in pursuance of the act. As we have neither the inclination nor the space at present to write a treatise on Church government, we cannot give even the substance of these constitutions or regulations. A General or Provincial Synod has also been organized. We must in like manner dismiss its constitution and regulations. It is, however, sincerely to be hoped that members of these Synods, who have the power to alter their constitutions and regulations, will cautiously exercise a power which is antagonistic to anything like permanency. In most deliberative assemblies, there are men who have a passion for law-making and constitution-tinkering. This passion, if not kept under control, is more likely to be mischievous than good. Change, for the mere sake of change, is often disastrous. It would be well to allow the constitutions and regulations of the Synods to simmer down to something like consistency, before suffering them to be hacked and chopped by amateur legislators.

We understand that, notwithstanding the acts to which we have referred, the Crown, on the 9th June, 1860, by letters patent under the seal of Great Britain, appointed the Bishop of Montreal to be Metropolitan of Canada; which patent was afterwards cancelled, and a new patent, dated 12th February, 1862, issued, appointing the same Bishop Metropolitan of Canada, "subject to the rules, regulations and canons that the Provincial Synod may from time to time make in respect thereof." We must say we do not understand on what principle the Crown now issues letters patent either for the appointment of a Metropolitan or of Diocesan Bishops. The appointment of Diocesan Bishops clearly rests, since the 19 & 20 Victoria, chapter 121, with the several Synods. The appointment of a Metropolitan does not seem to be contemplated in any of the acts to which we have referred; and now that all connection between church and state is by declaration of the Legislature removed, the exercise of the power, even if existing in the Imperial Crown, is, to say the least of it, impolitic. The patent, according to the decision of *Long and the Bishop of Capetown*, reported in other columns, must be ineffectual to create any jurisdiction, ecclesiastical or civil, in this colony. We cannot see that the Metropolitan is anything more than President of the Provincial Assembly, and we presume that the appointment of such an officer ought properly to be made from time to time by that Assembly. We imagine that the Imperial authorities, since the decision of *Long and The Bishop of Capetown*, will not repeat the absurdity of sending out to this colony pieces of parchment, having the great seal upon them, which, when here, are, to say the least of them, of questionable validity. Even if such patents be valid for any purpose, we apprehend they may at any time be revoked by the Synods concerned. The power of appointment and the power of revocation should, as a general rule, be vested in the same authority. It is not seemly for the Crown to issue commissions under the great seal, which may at any time, without reference to the Crown, be revoked by an assembly of the Queen's subjects.

It only remains for us to add that the Queen, by proclamation, dated 2nd October, 1857, divided the diocese of Toronto into two dioceses, the westerly one called Huron, and the easterly, Toronto; that the Legislature, in 1858, adopted the division, and incorporated a Church Society in and for the diocese of Huron (22 Vic., cap. 55); that afterwards the Queen, by a like proclamation, dated 28th February, 1862, further divided the diocese of Toronto, or eastern portion of Upper Canada, into two dioceses, the one called Toronto, and the other Ontario; and that the Legislature adopted the division, and incorporated the Synod in and for the diocese of Ontario (25 Vic. cap. 28). The right of presentation to rectories within the latter diocese is, by action of the Synod, vested

in the Bishop for the time being, during his incumbency of office (*Attorney-General* v. *Lawder*, p. 291 of this journal).

We have our doubts as to the validity of Royal proclamations, dividing or subdividing dioceses in this colony. Though loyal to the mother country in all that the Crown has a right to expect from us, we must not forget that we have a constitution of our own, and are so far independent as to be enabled to make our own laws in our own way. The day is gone by for legislation of any kind in Canada through the medium of Royal proclamations issued in Great Britain. We have our own Legislature, and when legislation of that kind is needed, our Legislature should be consulted. Supposing the Imperial Parliament to have the power, it is very clear that the Queen *alone* has not the power. In this colony, so long as the persons interested acquiesce, there can perhaps be no valid objection; but we think that as the Crown appears to have withdrawn from all connection with the Church of England in this colony, the power to divide and subdivide dioceses, if not a legislative one, ought to rest with the Provincial Synod.

IMPORTANT TO MAGISTRATES.

The attention of magistrates is directed to the case of *Switzer* and *McKee*, reported in other columns. The law, as there laid down, is not generally known, and even where known, too much neglected.

JUDGMENTS.

QUEEN'S BENCH.

September 21, 1863.

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

Montgomery v. *Spence.*—Action on covenants contained in a lease. Plea, assignment by defendant, with assent of plaintiff. Demurrer. Judgment for plaintiff on demurrer.

Montgomery v. *Spence.*—Rule *nisi* to enter verdict for defendant or for new trial discharged.

Niagara Falls Bridge Company v. *The Great Western Railway Company.*—Action of covenant for rent; *rei situæ* half in Canada and half in the United States. Plea, tender of United States "green backs." Demurrer. *Lex loci contractus* held to govern, and judgment for defendant on demurrer.

Burn v. *Bletcher.*—Replevin for a vessel. Judgment for plaintiff on demurrer to plea to avowry, and defendant entitled to judgment on demurrer to replication.

Hall v. *Duncan.*—Action on a shipping contract. The question was, whether plaintiff had performed his contract. Rule absolute for new trial. Costs to abide the event.

Kennedy v. *Patterson et al.*—Trespass. Rule absolute for new trial.

Gore Bank v. *Cook.*—Rules obtained by judgment creditors discharged with costs, the parties not having availed themselves of leave given by the court to amend in order to bring the proper parties before the court.

Robinson v *Ellsworth.*—Rule *nisi* for new trial on affidavits discharged with costs.

Torrance v. *Calvin* —Rule absolute for new trial, costs to be paid in three weeks; otherwise rule discharged.

Grieve v. *Smith.*—Postea to plaintiff for the recovery of $30.

McMurray v. *Ryan.*—Appeal allowed. Rule absolute for new trial in court below.

Hughes v. *Snure.*—Action against the maker and endorsers of a promissory note. Plea of set-off not connected with the note sued on. Judgment for plaintiff on demurrer.

Small v. *Eccles* —Rule calling on defendant to show cause why he should not on affidavit answer as to such books and documents as may be in his possession relating to the matters in dispute in the cause, discharged with costs, on the ground that it was moved on an affidavit used in Chambers, without it being shown that leave was given to use the affidavit, and it being shown that a summons obtained on that affidavit had been discharged.

Hunter v. *Baptiste.*—Ejectment. Rule absolute for new trial without costs.

Whitney v. *The Northern Railway Company.*—Rule absolute for new trial. Costs to abide the event.

Hall v. *Hill.*—Ejectment for land sold for arrears of taxes. *Held*, that the directions of sec. 125 of Con. Stat. U. C. cap 55, as to the contents of the treasurer's warrant are *imperative;* and the warrant in this case not being shown to comply with the statute, sale held invalid, and new trial granted, costs to abide the event.

Walker v. *Douglass.*—Action on a promissory note. Rule discharged.

Keenahan v. *Eagleson* —Action against defendant, an alderman of the city of Ottawa, for not making return of a conviction to next general county sessions for the county of Carleton. *Held*, action maintainable, and rule discharged.

Tate and The City of Toronto.—Priority of attaching creditors declared, and order accordingly.

Perrie v. *Tannahill.* — Amendment of plaintiff's declaration allowed, and rule for new trial discharged.

Marsden v. *Henderson.*—Action for libel and slander. *Held*, that slander of a class such as "wheat buyers," may by evidence be shown to have relation to a particular individual of the class viz: the plaintiff. Rule *nisi* to enter nonsuit or for a new trial discharged.

Holmes v. *McKechin.*—A case of disputed boundary. Rule absolute for new trial. Costs to abide the event.

Crabtree v. *Griffith.*—Action for trespass. Question of lien. Rule absolute for new trial, without costs.

Ward v. *Vance—Thompson, garnishee.*—Issue directed.

Stoke v. *Jones.*—Rule absolute for new trial, without costs.

Kelly v. *Henderson.*—*Held*, that plaintiff having obtained a verdict subject to a reference, which fell through, was irregular in again entering his record for trial without first setting aside the former verdict, and so rule absolute to set aside his proceedings with costs.

Venator v. *Scott.*—Rule absolute for revision of costs by Master.

Ritchey v. *The Toronto Roads.*—Rule *nisi* discharged with costs.

Ramsay v. *Carruthers.*—Rule discharged.

Kelly v. *Molds.*—Rule discharged.

September 26, 1863.

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

Stephens v. *Boolton.*—Rule absolute to increase verdict to £58 13s. Defendants rule discharged.

Buffalo and Lake Huron Railway Co. v. *Hemmingway.*—*Held*, that a judge under the interpleader act has authority to protect an execution creditor, as well as the sheriff as against the execution debtor. Rule discharged.

Knowles et al v. *Post et al* —Rule to stand till next term, in order to enable the party who moved it to support it.

Sheldon v. *Sheldon,*—Rule absolute to refer this cause to the referee named in the rule.

Cornwall v. *Gault* —Postea to defendant.

The Queen v. *McQuerrie.*—Two indictments. Judgment arrested.

Gray v. *Carty*—Rule discharged.

In the matter of McCutchon and the Corporation of the City of Toronto—Rule absolute to quash sections 5, 6, 7 and 8 of No. 295. Sewerage By-Law of the City of Toronto, and s. 2 of Sewerage By-law No 304, with costs.

Guy v. *Lyon.*—Rule discharged.

Patton v. *Evans.*—Rule discharged.

Grace v. *Walsh.*—Rule for prohibition to go.

Edgar v. *The Canada Oil Company*—Rule for a new trial, the Court declining to accept the burthen of decided difficult questions of fact.

COMMON PLEAS.

September 21, 1863.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON, J.

McCullough v. *McIntee.*—Rule discharged.

Smith v. *Roblin.*—Rule discharged.

Cross v. *Richardson.*—Rule to enter nonsuit made absolute.

The Queen v. *Brown & Street.*—Rule for mandamus discharged without costs.

Chapman v. *Boultbee.*—Rule absolute to enter nonsuit.

Salter v. *McLeod.*—Rule absolute for new trial. Costs to abide the event.

Stoker v. *The Welland Railway Company.*—*Held*, that if a judge at Nisi Prius tells a plaintiff he will nonsuit him on a point of law, *plaintiff is not deprived* of the right to move against the nonsuit, by the acquiescence of his counsel; but the rule is different where the judge directs a nonsuit for want of evidence. Rule discharged.

Moore v. *Andrews.*—Appeal allowed, and judgment of court below reversed, with leave to plaintiff to move to amend in the court below within two weeks.

Foreman v. *Johnston.*—Rule discharged.

Turner v. *Patterson.*—Rule discharged.

Reynolds v. *Metcalfe.*—Rule discharged.

Young et al v. *Moderwall.*—Judgment for plaintiffs on demurrer, with leave to defendant to amend on payment of costs.

The Queen v. *Huston et al.*—Judgment for plaintiff on demurrer and postea to plaintiff.

McNaught v. *Turnbull.*—Plaintiff entitled to the postea.

Hooker v. *Gamble.*—Rule discharged.

Doran v. *Read.*—Rule discharged. *Quære*, whether, under the operation of the Consolidated Statutes of Upper Canada, a deed executed by husband and wife, the wife being a minor, and therefore unable to consent, is valid to pass the estate and interest of the husband?

Taylor v. *McPherson.*—Rule absolute for new trial, on payment of costs.

In re Walton and the Corporation of Monaghan.—Rule discharged with costs, because application too late.

In re Trustees of the Grammar School of the United Counties of York and Peel.—*Held*, that no obligation rests on County Councils to raise money for grammar school purposes, and therefore rule for mandamus refused.

Brown v. *Riddell.*—Rule absolute for discharge of defendant from custody. Costs to be costs in the cause.

Jacob v. *Henry.*—Rule absolute to enter nonsuit.

September 26, 1863.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON. J.

Maynard v. *Gamble et al.*—Action against defendants as church wardens of Christ Church, Woodbridge, for the occupation by the clergyman, with their sanction, of a dwelling house at Woodbridge. Plea, never indebted. Verdict for plaintiff Rule *nisi* to enter nonsuit for a new trial discharged. Adam Wilson, J., dissentiente.

Mem et al v. *Hall.*—Appeal from County Court of County of Peterboro'. No judgment on case as stated. Sent back to County Court.

Gardiner v. *Ford et al.*—Judgment for defendants on demurrer.

Moran v. *Palmer.*—Rule discharged without costs.

Harry v. *Anderson.*—Judgment for defendant on demurrer to the declaration. Leave to apply to amend in two weeks.

In re Springer and Macdonald, one, &c.—Rule discharged with costs.

In re Glass and Macdonald, one, &c.—Rule discharged with costs.

McNab v. *Howland et al.*—Rule absolute for new trial as to both defendants on payment of costs by defendant Fitch.

The Queen v. *The Northern Railway Company.*—Judgment for levy of fine.

The judical Committee of the Privy Council is a tribunal of which so little is commonly known, that a summary of last year's work will be acceptable. The largest part of the business comes from India and the colonies. There were 51 appeals entered in the course of the year—21 of them from India, 13 from the colonies, 2 from the Channel Islands, 13 from the Admiralty Courts, and two from the Ecclesiastical Courts. 43 were heard and determined; and the judgment appealed *from was affirmed* in 23 instances, reversed in 21, varied in 4. Out of the 19 cases from the colonies determined in the year, the judgment was affirmed in only 5 instances. Costs were given in 38 of the appeals; the taxed costs on one side only are stated to have averaged £267, but the tabular return indicates £336. The year closed with 94 appeals remaining for hearing, 48 of them from India. In the same year 11 applications were lodged for the extention or confirmation of letters patent; one was withdrawn three were dismissed, one was granted.—*Solicitor's Journal.*

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27 VIC., CAP. LXXVI.

An Act to determine the Time at which Letters Patent shall take effect in the Colonies. [28th July, 1863.

Whereas, her Majesty hath, from time to time, caused to be made under the Great Seal of the United Kingdom of Great Britain and Ireland divers letters patent intended to take effect within her Majesty's colonies and possessions beyond the seas: and whereas, doubts are entertained respecting the period at which such letters patent have been taken or may hereafter be taken within such colonies and possessions, and it is expedient that such doubts should be removed: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Existing letters patent not to take effect in colonies till published or acted on. Acts done under such letters patent valid.*] No such letters patent heretofore made shall (unless otherwise provided therein or by other lawful authority) be deemed to have taken or shall take effect in any such colony or possession as aforesaid until the same were or shall be publicly made known or acted upon therein: provided that any act or thing heretofore done or purporting to have been done in pursuance or under authority of such letters patent shall be as valid and effectual as if the same letters patent had taken effect at the date of the making thereof.

2. *Future letters patent not to take effect in colony till publication.* No such letters patent hereafter to be made shall

(unless otherwise provided therein or by other lawful authority) take effect in any such colony or possession until the making of the same shall have been signified therein by proclamation or other public notice.

3. *Appointments by letters patent to be void unless published within six or nine months.* Any such letters patent by which any person may be hereafter appointed to any office or employment within any of such colonies or possessions shall (unless otherwise provided therein or by other lawful authority) become null and void in respect of such colony unless the same shall be so signified as aforesaid within the following period: that is to say, within nine calendar months, in case such colony or possession shall be to the eastward of Bengal, in the East Indies, or to the west of Cape Horn, in South America, or in any other case within six months after the making thereof.

4. 9 & 10 *Vict. c.* 91, *repealed.*] The Act, chapter ninety-one of the ninth and tenth years of her Majesty, intituled "An Act to continue certain Patent Commissions until the exhibition of the Commissions revoking them," is hereby repealed.

3. *Period of Act coming into operation.*] This Act shall take effect in each of her Majesty's colonies and possessions so soon as the same shall be proclaimed therein by the officer administering the government thereof.

A DESERTED PARISH.

At the Judges' Chambers on Wednesday, before Mr. Justice Byles, an application was made by Mr. Hardinge Giffard, as counsel for a Mr. Cousin, to remove an order of justices appointing him overseer of a parish, into the Court of Queen's Bench, by writ of *certiorari*, in order that the same might be quashed. There was only one house in the parish, and as there must be two overseers, the order was informal. His Lordship asked, where the parish could be situate? Mr. Giffard said at Upper Eldon. It seemed that there was only one house in the parish, which was near Southampton, and only one inhabitant. The learned counsel said the object was no doubt to form it into a union, but the householder objected. It was just 100 years since a similar attempt had been made, and the parish had not increased. His Lordship granted the writ as prayed to remove the proceedings.—*Law Times, August* 29, 1863.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

DONALDSON ET AL., (DEFENDANTS,) APPELLANTS, v. HALEY, (PLAINTIFF,) RESPONDENT.

County court—Recording of verdict—Dissent of juryman—Mistrial—Notice of action—Waiver of defects.

On the trial of a cause in the county court it was agreed that a sealed verdict should be handed by the jury to the constable in charge of them, and that they should disperse to meet at the opening of the court on the following morning. When the court opened all the jury answered to their names, the sealed verdict was then opened and read to them, "verdict for the plaintiff $120," and being asked if they confirmed it, said they did so, one answering. The verdict was then recorded, and upon reading it as recorded, one juror said he had only agreed to $100. The judge insisted upon the verdict remaining as recorded, which decision he afterwards upheld in term. Upon appeal to this court, *held*, that as the verdict must be unanimously delivered and recorded in open court, a juror dissenting before such recording rendered the verdict informal.

A defendant after accepting service of an informal notice of action adds the following words, "and agree to accept the same as a sufficient notice of action to me under the statute"

Held, that he could not afterwards rely on a defect therein as a defence to the action.

Appeal from the county court of the county of Wellington.

Pleas by both defendants, not guilty and not posse.

On the trial in the court below it was agreed that a sealed verdict should be handed by the jury to the constable left in charge of the jury, and that the jury might then disperse to meet at the opening of the court on the following morning. At the opening of the court the jury being called all answered their names in the usual way, the sealed verdict being handed in was opened and read to the jury, and on being asked if that was their verdict, "verdict for plaintiff $120," it was confirmed by them, some one of them answering, the writing was signed by one of them as their foreman, the verdict was then recorded. On the verdict being read as recorded, one of the jurors said he had agreed to $100 only. The other jurors insisted that he had agreed to $120, and concurred in the verdict. The judge directed the verdict to remain as recorded, the verdict being in fact so recorded by the jury, through their foreman, in writing, and confirmed by them.

A rule *nisi* was subsequently obtained for a new trial, which, after argument, was discharged in the court below as against Grindly, and a nonsuit entered as to Donaldson, from which decision the defendants have appealed upon the following grounds:

1.—That the rule for a nonsuit, as to the defendant Grindley, should have been made absolute, as there was no evidence of any interference on his part with the property of the plaintiff, or

2.—That a new trial, or trial *de novo*, should have been granted, the finding endorsed on the record not having been, under the circumstances, a valid verdict.

Anderson, for the appellant, cited *The Queen* v. *Vodden*, 23 L. J. Magistrates' cases, P. 7; *Blenkiron* v. *The Great Central Consumers' Company*, 2 F. & F. 437.

Adam Crooks, contra, referred to *Wilson* v. *Leonard*, 3 Beav. 377; Broom's Actions at Law, 226; *Outhwaite* v. *Hudson*, 7 Ex. 380.

DRAPER, C. J.—It seems by the statement of appeal that both defendants join in it, though a nonsuit has been ordered as to Donaldson, against which the plaintiff does not appeal, and though the reasons of appeal may be considered as applicable only to the case of Grindley.

Assuming the appeal to be on the part of Grindley alone, I think there is no weight in the first reason of appeal, for I agree with the learned judge of the county court that there was ample evidence to go to the jury to sustain the plaintiff's case against him.

There remains only the question of the verdict. The facts are set out in the report of the learned judge of what took place at the trial, and also in his judgment on the rule *nisi*. It was agreed between the parties that the jury should give a sealed verdict. A verdict was delivered sealed to the constable in charge, and the jury dispersed. They all appeared at the opening of the court on the following morning, and were called. "The sealed verdict being handed in was opened and read to the jury, and on being asked if that was their verdict, "verdict for plaintiff $120," it was confirmed by them, some one of them answering. The writing was signed by one of them as their foreman. The verdict was then recorded. On the verdict being read as recorded, one of the jurors said he had agreed to $100 only. The other jurors insisted that he had agreed to $120, and concurred in writing on the verdict. I directed the verdict to remain as recorded, the verdict being in fact so recorded by the jury through their foreman, in writing, and confirmed by them."

In *Regina* v. *Vodden*, 23 L. J., M. C. 7, one of the jury delivered a verdict of not guilty, which was entered by the clerk of the peace on his minutes, and also by the chairman of the quarter sessions on his note book. The prisoner who was indicted for felony was then discharged out of the dock, but others of the jury interfered and said the verdict was guilty. The prisoner was immediately brought back and the jury was again asked and said "guilty," and sentence was thereupon passed. The judges, on a case reserved, held that the original mistake was corrected within a reasonable time. *Pollock*, C. B., said, "I remember the clerk used to say, "gentlemen of the jury hearken to your verdict while" (as?) "the court records it, you say the prisoner is not guilty and that is the verdict of you all." Had this form been adopted it would no doubt have been competent to the jury when so called upon to have corrected the mistake." *Parke, B.*, also observed, "I infer from the case that the ancient form of calling on the jury to hearken to the verdict was abandoned, which is a great error."

In this case there was a sealed verdict, and the jury had separated upon the understanding that they had agreed, because without such understanding they were not at liberty to separate. If all,

instead of one, had signed the verdict, it would have prevented question as to the reality of an agreement in what was written, but even then, when they came into court next morning, they were not absolutely bound by the sealed verdict, which was not, in law, the verdict until confirmed in open court, and might consequently be changed by their unanimously giving some other verdict. Circumstances might arise, which would shew that a juror who consented to a sealed verdict, thereby enabling the jury to separate, and on coming the next day into court retracted his consent, was guilty of a gross contempt and might be treated accordingly, but that cannot alter the established rule that the sealed verdict must be confirmed in open court, as every public verdict must be delivered by the unanimous voice of the jury. I think therefore there has been a miscarriage in recording as the verdict of the jury the verdict of only eleven out of twelve. The noting of the verdict on the back of the record, is not, strictly speaking, the entering the verdict of record, though it is commonly so expressed. Such noting is merely a minute from which the *postea* is made up. The *postea*, added to the preceding entries on the *nisi prius* record, is the proper record of the court of *nisi prius* of the verdict, and is returned to the proper court to be duly entered on its rolls.

Probably the plaintiff will consent to waive the $20 in dispute and may be permitted to take judgment against Grindley for the residue, for I agree in the learned judge's view of the plaintiff's right to recover against him. If this is not done the appeal must be allowed, and the case go down to a second trial against both defendants, and this contingency renders it necessary to express our opinion as to the nonsuit granted to Donaldson, who has joined in the appeal.

The learned judge it appears acted upon the case of *Martins* v. *Upcher*, 6 Jur. 582, in which a notice of action was given to a justice of the peace for an act by him done in the execution of his office, but the place where the act was done was not stated. The court held that the notice was insufficient, and that the defect was not cured by a tender of amends. I can readily understand that, in doubt as to what the decision of the court might be on the sufficiency of the notice, a point which Lord Denman observed then came up for the first time, the magistrate might tender amends, in case the notice was held good, and there is no inconsistency in saying I believe the notice bad, but I tender you amends because I cannot maintain my act. If the plaintiff had accepted the £50 tendered the case would have been at an end. But as his tender was refused, the defendant had a right to resort back to any defence the law gave him, and the want of a sufficient notice was a defence given by statute. To make the plaintiff's argument good, he was driven, as Wightman, J., remarked, to "maintain that a tender of amends dispenses with notice altogether." The present case differs materially. *Quilibet potest renunciare juri pro se introducto.* The defendant Donaldson might have waived any notice and might therefore accept as sufficient and perfect the one served on him, and this he has done, for he does not confine himself to admitting that he had been served with a duplicate original, but he adds, "and agree to accept the same as a sufficient notice of action to me under the statute." To permit him, after this, to object to the sufficiency of the notice, would enable him to commit a fraud. He was not bound to point out defects, he might accept service simply, as service might be proved on him, and waive no right, but he cannot first waive any defect and then rely on a defect as a defence to the action.

Per Cur.—Appeal allowed.

CHANCERY.

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

ATTORNEY-GENERAL v. LAUDER.

Held, that the right of presentation to Rectories in the Diocese of Ontario, in Upper Canada, is vested in the Bishop, for the time being, during his incumbency of office.

(September 3, 1863.)

This was a bill filed by the Attorney-General for an injunction restraining the Rev. Dr. Lauder from exercising the functions of Rector of St. George's Church, in the city of Kingston.

Dr. Lauder had been appointed to the Rectory by the Bishop of Ontario assuming to exercise the right of presentation to Rectories within his diocese, under and pursuant to a by law in that behalf, of the Synod of the Diocese of Ontario.

To the bill a demurrer was filed for want of equity.

Two questions were presented for adjudication by the bill and demurrer. The first as to the right of the Bishop of Ontario to present to the Rectory while vacant. The second as to the right of the Attorney-General to call in question his act in so doing. Owing to the conclusion at which the learned Chancellor arrived, it became unnecessary to consider the second question.

Adam Crooks, Q. C., and *D. E. Blake*, for the Attorney General.

Hon. J. Hillyard Cameron, Q. C., and *S. H. Strong, Q. C.*, for the defendant.

VANKOUGHNET, Chancellor.

By the Act of the 31st Geo. III., ch. 31, power was given to erect certain Rectories, and under that power the Rectory of Kingston was constituted.

By sec. 39 of the same Act, His Majesty was empowered "To authorize the Governor to present to every such Rectory an incumbent or minister of the Church of England, and to supply, from time to time, such vacancies as might happen therein." And it was provided "That every person so presented to such Rectory should hold and enjoy the same, and all rights and profits and emoluments thereto belonging or granted, as fully and amply, and in the same manner, and on the same terms and conditions, and liable to the performance of the same duties, as the incumbent of a Rectory in England."

This right of presentation is, in England, familiarly known as an advowson, and is property. It is expressly recognised as such in terms in the 17th sec. of the Church Temporalities Act of 1841 of this Province. It is given in the books as the most apt illustration of an incorporeal hereditament. It may be conveyed by deed or devise, in whole or in part.

By the Act of the Provincial Legislature of 1852, this right of presentation was vested in, and was to be exercised by the Church Society of the Church of England in the Diocese within which the same was situate, or in such other person or persons, bodies politic or corporate, as such Church Society, by any by-law or by-laws to be by them, from time to time, passed for, that purpose should or might think fit to direct or appoint in that behalf.

The Rectory mentioned in this suit is situate within the Diocese of Ontario, which has been recently erected by letters patent from the Crown. There is no Society known as the Church Society within this Diocese. By the Act of 25 Vic., ch. 86, sec. 1, a body corporate is created under the name of "The Incorporated Synod of the Diocese of Ontario," and "is to have and is invested with the like corporate rights, powers, patronage and privileges, as by any Act or Acts of the Parliament of this Province are conferred on any Church Society incorporated in any Diocese of the United Church of England and Ireland in this Province." And to the said corporation, and the members thereof, the several clauses and provisions of the said Acts are to apply, so far as they are not inconsistent with the Act now in recital. Had a Church Society been erected in the Diocese of Ontario instead of the Incorporated Synod, it was admitted on the argument that the right of presentation would have been in that Society. The words which give to the Synod certain rights, and which I have quoted, are not very happily chosen, and are somewhat open to the criticism to which they have been subjected on the argument of this case. They are not that the Synod shall have all the power that a Church Society would have, and shall stand in the place of such Church Society, or shall have and exercise within the Diocese of Ontario the rights, &c., formerly exercised within the limits thereof by the Church Society of the Diocese of Toronto, but they are that they shall exercise the like powers of any Church Society. What the Legislature meant is obvious enough. They never could have intended that the Church Society of the Diocese of Toronto, within its abridged limits, should continue to exercise jurisdiction in the Diocese of Ontario, and they intended to transfer those powers to the incorporated Synod.

The question is, whether the words used will affect this intent? The first consideration that presents itself to one's mind is, does the Church Society of Toronto shrink with the limits of that Diocese as they may be fixed from time to time? There is nothing in any Act of Parliament that I can find to say so. But the Act of 22nd Vic., ch. 65, incorporating a Church Society for the Dio-

cese of Huron, seems to assume this, and must it not necessarily be the case? The Church Society of the old Diocese of Toronto had no territorial limits assigned to it, it was merely the Church Society of the Diocese. Must it not take up its abode within that Diocese wherever it from time to time lies? Must it not shrink or expand with it? Can it exist out of the Diocese and exercise jurisdiction out of it? I think not though it may, undoubtedly, hold property out of it, and right of presentation is property. Then if it cannot exercise jurisdiction out of the Diocese of Toronto, and is confined within it, it is not the Church Society of the Diocese of Ontario; and if it be not the Church Society of that Diocese, then there is no Church Society there to exercise any rights or powers as such. If so, the difficulty vanishes, for, when there is no Church Society in or possessing any power in the Diocese, then the right of presentation cannot, of course, be exercised by a Church Society, and therefore the giving to any body corporate or otherwise within the Diocese of Ontario, "the like corporate rights, powers, *patronage* and privileges" conferred on any Church Society can have full effect, and would convey the right of presentation, which is in the strictest sense of the term "*patronage*," and even if these were insufficient, the extension to the Synod "of the several clauses and provisions" of the Acts relating to the Church Society, would convey all the rights and powers which these Societies had. To illustrate what I mean—if illustration be necessary—were certain powers given to the city of Hamilton (which, of course, has no jurisdiction in the city of Toronto) to exercise rights in regard to taxation, or harbour improvements, an Act giving the "like" powers to the city of Toronto would plainly confer the same and the exclusive rights upon that city. But independently of this process of reasoning, I think looking at what seems to me the plain intent and meaning of the Legislature, I ought rather to hold, however doubtful the language employed, that the right of presentation passed to the Synod of Ontario. Even if it could be maintained that the Church Society of the Diocese of Toronto still held the powers and rights which they formerly possessed within the limits of the Diocese of Ontario, yet the Synod of that Diocese is invested with the "like" rights and powers; and having exercised them, I take it the Rectory must be treated as full, and that there is, therefore, no room for the action of the other body.

Difficulties, however, of another kind than those presented here may arise under these various enactments. The Crown is, by statute, deprived of the power of presenting. Suppose no Church Society existed in any new Diocese which may be erected, or no body specially authorised by the legislature to exercise the patronage. Where does it lie? Supposing, as may have happened in this case, that the Church Society, for the time being, exercised the power given to it, and lodged the right of presentation for life in the Bishop of Toronto within whose Diocese Kingston then was? Would he or not still retain the patronage, the Society having, at the time it conferred it the right to dispose of it? These difficulties may require legislative interposition to remove them; but they lead me to the consideration of the by-law under which the Bishop of Ontario has claimed to act. This by-law vests in him the patronage of all rectories during his life or incumbency. I suppose it meant his life *and* incumbency. I have had some doubts whether the legislature intended that the Church Society, or corresponding body, should make such an exclusive disposition of this right. But, on reflection, I do not find anything to limit their exercise of it either in the language of the Act or in the consideration of the public policy which led to it. We have only to read the Act to see that the legislature intended to sever all connection between the Crown, or the Government as representing the public generally, and the Church of England, and to leave to the latter the exclusive management of its own affairs of every description. The Crown surrenders all interference in them and the legislature, and practically says this—the connection between you and the Crown as representing the general public, has been inconvenient and impolitic. We get rid of it. We do not interfere with any rights you have, but we give you the exclusive use of them. We have, or rather the Crown, subject to our right to interfere with and dispose of them, has the patronage of presentation to livings. We think it no longer expedient that the Crown should use it. And we are indifferent how you use it, but to enable you to do so in the manner most acceptable to your community, we place it in the possession of the body recognised by law as your representative and under your control. That body may do with it as it pleases, and we have no further concern in the matter. And it may deal with it by by-law, the usual mode of declaring the corporation will and act.

Taking this view of the statute and treating the right of presentation as a right of property, it seems to me that, however unwise or inexpedient such an exercise of it as has been made in the present case may be, the legislature has given to the corporation the power unconditionally of disposing of the patronage, and that I must, therefore, treat the by-law in that behalf as valid. I do not think it can be repealed, as I think it vests the property, the advowson, in the Bishop for, at least, the period of his incumbency of office.

Demurrer allowed.

CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

THOMPSON v. CRAWFORD ET AL., EXECUTORS OF LUNDY.

Certificate for full costs—Grounds therefor.

In an action brought on a lease alleged to contain a covenant on the part of the lessor, of which a breach was alleged and damages claimed in respect of the breach, and it was a difficult question of law to determine whether or not the lease contained such a covenant as alleged, although the jury found $140 damages only for plaintiff, the judge who presided at the trial, in the exercise of the discretion given him by C.m. Stat. U.C., cap 22, s. 328, certified that the cause was a fit one to be withdrawn from the County Court and tried in the Court of Common Pleas. [Chambers, March 14, 1863.]

This was an action of covenant, for the recovery of unliquidated damages.

The declaration stated that Francis Lundy, in his life time, by deed dated 3rd April, 1862, demised to the plaintiff lot number 10 in 4th concession east of Hurontario Street, in the township of Chinguacousy, to hold for the term of twelve years from 1st April, 1863, at the annual rental of $700; and that in and by the deed of demise the lessor covenanted with plaintiff that, notwithstanding anything to the contrary, plaintiff should be at liberty to take possession of the demised premises (excepting 30 acres thereof) on 20th October, 1862. Averment that lessor died before 20th October, 1862; that plaintiff, on that day and ever since, had been ready to take possession; and that although defendants, as executors, were requested to cause plaintiff to be allowed to take possession, yet plaintiff was not permitted on or since 20th October, 1862, to take possession, but, on the contrary thereof, the widow of lessor claiming a right to dower was in possession and refused to give plaintiff possession, and he was wholly unable to obtain it.

Defendants pleaded that, notwithstanding anything in the deed to the contrary contained, plaintiff was at liberty to take possession of the demised premises, except said 30 acres, on 20th October, 1862.

The cause was tried at the last January Assizes for the United Counties of York and Peel, before Richards, J.

The plaintiff put in the lease declared upon. It was made in pursuance of the act to facilitate the leasing of lands and tenements. The following covenant was contained therein on the part of the lessor. "The said lessor covenants with the said lessee for quiet enjoyment. And it is hereby agreed between the parties hereto, that the said James Thompson (notwithstanding any thing heretofore to the contrary) shall be at liberty to take possession of the said premises and every part thereof (except thirty acres for crop this fall, reserved to the use of the said lessor), on the 20th day of October next."

It was proved, on the part of plaintiff, that Francis Lundy, the lessor, died in July, 1862, leaving his wife and several children surviving him; that on 20th October, 1862, the plaintiff went to the premises and found Lundy's widow in possession; that he demanded possession of her; that she, insisting on her right to dower, refused; that plaintiff said he would have all or none; that having previously made a verbal request, he served a written notice on defendants on 23rd October, demanding immediate possession of the land and premises demised, except as in the lease excepted, and stating that if possession were not delivered to him within two days after service of the notice, he should deem it a refusal and would proceed at law to recover damages.

Defendants objected that there was no covenant proved such as declared upon; and if there were, that no breach of it was shown, so as to render defendants liable in the action.

The learned Judge thought the objections to plaintiff's recovery well founded, and directed a nonsuit, with leave to plaintiff to move to enter a verdict in his favor, for such sum as the jury might find the plaintiff entitled to recover for not being let into possession on 20th October, 1862.

The jury found $140 for plaintiff.

Plaintiff's counsel made application for a certificate for full costs in the event of his rule to enter verdict for plaintiff for $140 being made absolute, contending that he was entitled to it because of the difficult questions of law which arose in the case.

The learned Judge noted the application.

Afterwards, in Hilary Term last, a rule *nisi* obtained on the part of plaintiff, calling upon defendants to show cause why the nonsuit should not be set aside, and a verdict entered for plaintiff for $140, pursuant to leave reserved, was made absolute.

Robert A. Harrison thereupon renewed his application for a certificate for full costs, citing *Paterson* v. *Snook*, 8 U. C. L. J. 109.

C. McMichael showed cause.

RICHARDS, J.—In this case a verdict for $140 has been found for plaintiff. Mr. Harrison applies for a certificate that the cause is a fit one to be withdrawn from the County Court and brought into the Court of Common Pleas. He rests his application upon the ground that the cause involved difficult questions of law, and so is a fit one to be withdrawn from the County Court. He argues that the questions of law raised were difficult, because, in the first instance, I decided against him, and my decision has been reversed by the Court of Common Pleas. I think he is entitled to the certificate, and shall therefore grant it.

Certificate accordingly.

JOHNSON v. MORLEY, et al, executors of WILLIAM CLOUGHLY, deceased.

Costs—Recovery without a trial—Rule Trinity Term, 24 Victoria—Con. Stat. U. C, cap. 22, sec. 328.

Semble, that the Rule of Trinity Term, 24 Vic., which provides that "In any action of the proper competence of the County or Division Courts respectively, in which final judgment shall be obtained for a plaintiff without a trial, or in which plaintiff shall obtain execution on proceedings, in the nature of a final judgment, no more than County or Division Courts, as the case may be, shall be taxed without a special order of the Court or a Judge, &c.," applies in the case of a cause referred to arbitration by compulsory reference to the whole costs in the action, including the costs of the reference and of the award, and proceedings subsequent thereto, and is not restricted to what may strictly be called the costs of the action.

Held, that under any circumstances, such is the proper construction of the order of reference in this cause, by which "the cause and all matters in dispute therein were referred to arbitration, with power to the abitrator to certify for costs, in the same manner as a judge at Nisi Prius, and that the costs of the cause, award, order and reference, subject to such certificate, should abide the event."

Held, also, that where plaintiff, *without a trial*, recovers, in a Superior Court, an amount within the pecuniary jurisdiction of an inferior tribunal, defendant is not entitled to set off as against the costs of plaintiff, so much of defendant's costs taxed, as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the inferior tribunal, had the action been brought in that tribunal—the 328th section of C. L. P. Act not being applicable to such a case.

(Chambers, August 4, 1863.)

The defendants obtained a summons calling on the plaintiff to shew cause,—

1. Why the Master should not revise his taxation, and tax the plaintiff's bill of costs on the Division Court scale.

2. Why he should not allow to the defendants Superior Court costs of the cause, order of reference and award.

3. And why the plaintiff should not pay the costs of the application, or otherwise, as the Judge might direct.

The affidavits and papers filed, and upon which this summons was drawn up, shewed:

1. That an action was commenced against defendants, on the common counts, for wages, for work, for money lent, and on an account stated, the particulars of demand showing claims amounting to $632.

2. That by a Judge's order of reference, dated the 20th December, 1859, the cause and all matters in dispute therein were referred to arbitration, with power to the arbitrator to certify for costs in the same manner as a Judge at Nisi Prius; and that the costs of the cause, award, order and reference, subject to said certificate, should abide the event.

3. That in January, 1860, an award was made in the plaintiff's favour for £20, but no certificate was granted as to costs.

4. That the Master did, on the 29th of July, 1863, tax the plaintiff's costs at £20 10*s.* 7*d.*, allowing the plaintiff Superior Court costs of the reference order and award, and allowing to her costs on the Division Court scale in the cause, down to the time of the reference.

5. That the Master allowed the defendants their costs in the cause only down to the time of the reference, and did not allow to them any costs of the reference.

The copies of the bills of costs were filed with the papers.

Harman, in shewing cause, objected to the summons; that it did not shew upon what ground a revision was claimed; and that the items objected to or claimed should have been stated; and he cited *Alven* v. *Furnival*, 2 Dowl., P. C. 49, and *Daniel* v. *Bishop*, McClel., Rep. 61. And also, because it did not appear that the taxation was final, or that the master had made his allocatur, citing *Clearer* v. *Hargrave*, 2 Dowl., P. C. 689. He mentioned that the rule under which the present taxation was had is the Rule of Trinity Term, 24 Vic. [1860]. He referred to 20 U.C. Q.B., 123, rescinding the former Rule No. 155, in Har. C. L. P. Act 661, and substituting the following in its stead:—"In any action of the proper competence of the County or Division Courts respectively, in which final judgment shall be obtained by a plaintiff without a trial; or in which a plaintiff shall obtain execution on proceedings in the nature of a final judgment; no more than County or Division Court costs, as the case may be, shall be taxed without the special order of the Court or a Judge, but this rule shall not extend to costs in interlocutory proceedings," and contended that the Master had acted rightly in taxing the costs of the cause at the lower scale, and in allowing the plaintiff the full costs at the Superior Court scale, of all the proceedings before the arbitrator, because none but the costs of the cause were within the operation of the rule. He argued that it had been so decided by Mr. Justice Burns in *Fleurynck* v. *Clifton*, according to a note of his judgment in the taxing officers book.* He also referred to the following English decisions:—*Holland* v. *Vincent*, 23 L. J. Exch., 78, S. C. 9, Ex. 274. *Nicholson* v. *Sykes*, 23 L. J. Exch., 193, S. C. 9, Ex. 357.

Magrath, in support of the summons, contended that it did sufficiently appear that the Master had taxed the costs in the cause, and also what the objections were to the taxation. That the costs of the cause include the costs of the reference, referring to *Deer* v. *Kirkhouse*, 20 Law J., Q. B. 195. *MacIntosh* v. *Blyth*, 1 Bing., 269. And whether or not it was unreasonable that in a case within the inferior jurisdiction, where inferior costs only are to be recovered, that the bulk of the costs should be allowed at the Superior Court scale.

ADAM WILSON, J.—The first question is, whether the case has been brought right in form before me; and the next is, whether the Master has determined rightly the mode of taxation.

I am not inclined to reject the application because of the alleged insufficiency of the materials, although the case would certainly have been more complete if the summons had stated the reason why the taxation was complained of, or why a revision should be had, instead of merely stating the facts, and leaving the inferences to be drawn from them.

I think it appears that the Master has taxed the costs sought to be revised. It is so expressly sworn, but a difficulty here presents itself from the wording of the rule, which provides that "in any action of the proper competence of the Division Court, on which the plaintiff shall obtain execution on proceedings, in the nature of a final judgment no more than Division Court costs shall be taxed, &c."

Now, it does not appear that the plaintiff either has obtained, or is desirous of obtaining, execution, although the proceedings may be in the nature of a final judgment, and, no doubt, are so. He may, in strictness, proceed by action, which, although answering the purposes of an execution, is not execution. But as it is not advisable to raise any question upon this at present, I will assume that the taxation is for the purpose of obtaining an execution, and that an execution is the only process which can issue for the recovery of the money.

The reference in this case is under the 158 sec. of the C. L. P. Act, upon which judgment can be entered in the usual manner. Before

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* See 9 U. C. L. J. 211.

the passing of this Act no such judgment could be entered unless a verdict had been taken. And, therefore, before this Act—if without a verdict the cause was referred—*the plaintiff was entitled to* the full costs of the suit, and of the reference, in case of an award in his favour, however small the sum awarded might be, because there were no restrictions upon his right to full costs—the statute applying to cases where a trial had been had—and the Rule of Court to cases where final judgment was entered,—and neither of such provisions extending to such a case as that which I have mentioned. But, as under the amended law, final judgment may now be given upon an award made in a cause without a trial; and as such a case is brought directly within the operation of the Rule of Court above-mentioned, the only question is, whether the rule does apply only to the costs of the action proper, so as still to leave the costs of the reference and award beyond its operation; or whether it does not include all the costs taxable in the action, however these costs may have been incurred.

The case of *Deer* v. *Kirkhouse*, 20 L. J., Q. B. 195, shows, that where a verdict is taken, subject to a reference of the action to an arbitrator, who is to certify, for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the action.

Holland v. *Vincent*, 23 Law J., Exch. 78, better reported in 9 Exch. 273, shows that the costs of a reference to arbitration are not within the directions to the Masters of the Courts of Hilary Term, 16 Vic., so as to enable them to tax the costs of the reference on the lower scale, when the award is for less than £20. It is to be observed that in this case the costs of the cause were to abide the event; and the costs of the reference and award were to be in the discretion of the arbitrator.

Nicholson v. *Sykes*, 23 L. J., Exch. 193, maintains the preceding case.

The directions referred to are in terms not unlike our rule—that is, the particular direction like our rule, applies to all actions—but the directions are accompanied with schedules of costs, which, by the items are only applicable to actions and proceedings in actions. Our rule has no such restrictive accompaniment, and, no doubt, this is the reason why the Court of Exchequer determined that the directions "do not apply to the costs of reference, but only to the costs of a cause."

The case of *Deer* v. *Kirkhouse* does, excepting in the point of a verdict, expressly apply to this case—for here as there "costs of the cause (award order) and reference" (subject to such certificate) are to abide the event. And I do not think that the verdict makes any substantial difference between the two cases. In each case there is a cause in court, upon which, in each case, a judgment may be entered. The verdict being taken, it is true, makes the award a merely auxiliary proceeding to make that absolute which was before inchoate—the verdict, all the time, being the proceeding which is to be acted upon—but that cannot be held to be the only reason why the costs of the reference are to be considered as costs of the cause. It is more likely that it is the fact of the costs of the reference equally with the costs of the cause, being made to abide the same event of the action which places them on the same footing as to the scale of taxation. In *Tregonings* v. *Attenborough*, 7 Bing. 733, there was a verdict, and the costs of the reference were held to be costs of the cause. In *Taylor* v. *Gordon*, 9 Bing. 570, there were also a verdict, but the costs of the reference were held not to be costs in the cause, because an inquiry, quite independent of the question at issue in the cause, was opened before the arbitrator. It is not, therefore, the verdict which makes the difference. In this case, as in *Deer* v. *Kirkhouse*, the costs of the reference are with the costs in the cause, to abide the event; and it appears to me that if the costs of the cause proper are to be taxed upon the lower scale, all the costs of the cause, including the reference, should be taxed upon the same scale.

I see nothing in the rule to exclude the costs of a reference as part of the proceedings in an action, and to place them on one footing, while the costs of the action proper are placed upon another. And I know of nothing to prevent the Court from regulating the costs of a reference precisely as it may regulate the costs of proceedings carried on by or before itself. References, too, (by consent) are proceedings well known to, and recognised by law as relating to actions pending in the County and Division Courts, with respect to which there are, no doubt, some recognised items of charges adopted to these courts. But, whether this is so or not, can be no *reason for giving the higher costs upon any such proceedings*, if the rule, as I think it does apply to the whole costs in the action, and not only to what may strictly be called the costs of the action.

But, besides this, I am of opinion the order of reference does of itself conclude this question, for it manifestly treats the whole of these costs as costs in the cause, and as subject to the certificate of the arbitrator in like manner as they are made subject to the general event of the cause.

If I were deciding only on the rule of court, I should not interfere with the discretion which the Master has exercised, acting as he has done, upon the opinion of the late Mr. Justice Burns, and upon decisions which do seem at first to warrant his views; but have referred the defendants to the full court to settle what the general practice should be; but as I am construing the order of reference rather than the rule, I think I ought, in this respect, to act upon my own opinion: and, therefore, I shall order the Master to revise his taxation, and to allow the plaintiff throughout the general costs (whether strictly in the cause or not) according to the lower scale; and to disallow to the defendants their whole costs in the cause proper which he has taxed to them, and not to allow to them any part of the costs of the reference, because, as this is a taxation under the rule, and not under the statute, there can be no set-off in favour of the defendants.

This is the course which I think should be adopted, according to the best judgment which I can form.

I give no costs upon this application.

Order accordingly.

SHANLEY (Judgment Creditor), MOORE (Judgment Debtor), CORPORATION OF CITY OF LONDON (Garnishees).

C. L. P. Act, s. 238—Garnishee proceedin. —Debt due or accruing due—Salary of a physician to a municipal corporation.

A salary payable to the physician of a municipal corporation, who holds his appointment at the will of the municipal corporation, at an annual salary of $400, payable quarterly, is neither a debt due nor accruing due within the meaning of the Common Law Procedure Act, and therefore cannot be attached at the instance of a creditor having an unsatisfied judgment against the physician. [Chambers, August 20, 1863.]

Hector Cameron applied for an order on the summons which he had obtained in this cause, requiring the garnishees to pay over to the judgment creditor.

It appeared by the affidavits filed, that the judgment debtor is the physician for the garnishees, under a by-law appointing him to that office, and that he held such office for many years past, being yearly appointed to it by the Council, in the month of January of each year. That he is allowed a salary of $400 per annum, which is payable in four equal payments, on the first days of January, April, July and October, in each year.

It was urged against the application that as the judgment debtor held his office only during the pleasure of the garnishees, there is that want of permanency in the office which would give the judgment creditor any claim upon the salary of the judgment debtor.

It was also urged against the application, that there was a prior order upon the garnishees to pay another judgment creditor of the present judgment debtor, which had been made by the late Mr. Justice Burns, under which there was still about $300 remaining due to that creditor, and that no other sum would fall due to the judgment debtor, payable by the garnishees, during the present year of office.

Cameron replied, showing by affidavit that the judgment creditor in the other case referred to had received from the garnishees, on account of the order to pay, more than enough to satisfy his whole claim; but that he had voluntarily returned to the judgment debtor about $400, or at all events a larger sum than was yet claimed to be due to that creditor, and therefore he could not claim the further benefit of that order, otherwise it might be maintained as a perpetual bar to every other creditor, and as a fraudulent protection to the judgment debtor.

ADAM WILSON, J.—Our Common Law Procedure Act authorises a judgment creditor, upon making affidavit, among other things, that some third person is indebted to the judgment debtor, to apply to a judge for an order that all debts owing by or accru-

ing from such third person to the judgment debtor shall be attached to answer the *judgment (s. 288)*, and this is precisely the language of the English Common Law Procedure Act (17 & 18 Vic. cap. 125, s. 61).

Under the act, not only debts which are due, but accruing due, or for which the day of payment has not arrived, may be attached; for both are equally debts, the latter being *debitum in presenti*, though *solvendum in futuro*.

A claim which is not yet reduced to a debt (as unliquidated damages) is therefore not attachable, even after verdict but before judgment. (*Jones* v. *Thompson*, El. Bl. & El. 63.)

A superannuation allowance from the East India Company, made in favour of a clerk by a resolution of the company, and not by deed, is not such a debt as can be sued for by the clerk, and therefore it is not attachable; it is said to be a mere gratuity, and not a debt. (*Jones* v. *the East India Company*, 17 C.B. 351.)

In the present case, it is desired to attach a claim which it is said the defendant has upon the city of London, as city physician, for services not yet performed. I cannot see how this is a debt. It is not like the case of money then being *debitum in presenti*—money engaged to be paid on a day yet to come—as money due on a bond, bill or note, or for goods sold or work performed; in all these cases there is the *debitum in presenti*. But how can this be said of salary or wages not yet earned, although they are being earned under an express contract? They are not yet debts, and may never become so. I do not think the object of the Legislature was to levy upon future work or service, by seizing in anticipation and contingency the consideration engaged to be paid for them. What is there to prevent the judgment debtor from releasing, or from being released, by the person with whom he has contracted, from such further or future service? Can it be said that, when such future service is attached, the judgment debtor is bound to go on and perform such service; and that the person with whom he has contracted is bound to keep him in his employment? What, if the judgment debtor will not fulfil his contract? What, if he dies? And what, if the other party will not fulfil his contract, or dies? These considerations, I think, show very clearly that claims of this kind are not of a nature to be attached as debts, and were never intended to have been so by the Legislature.

I must therefore decline to make any order with respect to any allowance or salary dependent upon services not yet performed, and which for aught any of us can tell may never be performed, not only by reason of death or other inevitable occurrence, but by the wilful breach of the agreement by either of the parties, or even by the express and determinate act of the parties to defeat the payment of this claim.

If an order may be granted to attach a salary or wages not yet earned, the next thing will be to claim an order for fees of office not yet accrued, or the amount of a wager not yet determined, or perhaps to attach indefinitely every claim whatever which a party may become entitled to at any period during his lifetime, until the debt is paid. Now although future rights of debtors are operated upon by some statutes, such as the Bankruptcy Acts, it is certainly under very different words from the mere authority to attach debts, which is the language of and the only purpose of this act.

I discharge this summons, but without costs.

Summons discharged without costs.

Nelson v. Roy.

Com. Stat. U. C., cap. 22, s. 5—Teste of Ca. Sa.—Amendment.

Held, 1. That a writ of *ca. sa.* tested in the name of a retired Chief Justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office, should be tested in the name of his successor.

2. That a writ tested in the name of the retired Chief Justice is an irregularity only.

3. That it may be amended upon payment of costs.

[Chambers, Sept. 4, 1863.]

On 25th July last, Draper, C. J., was gazetted Chief Justice of Upper Canada, in the room and stead of McLean, C. J., resigned.

On the same day, the Honorable Archibald McLean was gazetted President of the Court of Error and Appeal, in the room and stead of the Honorable Sir John B. Robinson, Bart., deceased.

On 10th August last, plaintiff caused defendant to be arrested under a writ of *ca. sa.* sued out of the Court of Queen's Bench, directed to the Sheriff of the county of Lincoln, and tested as follows: "Witness the Honorable Archibald McLean, at Toronto, the tenth day of August, in the year of our Lord one thousand eight hundred and sixty-three."

Defendant was on 14th August last arrested under the writ, and is now a prisoner thereunder in close custody in the common gaol of the county of Lincoln.

Draper, C. J., though gazetted as Chief Justice of Upper Canada before the issue of the *ca. sa.*, was not sworn in till afterwards.

Defendant thereupon obtained a summons, calling on plaintiff to shew cause why the writ of *ca sa.* and the arrest of the defendant thereunder should not be set aside for irregularity, with costs, on the ground that the writ was tested in the name of the Honorable Archibald McLean, instead of in the name of the Honorable William Henry Draper, C. B., Chief Justice of the Court at the time the writ issued, and why defendant should not be discharged from the close custody in which he is now held under said writ by the Sheriff of the county of Lincoln, and on grounds disclosed in affidavits and papers filed.

The only affidavit filed was that of the attorney for defendant, wherein it was sworn that defendant was a prisoner in close custody by virtue of the *ca. sa.*, a true copy of which was annexed; that under said writ defendant was arrested on 14th August inst., and that the Honorable Archibald McLean was not, on the day said writ of *ca. sa.* issued, the Chief Justice of the Court of Queen's Bench, or the senior Puisne Judge of the said court.

Robert A. Harrison shewed cause. He argued—1. That McLean, C. J., was *de facto* the Chief Justice of the Court of Queen's Bench till his successor, Draper, C. J., took the necessary oaths of office, and so accepted office. 2. That even if not so, the mistake was an irregularity only and ought to be amended. 3. That as the mistake was that of an officer of the court, and not of plaintiff or his attorney, the amendment should be allowed without costs. He cited Con. Stat. U. C., cap. 22, ss. 5, 222; *Keefer* v. *Hanley*, 1 U. C. Pr. 1; *Thorpe* v. *Woalf*, 1 Dowl. P. C. 501; *Ainall* v. *Weatherley*, 3 Dowl. P.C. 464; *Billings* v. *Rapeljie*, 2 U.C. Prac R. 191; *Ball* v. *King*, 8 U. C. C. P. 474; *Meyers* v. *Rathburn*, Toy. U. C. R. 127; *Wilson* v. *Story*, 3 U.C.L.J. 50; *Plock* v. *Pachicho*, 9 M. & W. 342; *Fisher* v. *Brooks*, 3 U.C O.S. 143; *Andrews* v. *Page*, Tay. U.C.R. 478.

W. Atkinson supported the summons. He argued—1. That McLean, C. J., could not be deemed Chief Justice of the Court of Queen's Bench after 25th July, for on that day, as "a retired judge," and only as such he was appointed President of the Court of Error and Appeal. 2. That after 25th July, and until Draper, C. J., accepted office, there was no Chief Justice of the Court of Queen's Bench, and so there could not during that interval be any writs of *ca. sa.* 3. That the writ was a nullity, and so could not be amended. 4. That Con. Stat. U. C. cap. 22, s. 222, did not under any circumstances authorize amendments of final process. He cited Con. Stat. U. C. cap. 10, s. 8; cap. 13, s. 3; 1 Chitty's Prac. 11 Edn. p. 761, 765; 2 Ib. p. 1544; *Street* v. *Carter*, 2 Dowl. P.C. 671; *Hodgkinson* v. *Hodgkinson*, ib. 535; *Henderson* v. *Perry*, 3 U.C.Q.B. 252.

Morrison, J., having consulted Draper, C. J., said he was of opinion that the *ca. sa.* ought to have been tested in the name of Draper, C. J., but that the omission to do so was an irregularity only, and he would therefore allow the writ to be amended. He said he thought it ought to be amended on the usual terms of payment of costs.

Order accordingly.

In the matter of Smith & Henderson, two, &c.

Taxation of costs—Allocatur—Acceptance of money thereunder—Too late afterwards to apply for revision.

Where on 27th June the Master, to whom certain bills of costs had been referred, certified that there was a sum of £30 10s. due by the attorneys to their clients, which sum the clients on 4th July received from the attorneys, under and pursuant to the Master's allocatur, a summons, obtained on 26th August, for a revision of taxation, upon the ground that certain retainers had been improperly allowed by the Master on taxation, was discharged.

[Chambers, Sept. 7, 1863.]

On 2nd March last, Messrs. Smith & Henderson, attorneys, rendered to W. B. Harrison and his sister Caroline Harrison four bills of costs, in all amounting to £110 0s. 8d., giving credit for £30, showing a balance of £80 0s. 8d.

On 13th May last, W. B. Harrison and his sister obtained from a Judge in Chambers the usual order, referring the bills to the Master for taxation, and directing that if upon such reference the Master should find that the said Smith & Henderson have been overpaid, then that they should forthwith refund to the said W. B. Harrison and Caroline his sister the excess, upon the certificate of the Master of the amount thereof.

On 27th June last, the Master, having taxed the bills, certified that he allowed the same at £88 5s. 9d.; that he had taxed the costs of the reference against Smith & Henderson at £18 16s. 3d.; that Smith & Henderson had in their hands moneys of W. B. Harrison and his sister, £110; making in all, £128 16s. 3d.; leaving a balance in favor of Smith & Henderson of £30 10s. 6d.

On 7th July last, the attorney for W. B. Harrison and sister demanded from Smith & Henderson the sum of £30 10s. 6d., found due by them under the Master's certificate, which sum Smith & Henderson at once paid as demanded.

On 26th August last, the attorney for W. B. Harrison and sister, alleging that the Master had improperly allowed, in taxation of the bills, certain sums of money amounting to £15 10s. as retainers to Messrs. Smith & Henderson, obtained a summons calling upon the latter attorneys to shew cause why the taxation should not be reviewed, and why, on the review, the retainers should not be disallowed.

Robert A. Harrison shewed cause, and objected that W. B. Harrison and sister, having acted upon the Master's allocatur by accepting £30 10s. 6d. from Messrs. Smith & Henderson thereunder, were too late afterwards to make application for a revision of taxation. He referred to *Simmons* v. *King*, 2 D. & L. 786; *Pearce* v. *Chaplin*, 9 Q. B. 802; *Tinklar* v. *Helder*, 4 Ex. 187; *Truman* v. *Harris*, 2 B. & C. 801.

M. R. Vankoughnet supported the summons.

MORRISON, J.—I think the objection must prevail, and therefore discharge the summons.

Summons discharged.

COUNTY COURTS.

In the County Court of the United Counties of Leeds and Grenville, before GEORGE MALLOCH, Esq., County Judge.

WILKINSON v. KCKEE, WILKINSON v. HEALY, AND HERRICK v. JOHNSON.

Pleading—Verifying plea to jurisdiction by affidavit—Stat. 4 Anne, Cap. 16, Sec. 11.

These actions were brought against three tavern keepers, under the provisions of the Election Act.

The plaintiff in each case claimed $200, being $100 for keeping open tavern during the polling days in the town of Brockville, during the election of 1863, and $100 for selling liquor during those days.

The declarations contained nine counts:—

1st. Keeping open tavern on 26th and 27th June, 1863.

2nd. Selling spirituous liquors on 26th June.

3rd. Selling fermented liquors on 26th June.

4th. Giving spirituous liquors on 26th June.

5th. Giving fermented liquors on 26th June.

6th, 7th, 8th, and 9th, For committing the same offences on the 27th June respectively.

Claim at end of declaration, $200.

The defendant in each case pleaded to the jurisdiction, having a formal commencement and conclusion, and filed and served plea within four days after declaration served.

The plea was not in either case verified by affidavit, in compliance with the Statute, 4 Anne, cap. 16, sec. 11.

The plaintiff's attorneys waited till the expiration of the regular time for pleading in bar, and then, treating each plea as a nullity, signed judgment in each case as for want of a plea.

The defendants took out a summons in each case, to set aside the judgment with costs.

Herbert McDonald shewed cause, and cited *Lovell* v. *Walker*, 9 M. & W. 298; *Foxwist et al* v. *Tremaine*, 3 Wm. Saunders 210 (notes); *Rex* v. *Grainger*, 3 Burrowes 1,617, 6 Modern Report 146; Bacon's Abridgment, vol. 2, page 397, ("Courts") vol. 6, page 235 ("pleas"); 3 Blackstone's com. 301, (note) 2nd ed.; Bullen and Leak, pre. in pleading 534, (note) 11th ed.; Chitty's Arch. Prac. 900, 902, &c.; Saunders on Pleading, vol 1, page 4 and 5; 3 Chitty on Pleading, 894; and Stephen's Pleading, 43; as well as Stat. 4 Anne, cap. 16, s. 11.

R. F. Steele, contra, (with him *Sherwood*, Q. C.) cited *Onslow* v. *Booth*, 2 Strange 705; *Hughes* v. *Alvarez*, 2 Ld. Raymond 1,409; *Gray* v. *Sidneff*, 3 B. & P., 397.

MALLOCH, Co. J., decided that as the plea in each case, contained only matter of law, the defendant could not in either of the cases verify its truth. He therefore set the judgments aside, but as the point was a new one, only allowed the defendants the costs of the application, in case they eventually succeeded in their defence as to jurisdiction.

In the County Court of the United Counties of Leeds and Grenville, before GEORGE MALLOCH, Esq., County Judge.

FRANCIS v. BEACH, ADMINISTRATOR.

About 3 P. M. on Saturday, 22nd of August, 1863, last day for Service for C. C. plaintiff's attorney wished to serve declaration on defendants attorney. The office door being locked he threw it and notice to plead through an open window *Held*, to be no service till it reached attorney's hands. Day of month and year of judgment must be entered of record in judgment roll, in body of roll.

A clerk in the office of the plaintiff's attorney went about 3 P.M. on Saturday, to serve a declaration and notice to plead on the defendant's attorney. The office was locked up, whereupon he threw it through the office window. Defendant's attorney subsequently found it there, and accepted service of it as served on Monday. But on the following Monday the plaintiff's attorney signed judgment by default for want of a plea.

E. J. Senkler, jun., obtained a summons to set aside the judgment with costs, on the ground of irregularity. His summons set out seven or eight grounds, but of these only two were argued.

1st. The throwing papers through the office window no service.

2nd. That the only entry in the judgment roll of the date of the judgment, was the marginal statement signed by the clerk and therefore the rule of court requiring the day of the month and year of every judgment to be entered of record, was not complied with.

Steele shewed cause.

Senkler supported his summons.

MALLOCH, Co. J.—Set aside the judgment with costs, as being irregular—service only counted from Monday.

QUARTER SESSIONS.

In the matter of appeal between SWITZER and McKEE.

Conviction for assault—Summary jurisdiction—When to be executed—How apparent.

Held, 1. That at common law magistrates have no summary jurisdiction to try complaints for assaults.

2nd. That the jurisdiction is derived solely from Con. Stat. of Canada, cap. 91, and can only be exercised where prayed under that statute.

3rd. That the prayer for summary jurisdiction should appear on the face of the conviction.

Quære.—Must it appear on the face of the information?

September 15, 1863.

Mary McKee, on 1st June last, laid information before George Graham, Esquire, a Justice of the Peace for the United Counties of York and Peel, charging that James Thomas Switzer did, on Friday, 29th May last, commit an assault upon complainant, by striking her on the head, shoulders, and sides, without any provocation on the part of complainant.

The Justice, on 11th August last, made a conviction, of which the following is a copy:—

"Province of Canada, United Counties of York and Peel, to wit:

"Be it remembered, that on August 11, 1863, at Grahamsville, in the said United Counties of York and Peel, James Thomas Switzer is convicted before the undersigned, one of Her Majesty's Justices of the Peace, in and for the said United Counties, for that he, the said James Thomas Switzer did, on 29th May last, in the township of Albion, commit an assault on Mary McKee, by striking and otherwise abusing the said Mary McKee; and I adjudge the said James Thomas Switzer, for the said offence, to forfeit and pay the sum of fifty cents, to be paid and applied

according to law; and also to pay to the said Mary McKee the sum of seven dollars and fifty cents, for her costs in this behalf; and if the said several sums be not paid forthwith, I adjudge the said James Thomas Switzer to be imprisoned in the common gaol of the said United Counties of York and Peel, for the space of twenty days, unless the said sums, and the costs and charges of conveying the said James Thomas Switzer to the said common gaol shall be sooner paid.

"Given under my hand and seal the day and year first above mentioned, at Grahamsville, in the United Counties of York and Peel aforesaid.

"(Signed) GEORGE GRAHAM, J. P. (L. S.)"

On the same day, Switzer caused notice of his intention to appeal to the next Court of Quarter Sessions for York and Peel, to be duly served.

The appeal came on to be heard on 15th September last, before the Honorable Samuel Bealey Harrison, Chairman of the Court, and others, his fellows.

Robert A. Harrison, for the appellant, argued, among other things, that the conviction was bad for want of jurisdiction, inasmuch as it was not shewn, either on the face of the information, or of the conviction, that the complainant prayed the magistrate to proceed summarily under Con. Stat. of Canada, cap. 91, to hear and determine the offence. He referred to Con. Stat. of Canada, cap. 91, sec. 37. *Westbrook* v. *Calloghan*, 12 U. C. C., P. 616.

John McNab, for the respondent, argued that unless the contrary appeared, it must be presumed that all things were done necessary to give the magistrate jurisdiction, and it rested upon the appellant to shew that the party, complainant, objected to the jurisdiction.

HON. S. B. HARRISON, Chairman.—I can intend nothing in favour of this conviction. Without deciding that the prayer for summary jurisdiction must appear on the face of the information, I am of opinion that it should appear on the face of the conviction. The offence is one of which Justices of the Peace, at common law, have no summary jurisdiction. That jurisdiction is derived solely from the statute, and can only be exercised when prayed under the statute; and it is a clear rule of law that jurisdiction must always appear on the face of proceedings. In my opinion, therefore, the conviction must be quashed, and quashed with costs.

Per Cur.—Conviction quashed, with costs.

ENGLISH REPORTS.

PRIVY COUNCIL.

Present the Right Hon. Lord KINGSDOWN, the DEAN OF THE ARCHES CO T (DR. LUSHINGTON), Sir EDWARD RYAN, and Sir J. T. COLERIDGE.]

THE REV. WILLIAM LONG, Clerk, Appellant, THE RIGHT REV. ROBERT GRAY, LORD BISHOP OF CAPE TOWN, CAPE OF GOOD HOPE, R spondent.

Colonial Church discipline—Bishop—Authority — Incumbent— Synod — Power to convene—Liability to attend—Disobedience—Suspension—Deprivation.

The appellant, a clerk in orders officiating as a minister of the Church of England in a colony, was nominated to a church built and endowed by a private individual residing in the colony. The appellant was not instituted or inducted into his church and benefice, but he received from the bishop of the colony a license to officiate, and have the cure of souls within the district assigned to the church, and took an oath of canonical obedience to the bishop The bishop, without the authority of the Crown or of the local legislature, convened a Synod in the colony, to be composed partly of clergy and partly of lay delegates elected in the different parishes of the diocese. The appellant was summoned to attend the Synod, and was directed to take steps for the election of a lay delegate in his parish; but he refused to attend the Synod, and neglected to take any steps to forward the election of a delegate; he was consequently cited to appear before the bishop, and for this disobedienc he was first suspended, and afterwards deprived of his benefice:—*Held*, (overruling the judgment of the Supreme Court at the Cape of Good Hope),

First, that though the appellant did voluntarily submit himself to the authority of the bishop to such an extent as to enable the bishop to deprive him of his benefice for any lawful cause, yet that the cause for which the appellant was deprived by the bishop was not a lawful cause.

Secondly, that the oath of canonical obedience does not mean that the clergyman will obey all the commands of his bishop, against which there is no law, but that he will obey all such commands as the bishop by law is authorised to impose.

Thirdly, the Church of England, where there is no church established by law, is in the same situation with any other religious body, in no better but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them

Fourthly, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

Fifthly, in such cases, the tribunals so constituted are not in any sense courts; they derive no authority from the Crown: they have no power of their own to enforce their sentences; they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

[June 24, 1863.]

This was an appeal from a decision of the Supreme Court of the Cape of Good Hope, in a suit between the appellant, the Rev. Mr. Long, claiming to be the incumbent of the parish of Mowbray, in that colony, and the respondent the Lord Bishop of Cape Town. Mr. Long, being in possession of the church of the parish of Mowbray, and in receipt of the income attached to the benefice, refused to obey certain orders which the bishop, in what he considered the due exercise of his episcopal authority, thought fit to issue, and for such disobedience the bishop issued against Mr. Long sentences, first of suspension, and afterwards of deprivation. The validity of these sentences, and especially of the last, was the question to be decided by the Court below, which, by a majority of two judges to one, held them to be valid.

The bishopric of Cape Town was founded in the year 1847. At that time the legislative authority in the colony of the Cape of Good Hope was vested in the Crown. There was no State church; all denominations of Christians stood on an equal footing; there were no ecclesiastical courts as distinct from civil courts. The Supreme Court, under the Charter of Justice granted in 1832, had supreme jurisdiction in all causes—civil, criminal, and mixed—arising within the colony, with jurisdiction over all subjects of the Crown, and other persons within the colony.

In this state of things letters-patent were issued by the Crown dated the 25th September, 1847, erecting the colony or settlement of the Cape of Good Hope and its dependencies, and the Island of St. Helena, into a bishop's see and diocese, appointing the respondent Dr. Gray, to be ordained and consecrated bishop of the see, and commanding his Grace the Archbishop of Canterbury to ordain and consecrate him accordingly. The letters-patent purported to empower the bishop to perform all the functions appropriate to the office of a bishop within the diocese of Cape Town, and especially to give institution to benefices; to grant licenses to officiate to all rectors, curates, ministers, and chaplains, in all churches, chapels, and places where divine service should be celebrated according to the rights and liturgy of the Church of England; to visit all rectors, curates, ministers, and chaplains, and priests and deacons in holy orders, of the United Church of England and Ireland, and to cite them before him, or before the officers whom he was authorised to appoint, and to inquire concerning their morals, as well as their behaviour in their several stations and offices. Power was given to the bishop to appoint archdeacons, a vicar-general, official principal, chancellor, commissaries, and other officers; and it was provided that an appeal should be made from sentences of the subordinate officers so to be appointed, to the bishop, and from sentences of the bishop to the Archbishop of Canterbury. No ecclesiastical court was expressly constituted by these letters-patent, nor was power given to the bishop to establish one; and it was declared that they should not extend to repeal, vary, or alter the provisions of any charter whereby ecclesiastical jurisdiction had been given to any court of jurisdiction within the limits of the said diocese.

The letters-patent provided that the Bishop of Cape Town should be subject to the metropolitan see of Canterbury, in the same manner as a bishop of any see within the province of Canterbury, and should take an oath of due obedience to him as metropolitan; and they contained a clause that the bishop might, by an instrument in writing under his hand and seal, addressed to the Archbishop of Canterbury, resign his office; and after acceptance of such resignation by the Archbishop, the bishop was to cease to be Bishop of Cape Town to all intents and purposes. Dr. Gray having been duly consecrated by the Archbishop of Canterbury, and taken the oath prescribed, went out to the Cape to assume the duties of his office, and continued to discharge them till the latter end of the year 1853. At that time it was considered

by the Queen's Government that the then diocese of Cape Town was too extensive for one bishop, and that it would be advisable to divide it and make it into three dioceses, to be called Cape Town, Graham's Town, and Natal. With a view to this arrangement, Dr. Gray, on the 23rd November, 1853, resigned his bishopric into the hands of the Archbishop of Canterbury, by whom the resignation was accepted, and Dr. Gray ceased to be Bishop of Cape Town.

On the 8th December, 1853, new letters-patent were issued, by which certain specified parts of the original diocese of Cape Town were erected into a distinct and separate bishop's see and diocese, to be called thenceforth the Bishopric of Cape Town, and to this newly constituted bishopric Dr. Gray was appointed, and he was also appointed metropolitan bishop in the colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena. The new letters-patent seem to have been in other respects in the same form with the old. But previously to the issuing of these letters, the Crown had granted a constitution to the colony of the Cape; representative institutions had been founded, and a colonial legislature established.

Mr. Long was officiating in the colony as a minister of the Church of England before any bishop was appointed there. He had been admitted into deacon's orders for the colonies by the Bishop of London in 1844. In the year 1845 he went to Cape Town, and was appointed by the then governor of the colony to be minister of the English Episcopal Church of Graaf-Reinet, his salary being paid partly by the governor, partly by the Society for the Propagation of the Gospel, and partly by his own congregation. There seems to have been no endowment of any kind attached to this church. He had at this time no other authority for discharging the duties of a minister in that church than the holy orders which he had received from the Bishop of London and the appointment of the governor of the colony.

Soon after the arrival of the Bishop of Capetown in the colony in 1848, and while the first letters patent were in force, Mr. Long was ordained priest by the bishop, according to the form and manner of ordaining priests as contained in the Book of Common Prayer; and, on being so ordained, he took the usual oaths prescribed by the laws and usages in force in England, and, amongst others, the oath of canonical obedience to the bishop, by which he engaged to pay to him true and canonical obedience in all things lawful and honest. On this occasion the bishop granted, and Mr. Long accepted, a license from the bishop to officiate and have the cure of souls over the parish and district of Graaf-Reinet, the bishop reserving to himself and successors full power to revoke the license whensoever he or they should see just cause so to do.

In the year 1854, a clergyman of the English Church, named Hoets, built and proposed to endow an episcopal church in the parish of Mowbray, in the colony of Cape Town, and to convey the church to the bishop, upon certain terms agreed upon between them; and by a notarial act in the Dutch form, dated the 2nd June, 1854, Mr. Hoets transferred in full and free property to the bishop and his successors in perpetuity, for ecclesiastical purposes, a piece of land therein described, "with the church which the appearer had lately erected thereon, at his own cost and charge, for the worship of Almighty God according to the liturgy and ritual of the Church of England, situate in the parish of Mowbray."

By a notarial instrument of the same date, to which the bishop and Mr. Hoets were both parties, the conditions on which the grant was made were stated. The first was, that the church should with all convenient speed be consecrated, and should be at all times used and enjoyed by the parishioners of the parish of Mowbray free from any charge. Mr. Hoets covenanted with the bishop to pay a certain salary to the clergyman or incumbent to be appointed and instituted to the spiritual charge of the said church and parish, in manner after mentioned, during the incumbency of the two first incumbents thereof, as and for a provision and endowment towards the stipend of such two first incumbents, and a mortgage was made by Mr. Hoets to the bishop of certain bonds, in order to secure the due payment of the stipend. The bishop, in consideration of the premises, covenanted with Mr. Hoets, that he, the bishop, and his successors would admit, institute, and appoint unto the said endowment, and unto the spiritual charge and care of the said church and parish a clerk, to be presented and nominated by Mr. Hoets (such person being a priest in holy orders of the United Church of England and Ireland, or of any of the colonial churches in communion with the said United Church, and not subject to any spiritual or ecclesiastical censure or other impediment), as the first incumbent of the said church and parish. And so in like manner upon the death, resignation, or removal, for any lawful cause, of the first incumbent, upon the like presentment of Mr. Hoets, to admit institute, and appoint a second incumbent.

On the 3rd June, 1854, Mr. Long and several of the parishioners presented a petition to the respondent, as bishop and ordinary of the diocese, praying him to consecrate the church, and on the 6th June the bishop consecrated it accordingly, and signed an instrument, under his episcopal seal, declaring such consecration, and reserving to himself and his successors, bishops of Cape Town, all ordinary and episcopal jurisdiction, rights, and privileges. On the same day the bishop preached in the parish church, and referred to the appellant as being thenceforth the parish priest. There were, or were supposed to be, some impediments to the institution and induction of the new incumbent in the English form, and no such ceremonies took place; but Mr. Long entered into possession of the benefice, and discharged his parochial duties, receiving from the bishop a license to officiate and have the cure of souls within the parish and district of Mowbray. In this, as in his former license, the bishop reserved power to revoke it if he should see just cause, and Mr. Long, on these occasions, renewed his oath of canonical obedience to the bishop.

In the year 1856, the bishop was of opinion that, for the purpose of settling some scheme of church government which should be binding upon the religious community of which he was the head, it would be desirable to convene a Synod, consisting partly of clergy and partly of laymen, members of the church within his diocese. The measure had been in contemplation, and, indeed, under discussion, for several years before, and different opinions had been entertained both by clergymen and laymen as to its legality and its expediency.

On the 15th November, 1856, the bishop issued a pastoral letter, in which, after stating the reasons which induced him to believe that such a measure was expedient, if not indeed necessary, for the well-being of the church in the colony, and explaining the objects which might, in his opinion, be effected by means of a Synod, the bishop proceeded to declare of what persons the Synod should be composed. These were to be—first, lay delegates, to be elected in the different parishes by adults, being, or at the time of the election declaring themselves to be, members of the Church of England, and of no other religious denomination. Secondly, duly licensed clergy, being in priest's orders. Deacons were to be authorised to attend and speak, but not to vote. Some of the subjects to be brought under the consideration of the Synod were then enumerated, including matters not exclusively of ecclesiastical cognizance; as for instance, the tenure and management of church property; questions relating to the formation and constitution of parishes; difficulties which had presented themselves with regard to marriages, divorces, and sponsors; and, finally, the desirableness, or otherwise, of seeking to obtain the assistance of the Legislature to carry out the objects of the Synod. Mr. Long was summoned by the bishop to attend the Synod, which was appointed to be held at the Cathedral Church in Cape Town on the 21st January, 1857, and he was requested to affix a notice of the intended meeting on his church door, and to take the necessary steps for holding the election of a delegate for his parish. Mr. Long and his parishioners were opposed to this measure. The parishioners held a meeting on the 22nd December, 1856, at which they resolved that no delegate should be elected, and Mr. Long neither attended the Synod himself, nor took any steps to forward the election of a delegate.

No attempt appears to have been made at this time by the bishop to enforce obedience to his summons, but the Synod was held, and was attended, as it appears, by many of the clergy and laity, and various resolutions were passed by them, which were termed, "Acts and Constitutions of the First Synod, held at Cape Town the 21st January, 1857." These regulations provided that a Synod of the clergy should be convened by the bishop once in three years, They provided for the mode of electing delegates from the different parishes, and required that on some Sunday, or other convenient day, during divine service, each minister should give notice of the day and place of meeting for such election in his parish or district, and should cause notice of the same to be fastened to the door of the church or chapel of the parish or district. The clergy and

laity were ordinarily to sit and deliberate together, the bishop presiding, and to vote as one body; but any member of the Synod might demand a vote by orders, in which case no resolutions was to be regarded as adopted by the Synod unless carried by a majority of both orders, and assented to by the bishop. Various rules were made with respect to the formation of parishes, and the institution and induction of clergy; and all presbyters and deacons before institution or induction, or before receiving a license from the bishop, and as a condition of receiving such institution, induction, or license, were to sign a declaration that they would subscribe to all the rules and constitutions enacted by the Synod of the diocese of Cape Town. A consistorial court was appointed for the trial of all offences against the ecclesiastical laws of the diocese, and various provisions, were introduced with respect to the mode in which the trial should be conducted.

The Synod had been convened without any express sanction of the Crown, and no attempt was made to obtain the assistance of the Legislature to carry into effect its objects.

In 1860 the bishop convened a second Synod, to be held on the 17th January, 1861; and on the 1st October, 1860, the bishop addressed a letter to Mr. Long, inclosing a copy of a pastoral letter which he had issued, and also a copy of the printed regulations adopted by the Synod for the election of deputies. The pastoral letter referred to the acts and constitutions of the last Synod, and mentioned as one of the subjects to which the bishop would have to call attention, the constitution of the ecclesiastical court. Mr. Long was of opinion that the convening of this Synod, without the authority either of the Crown or the local legislature, was an unlawful act on the part of the bishop; that the Synod itself was illegal, and its acts of no validity; and he declined, therefore, to take any steps himself for calling a meeting for the election of delegates in his parish, but he handed over the papers to the churchwardens and sidesmen that they might act as they should think proper, informing them at the same time of his own views upon the subject. After some correspondence, Mr. Long refused to give the notice required of the intended election.

On the 27th November, 1860, he was served with a citation signed by the registrar of the diocese, by which he was cited to appear before the bishop on Monday, the 4th of February, 1861, to answer for having neglected and refused to obey the commands and directions of the bishop to give notice of a meeting to be held "in terms of a certain letter addressed and forwarded to you, and dated the 1st October, 1860, with the pastoral issued on the same day and therein inclosed." Certain clergymen, five in number, were named by the bishop to be his assessors, but the bishop offered, if Mr. Long had any personal objection to any of them, to change their names for those of other clergymen who might be resident in the neighbourhood.

On the 4th February, 1861, Mr. Long attended before the bishop and his assessors, and delivered in a letter signed by himself, stating, in respectful terms, the grounds on which he objected to give the required notice, and adding, that if obedience were still required to the bishop's command in that respect, it was impossible for him to pay it. Mr. Long's counsel at the same time handed in a protest signed by them, that no judgment or sentence pronounced by the bishop as the judgment or sentence of any alleged court was in any degree binding on Mr. Long, because no lawful authority was vested in the bishop to hold, by himself or others, any court or courts competent to hear or determine any causes of what kind soever. The court adjourned, as it seems, without hearing evidence; there was no question of fact in issue. The assessors afterwards delivered their opinions in writing to the bishop, and on the 8th February, 1861, the bishop pronounced a sentence suspending Mr. Long from the cure of souls, and the exercise of all ministerial functions and offices for a period of three months, and thenceforward until he should have expressed regret for his past disobedience, and his willingness to render obedience for the future. This sentence was intimated to the churchwardens of the parish, and they were requested to provide a clergyman to perform duty in the church during Mr. Long's suspension. Mr. Long, however, considered the sentence to be a nullity, and he continued to officiate as usual, apparently with the concurrence of the churchwardens.

On the 19th February, 1861, he was served with a citation by order of the bishop to appear before the bishop on Wednesday, the 6th March, to answer for having failed to render due and canonical obedience to the bishops, and for acting in defiance of the laws of the church and authority of the bishop. The citation recited the bishop's order and Mr. Long's disregard of it, and required him to appear and answer for his contempt, and to hear and receive such judgment as the bishop might see right to pronounce, and as the exigency of the case might require or authorise. Mr. Long declined to attend this summons, and on the 6th March a sentence was pronounded by the bishop, which, after reciting the various offences against his authority, of which he considered Mr. Long to have been guilty, concluded in these terms:—

"I, therefore, Robert, by Divine permission, Bishop of Cape Town, do, for these repeated acts of disobedience and contempt, withdraw the license of the Rev. William Long, and do deprive him of his charge and cure of souls in the parish or parochial district of Mowbray, and of all emoluments belonging to the same. And I do, moreover, hereby admonish the said William Long not to officiate again in the said church or parish, and warn him, that if he should do so after this his deprivation, he will render himself still further liable to the censures of the church.

"R. Cape Town.

"Cathedral Vestry, March 6, 1861."

Notice was given of the sentence on the same day to Mr. Long and to the churchwardens of Mowbray, who were required to conform to it; and a gentleman of the name of Hughes was appointed by the bishop to officiate in the church till a new minister was appointed, and to receive one-half of the income.

On the 7th March, Mr. Long and the churchwardens applied to the Supreme Court of the Colony of the Cape of Good Hope for an interdict to restrain the bishop and Mr. Hughes from interfering with him in the performance of his lawful duties as incumbent of the parish of Mowbray, and from disturbing him in the enjoyment of his lawful emoluments as such incumbent. Some further proceedings took place in this matter, but the plaintiffs were required to file a declaration in regular form, for the purpose of trying the important questions in difference.

A suit was accordingly instituted. It was a proceeding of course, in the forms of the Roman-Dutch law; a claim in convention by the original plaintiff, and a defence and claim in reconvention by the defendant; so that, in fact, both parties were plaintiffs, and both defendants. The claim of Mr. Long, after stating the several matters of fact on which he relied, insisted that he was aggrieved by the proceedings of the bishop, and prayed the protection of the Court, and also a declaration of the law by the Court, in conformity with his views on the several points in dispute; and, lastly, that he was entitled of right, and without any license other than his before-mentioned letters of order, and the presentation he had already received from Mr. Hoets, and the approval of such presentation publicly made known by the defendant in June, 1854, to exercise all the lawful functions of minister and incumbent of St. Peter's Church, Mowbray.

The bishop filed an answer and plea in reconvention, by which, as defendant, he pleaded the letters-patent of 1847 and 1853, the license granted by him, and accepted by Mr. Long, as officiating minister, both of Graaff-Reinet and Mowbray; he alleged, that until authorised so to do by the Synod, and until the formation of rectories by the same authority as after mentioned, and until certain rules in that behalf had been framed, he could not give, nor had he in any previous instance given, institution to cure of souls, or induction to benefices, in any other way than by licenses similar to that granted to the plaintiff. He insisted that he cited the plaintiff in accordance with the rules of the Synod, and in exercise of the authority belonging to him as bishop, conveyed to him by the letters-patent; that the sentences were judgments or sentences ecclesiastical or spiritual so issued under the power and authority conveyed to him by the letters-patent, or otherwise of right belonging to him as bishop of the church of which the plaintiff was a priest: and that the plaintiff was, in consequence thereof, removed for lawful cause from the church of Mowbray; and he maintained, in conclusion, that the Court was not entitled to examine the sentence; but that, if it were examined, it ought to be affirmed. This was his defence. In reconvention he prayed, by his second plea, that it might be adjudged that the letters-patent of the 25th September, 1847, and of the 8th December, 1853, are valid in law; and that they confer the rights and powers claimed thereunder, and that ecclesiastical jurisdiction may thereby be lawfully exer-

cised by him. By his last plea he prayed, that the said plaintiff in convention and the defendant in reconvention, might be restrained by interdict, so long as the sentence of deprivation should continue and remain in force, from occupying, or attempting to occupy, the church of St. Peter's, Mowbray, or otherwise interfering with the duties of the minister of the said church.

On the 15th February, 1862, the Court gave judgment against the plaintiff in convention, and for the plaintiff in reconvention, except as to his second plea in reconvention, and adjudged each party to pay his own costs. This was, in effect, a decision, on all material points, in favour of the bishop.

Sir *Hugh Cairns*, Q. C., *Travers Twiss*, and *F. M. White*, for the appellant, contended, that it was not lawful for any ministers and lay persons to assemble themselves together within the diocese of Cape Town, and make rules, orders, and constitutions, in causes ecclesiastical, without the Queen's authority: that the acts and constitutions of the assembly or Synod held at Cape Town on the 21st January, 1857, were not binding *proprio vigore*, upon the clergy or laity of the Church of England in the diocese of Cape Town, and more especially not upon the appellant and others, who in no way took part in, but dissented from, and protested against, the assembling of such Synod, and the proceedings thereof: that it was *ultra vires* for the respondent, as ordinary, to require the appellant to give effect to the said acts and constitutions, in regard to giving notice touching the election of lay delegates to a Synod: that the alleged refusal or neglect of the appellant to give effect to the said acts and constitutions was not an offence against the laws ecclesiastical, by reason whereof he might be lawfully suspended or deprived; that neither by virtue of the letters-patent granted to the respondent, nor by virtue of any law, canon, or constitution ecclesiastical, was the respondent, as bishop or otherwise, lawfully empowered to hold the said courts, and to pass the said sentences of suspension and deprivation upon the appellant: that if the respondent were empowered by any law, canon, or constitution ecclesiastical, to hold a court, and to bring the appellant to trial before it, yet that the proceedings of the courts actually held by him were void in law, inasmuch as they were not conducted according to the laws ecclesiastical: that such courts are not constituted, nor the proceedings in such courts conducted, according to the rules prescribed by the acts and constitutions of the Synod of Cape Town, of the 21st January, 1857, if such rules have any binding force or validity within the diocese of Cape Town: that neither by his receiving the respondent's license on becoming incumbent of St. Peter's, nor by his previously receiving letters of orders as a priest from the respondent, or otherwise, did the appellant assent to, or enter into any contract to submit to, the jurisdiction claimed and exercised over him by the respondent. They cited 1 Bl. Com. 279; Burn's Eccl. Law, tits. "Ordinary," "Council;" Canons (1603), 12, 14, 37, 40, 101; Cours du Droit Canon (Andre), tit. "Evêque;" 3 Grotius, 250, ed, London (1679); Hericourt's Eccl. Law of France, 32; 14 Rymer's Fœdera, 717; Ordinances of the United Church of Great Britain and Ireland; Ayliffe's Paregon, 433; 1 Stillingfleet's Eccl. Law, 12; Godolph. Rep. ch. 13, sec. 6; Hale's History of the Common Law, 30; stats. 25 Hen. 8, ch. 19; 31 Hen. 8, ch. 9; 13 Eliz. ch. 12; 1 Will. 3, ch. 8; 3 & 4 Vict. ch. 86; *The Bishop of St. David's case* (1 Ld. Raym. 447); and *The Dean of York's case* (2 Q. B. 1).

The Solicitor-General (Sir *R. Palmer*, Q. C.) and *Bullar*, for the respondent, contended that the bishop in the see of Cape Town possessed episcopal authority and jurisdiction, with episcopal powers over his clergy in matters of ecclesiastical discipline: that the appellant submitted himself to the authority and jurisdiction of the bishop; and consented, so far as any consent on his part might be necessary, to be subject to the exercise by him of his episcopal powers: that the exercise by the respondent of his episcopal authority and powers had not been unreasonable or improper; and the propriety of their exercise could be properly determined only on appeal to the Archbishop of Canterbury: that the contumacy of the appellant in continuing to officiate after suspension, without appealing to a higher tribunal, and in refusing to appear at the respondent's citation, rendered it impossible for the respondent to take any other course in the final proceeding before him than that of deprivation. They cited First Epistle to Timothy, ch. 5, ver. 19; Apostolican Canons, 31; 1 Van Espens, 133; 3 Godolph. Rep. 22 Hooker, book 7; Co. Lit. 96, a, tit. "Ordinary;" The Ordination Service; Articles of Religion, 33, 36; Twiss's Apostolical Letters; *Caudry's case* (5 Rep. 15); *The Attorney-General* v. *Welsh* (4 Hare, 572), *The Attorney-General* v. *Murdoch* (7 Hare, 445,) *Dr. Warren's case* (Grindrod's Compendium); *Philips* v. *Bury* (2 T. R. 346); *Daugars* v. *Rivaz* (29 Beav. 233); Colonial Act, 1860; *Poole* v. *The Bishop of London* (14 Moo. P. C. 262); *Birch* v. *Wood* (2 Salk. 506); *Price* v. *Pratt* (Bunb. 273); Godolphin, 15; Lyndwood's De Appellationibus; *Middleton* v. *Croft* (2 Str. 1056;) Gibson on Synods, 16; Reformatio Legum, 109; Kennett's Eccl. Synods, 199, 201; Cardwell's Synodolia; *The Dean of Jersey* v. *The Rector of* —— (3 Moo. P. C. 229); *Wilson* v. *McMahl* (3 Phillim. 67); Van der Linden, book 3, part 1, s. 9; *Ex parte Medwin and Hurst* (1 El. & Bl. 609); Hoffman on the Laws of the Church of the United States, 39, 474; *Evers and Owen's case* (Godb. 432); *Reg.* v. *Millis* (10 Cl. & Fin. 539); Gibson's Codex, 18, 1 Vetus et Nova Ecclesiæ Disciplina, 475, c. 74, Suarez de Legibus, 215, c. 4; *Hutchins* v. *Denziloe and Another* (1 Hagg. Consit. 170), Whately on the Book of Common Prayer; Sharp on the Rubrick; and stats. 1 Eliz. c. 2, s. 3; 14 Car. 2, c. 6; 26 Geo. 3, c. 84: and 1 Vict. c. 45.

Lord KINGSDOWN delivered the judgment of their Lordships.—In the argument at our bar, many questions of great novelty and importance were raised and discussed with remarkable ability. Some of them were considered, and very justly, by the counsel as seriously affecting the well-being of members of the Church of England in the colonies and other dependencies of the Crown. We propose to deal with these questions only so far as may be necessary for the purpose of the present decision, and to abstain, as far as possible, from saying anything which may prejudice cases that may hereafter arise.

It is advisable, in order to make the reasons of our judgment intelligible, to state in some detail the facts as they appear upon the record. [His Lordship then stated the facts of the case, and proceeded]:—The first question which we have to consider is, what authority did the bishop possess under and by virtue of his letters-patent at the time when these sentences were pronounced? The judges below have been unanimous in their opinion—first, that all jurisdiction given to the bishop by the letters-patent of 1847 ceased by the surrender of the bishopric in 1853, and the issue of the new letters-patent; and, secondly, that the letters-patent of 1853, being issued after a constitutional government had been established in the Cape of Good Hope, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony, even if it were the intention of the letters-patent to create such jurisdiction, which they think doubtful. In these conclusions we agree.

Dr. Gray had been duly appointed and consecrated a bishop of the Anglican Church in 1847, and such he remained after the resignation of his see; but by such resignation he surrendered all territorial jurisdiction and power of proceeding judicially *in invitos*, so far as such authority depended upon the letters-patent of 1847. These points have not only been decided by the Court below, but have been embodied in their judgment, by which they have expressly rejected the second claim above stated of the lord bishop. But a majority of judges below has held that the defect of coercive jurisdiction under the letters-patent has been supplied by the voluntary submission of Mr. Long, and that he is on that principle bound by the decision of the bishop. This point we have next to consider.

The Church of England, in places where there is no church established by law, is in the same situation with any other religious body, in no better but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

It may be further laid down, that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

In such cases the tribunals so constituted are not in any sense courts, they derive no authority from the Crown; they have no

power of their own to enforce their sentences; they must apply for that purpose to the courts established by law, and such courts will give effect to their decisions as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

These are the principles upon which the courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England. They were laid down most distinctly, and acted upon, by Sir L. Shadwell, V C., and Lord Lyndhurst, in the case of *Dr. Warren*, so much relied on at the bar, and the report of which, in Mr. Grindrod's book, seems to bear every mark of accuracy.

To these principles, which are founded on good sense and justice, and established by the highest authority, we desire strictly to adhere, and we proceed to consider how far the facts of this case bring Mr. Long within their operation.

To what extent, then, did Mr. Long, by the acts to which we have referred, subject himself to the authority of the bishop in temporal matters? With the bishop's authority in spiritual affairs, or Mr. Long's obligations in *foro conscientiæ*, we have not to deal.

We think that the acts of Mr. Long must be construed with reference to the position in which he stood, as a clergyman of the Church of England, towards a lawfully appointed bishop of that church, and to the authority known to belong to that office in England; and we are of opinion, that by taking the oath of canonical obedience to his lordship, and accepting from him a license to officiate, and have the cure of souls, within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to the living of Mowbray under a deed which expressly contemplated, as one means of avoidance, the removal of the incumbent for any lawful cause, Mr. Long did voluntary submit himself to the authority of the bishop to such an extent as to enable the bishop to deprive him of his benefice for any lawful cause; that is, for such cause as (having regard to any differences which may arise from the circumstances of the colony) would authorise the deprivation of a clergyman by his bishop in England. We adopt the language of one of the judges of the court below, that, "for the purpose of the contract between the plaintiff and the defendant, we are to take them as having contracted that the laws of the Church of England shall, though only as far as applicable here, govern both."

Is, then, Mr. Long shewn to have been guilty of any offences which, by the laws of the Church of England, would have warrented his suspension and subsequent deprivation? This depends mainly on the point, whether Mr. Long was justified in refusing to take the steps which the bishop required him to take, in order to procure the election of a delegate for the parish of Mowbray to the Synod convened for the 17th January, 1861.

In what manner and by what acts did he contract this obligation? The letters-patent may be laid out of the case; for if the bishop's whole contention in respect of them be conceded, they conferred on him no power of convening a meeting of clergy and laity, to be elected in a certain manner prescribed by him, for the purpose of making laws binding upon churchmen.

A very elaborate argument was entered into at our bar, in order to shew that Diocesan Synods may be lawfully held in England without the license of the Crown, and that the statute with respect to Provincial Synods does not extend to the colonies. It is not necessary to enter into the learning on this subject. It is admitted that Diocesan Synods whether lawful or not, unless with the license of the Crown, have not been in use in England for above two centuries, and Mr. Long, in recognising the authority of the bishop, cannot be held to have acknowledged a right on his part to convene one, and to require his clergy to attend to it. But it is a mistake to treat the assembly convened by the bishop as a Synod at all. It was a meeting of certain persons, both clergy and laity, either selected by the bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing, in fact, certain laws, by which all members of the Church of England in the colony, whether they assented to them or not, should be bound. Accordingly the Synod, which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the colonial legislature, to bind persons not in any manner subject to its control, and to establish courts of justice for some temporal as well as spiritual matters; and, in fact, the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal.

Now, Mr. Long was required to give effect, as far as he could, to the constitution of this body, and to take steps, ordered by that body, for convening one of a similar nature. He was furnished with a copy of the acts and constitution of the last Synod, and he was requested to attend carefully to the inclosed printed regulations with regard to the election of delegates. He clearly, therefore, was required to do more than give notice of a meeting, and he could not give the notice at all without himself fixing the time and place at which the meeting was to be held. He was required to do various acts of a formal character, for the purpose of calling into existence a body which he had always refused to recognise, and which he was not bound by any law or duty to acknowledge.

The oath of canonical obedience does not mean that the clergyman will obey all the commands of the bishop against which there is no law, but he will obey all such commands as the bishop by law is authorized to impose; and even if the meaning of the rubric referred to by the bishop in his case were such as he contends for —which we think that it is not—it would not apply to the present case, in which more was required from Mr. Long than merely to publish a notice.

We are, therefore, of opinion that the order of suspension issued by the bishop was one which was not justified by the conduct of Mr. Long, and that the subsequent sentence of deprivation founded upon his disobedience to the order of suspension must fall with it.

It was strongly pressed, both before us and in the court below, that supposing these sentences to be erroneous, Mr. Long had no remedy against them except by appeal to the Archbishop of Canterbury under the provisions of the letters-patent. What authority his Grace might possess under the letters-patent, or otherwise, to entertain such an appeal if it had been presented, it is unnecessary, and we think inexpedient, to discuss. It is sufficient to say no such appeal has been presented, and that the suit in which this appeal is brought respects a temporal right, in which the appellant alleges that he has been injured. It calls for a decision as to the right of property, and involves the question whether Mr. Long has ceased by law to be what in England is termed *cestui que trust* of funds of which the bishop is trustee. Whatever else Mr. Long may by his conduct have done, we cannot hold that he has precluded himself from exercising the power which, under similar circumstances, he would have possessed in England, of resorting to a civil court for the restitution of civil rights, and of thereby giving to such courts jurisdiction to determine questions of an ecclesiastical character essential to their decision. Indeed, in this case the appellant and the respondent have alike found it necessary to call upon the civil court to determine the right of possession of the church of Mowbray.

We think that even if Mr. Long might have appealed to the archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court; and that the judges of that Court were justified in examining, and, indeed, under the obligation of examining, the whole matter submitted to them. We, of course, are in the same situation; and after the most anxious consideration have come to the conclusion that the sentence complained of cannot be supported; and, therefore, we must humbly advise her Majesty to reverse it, and to declare that Mr. Long has not been lawfully removed from the church of Mowbray, but remains minister of such church, and entitled to the emoluments belonging to it.

Being of this opinion, we are relieved from the necessity of considering, as a ground of our decision, whether the course adopted by the right reverend respondent in the proceedings against Mr Long was, in respects, proper, and whether the proceedings themselves, if the bishop be regarded as acting, and entitled to act, with the authority of a visitor sitting in *foro domestico*, were conducted with that attention to the rules of substantial justice and that strict impartiality which are necessary to be observed by all tribunals, however little fettered by forms. Much argument was addressed to us at the bar in this part of the case, and it would not be proper to pass it altogether without notice; and first, with

respect to the suspension, and the constitution of the tribunal for the trial of Mr. Long on the first charge against him.

It cannot be held that all the provisions which would have been applicable to such a case under the Church Discipline Act in England were necessary to be observed in the colony. This was impossible, but care should have been taken to secure, as far as possible, the impartiality and knowledge of a judicial tribunal. Here the bishop was not merely in form, but substantially, the prosecutor, and a prosecutor whose feelings, from motives of public duty, as well as from the heat necessarily generated in the purest minds by a long and eager controversy, were deeply interested in the question. It was, perhaps, necessary that he should preside as the judge before whom the cause was heard, and by whom the cause was heard, and by whom the sentence was pronounced, but he should have procured, as a bishop in England under such circumstances would have done, the advice and assistance, as assessors, of men of legal knowledge and habits, unconnected with the matter in dispute, and have left it to them to frame the decision which he would afterwards pronounce. But instead of adopting this course, he selected as assistants three gentlemen, all clergymen sharing his own opinions on the subject of controversy, and all themselves members of that Synod which Mr. Long was accused of treating as illegal.

Mr. Long was cited for refusing to give the required notice, but the sentence was not grounded entirely on this charge. The protest which he had given in by his counsel against the proceedings was treated as a very grave offence. The bishop, in speaking of it, says—"To put in such a document is virtually to reject episcopacy and the church, and to step on the very confines of schism, if not to have overstepped the line." Mr. Long's conduct at a private meeting with the bishop is discussed, as to which there is great doubt what really took place, and no regular evidence appears to have been produced, or was, in fact, admissible, for it was not to the point in question; and from the language of the bishop in delivering his judgment it may be inferred, that the sentence against Mr. Long was not founded entirely on the only charge which he had been summoned to meet.

The proceedings which led to the subsequent deprivation are open to no less objection than those which resulted in the suspension. The bishop had declared before the first Synod that there were no rules of proceedings for trying ecclesiastical offences, and one of the objects of the Synod was to supply the deficiency. The Synod had established a consistorial court and certain regulations, by which the trials of clergymen and of laymen before such court should be guided.

These regulations had, amongst other things, provided, that no sentence of deprivation should be pronounced by any person whatever, but only by the bishop, with the assistance of the chancellor of the diocese, or, in case there be no such officer, some legal adviser whom he may see fit to appoint. The bishop insisted that Mr. Long was bound by the rules established by this Synod, and must, therefore, it should seem, have considered himself bound by them; and yet, without any regard to these rules, without calling in the assistance of any legal adviser whatever, without any analogy to the course of proceedings in England by which the judgment of impartial persons acquainted with the law is secured, the bishop pronounces sentence of deprivation. On this occasion, as on the former, the sentence seems to have been founded on what are termed repeated acts of disobedience and contempt by Mr. Long, instead of on the single charge which he was called upon by the citation to meet.

We cannot say, therefore, that the proceedings in this case have been conducted in a proper manner, though our judgment rests on the other grounds already stated.

We have been much embarrassed by the question, how we ought to deal with the costs in this case. We do not doubt that the bishop has acted in the conscientious discharge of what he considered to be his public duty, and he has succeeded, at great personal trouble and expense, in bringing this contention in the court below to a favourable issue. On the other hand, it is impossible not to feel that Mr. Long has been subjected to probably not less trouble and expense by a course of proceeding on the part of the bishop which we have been obliged to pronounce not warranted in law

Feeling the hardship of the case upon the right reverend respondent, we still think that we are bound to award the costs of the suit and of the appeal to the appellant. We cannot, of course, suggest to her Majesty any consideration of what it may be fit to do, at the expense of the public; for this is beyond our province. But it is not beyond our province to observe, that the lord bishop has been involved in the difficulties by which he has been embarrassed in a great measure by the doubtful state of the law, and by the circumstances that he, not without some reason, considered the letters-patent under which he acted to confer on him an authority which, at the time when he acted under them, her Majesty had no authority to grant, and that, either in this or in some other suit, it was important to the interests of the colony generally, and especially of the members of the Church of England within it, that the many questions which have arisen in this case should, as far as possible, be set at rest.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

PEARSALL v. CHAPEN.

1. In an action for ejectment, replevin, trover, assumpsit, or other form for the purpose of recovering back anything, as on the rescission of a contract, the very first thing to be done, after showing that the plaintiff parted with the thing in pursuance of the contract alleged, is to shew that the plaintiff has rescinded the contract by doing or offering to do all that was necessary and reasonably possible to restore the parties to the condition in which they were before the contract, and then to shew that he had good ground to rescind it.
2. Thus, where a sale of land has been induced by the false and fradulent representations of the vendor, the vendee has no right to recover back the price paid without first tendering a re-conveyance
3. The various meanings of the words *void* and *voidable* as used in laws, contracts, decisions and text books discussed and defined.
4. Ratification of fradulent contracts when and how made.
5. It is error to say that a vendee, claiming to rescind or recover back the price paid, is not chargeable with any care of the property in his possession if the sale was fradulent.
6. Account for a recission provided for by a contract and another for a recission because of fraud would not be repugnant; but a count for damages for the fraud and one for a recission would be
7. The plaintiff may waive the action of tort for deceit and sue in assumpsit for the money which he paid on the contracts, or which defendant has received, under it. But where part of the consideration paid was land and claims against other persons, these cannot be recovered under a count for money had and received, unless, and only so far as the defendant has converted into money. If plaintiff wants more than mere recission he must sue for damages for the deceits.

Errors to the Common Pleas of Elk County.

Summons in case &c., *J. C. Chapen* v. *Alfred Pearsall.*

The material facts are stated in the opinion *infra.*

Judgment for plaintiff for $1,555 20, whereupon defendant sued out a writ of error.

The opinion of the Court was delivered January 5, 1863, at Philadephia, by

LOWRIE, C. J.—The plaintiff below purchased from the defen- a tract of land by a written contract, which was afterwards consummated by payment and conveyance, and the plaintiff alleges that, at the time of the contract, the defendant agreed orally that if the plaintiff did not find the land answering to certrain representations, relative to the kind and quantity of timber on it, the defendant would take it back and return the price. The plaintiff sued on this agreement, but as it was made during the existence of the act of 22nd April, 1856, making such oral contracts of no effect, he afterwards changed his ground and added a count for money had and received, and went, as on a recission of the contract for fraud, for the recovery back of the price.

The court instructed the jury that, if the sale was induced by the false and fraudulent representations of the vendor, the plaintiff had a right to recover back the price without first tendering a reconveyance, and this is the first point which we shall discuss. And, as this point appears to have its natural clearness dimmed by a little practical confusion of the different principles that enter into the administration of this kind of cases, we must endeavor to recover this clearness by careful discrimination.

If the court has stated this point correctly, then a defrauded vendee may recover back the price without rescinding the contract and while retaining the title acquired by it; and perhaps without liability to return it, since the vendor cannot allege his own fraud

in order to reclaim it; he may rescind for what he gave and affirm for what he got, and is thus allowed by the law to return injustice for fraud, and invited to learn the art of being duped, as a mode of profitable speculation. We do not so understand the law.

If this be indeed the law of such cases, then the fraud is not corrected, but punished, by this remedy. And the punishment is grossly unjust, because grossly unequal, and it can only be by mere accident that it is at all proportionate to the offence. No matter how small the fraud, it forfeits the whole value contracted for, be it ten or ten thousand dollars And, if nothing can conform the contract in favour of the defrauder, then the other party may get all he bargained for and afterwards recover back all he gave; in order to make the punishment as severe as possible, he may, knowing of the fraud, wait until he obtains full performance from his adversary, and then set up the fraud as a ground for rescinding the contract for all he paid under it. This is making a person who is guilty of a fraud practically an outlaw for all his interests that are involved in the fraudulent contract. The law does not usually deal thus with any offender. It keeps its temper even in dealing with fraud, and especially in the investigation of its existence and degree.

In an action for ejectment, replevin, trover, assumpsit or other form for the purpose of recovering back anything, as on the recission of a contract, the very first thing to be done, after showing the plaintiff parted with the thing in pursuance of the contract alleged, is to show that the plaintiff has rescinded the contract by doing or offering to do all that is necessary and reasonably possible to restore the parties to the condition in which they were before the contract, and then to show that he had good ground to rescind it. This is the order demanded by the very nature of the action. He is not suing for a recission or to obtain one, but for the results or consequences of a recission, on the ground that he has already exercised his right to rescind, given him by the law. There is hardly a discordant thought in the reports, that these are the essential elements of a recission and of the action founded upon it in cases of fraud. We refer to a very few of them, relating to both real and personal estate, (the rule being the same as to both 3 Met. 337) 8 Barb, Sup. Ct. 9, 22 Pick. 29, 546, 4 Harris 204, 12 Barb. 641, 14 id. 594, 16 id 921, 23 Pick. 283, 8 Met. 550, 5 Cush. 126 3 Wend. 236, 7 Black. 501, 6 Ind. 26, 12 Ill. 336, 15 Mass 319. 38 L. Mon. 172, 25 Verm. 234, 30 id 139, 22 Ala. 249 32, 384. And the same is the usual rule where a contract is rescinded for infancy, 2 Kent 257.

We need not refer to the few sporadic cases that are incompatible with these decisions; but we may say generally that a strong misleading element in them is an undue reliance on the broadest meaning of the ambiguous word *void*, which is so commonly found in laws, contracts, decisions, and text books. Deductions founded on the broadest meaning of this word, would lead to greater errors than are found in the most erroneous cases, while those founded on its narrower meaning seldom err. When we say that any given class of contracts is *void*, let us be sure of the meaning of the word before we undertake to declare all the consequences that follow from its application. Observation of its use will give us its meaning.

It is usually said that fraud in procuring a contract makes it *void*; but in many cases it is said that it makes it only *voidable*, 4 Watts, 88; 12 Pick. 307; 2 id., 191; 6 Grattan, 268; 2 Shep. 364; 1 Dong. (Mich.) 330.

So when a conveyance is in fraud of creditors it is usually called *void*, and the Stat 13 Eliz. makes it "clearly and utterly void, frustrate and of none effect" as against the creditors; but in many cases the word *voidable* is designedly substituted; 1 Sid. 133; 2 Mass. 279; 2 Met. 339, 23 Mo. 168; 31 Mi. 653; 1 Manning (Mich) 321. Chancellor Kent, 4 Commen 517, calls it "voidable not void," and Chief Justice Spencer delivers a very able opinion to prove it so, 18 Johns, 527.

Provisions in leases are very common that, if the tenant shall not, with due promptness, perform his covenants to build, repair, pay rent and such like, the lease shall be *void*, or utterly null and void to all intents and purposes, or expressions of similar import; yet these terms are very often, perhaps generally, held to mean *voidable* and not void; 4 B. and Ad. 664; 6 B. and Cr. 519; 4 and Ald. 401; 6 M. and Setl. 121. And *voidable* is now the usual predicate of contract by infants.

The stat Hen VI. c. 10, makes certain forms of outlawry *void*, yet they can be annulled only by writ of error; and another makes certain obligations, not taken in a prescribed manner, *void*, yet they must be avoided by plea, 3 Co., 59, p. This means that even nullities may be only *voidable* in the sense that a regular adjudication is necessary to declare them void.

Other statutes make certain alienations by bishops and other ecclesiastics, and certain forms of alienations of entailed estates *void*, absolutely void or utterly void and of no effect to all intents and purposes, yet they are void only as against the official successors or the successors in the title; 3 Co. 59; 60, or, as some would say *voidable*; the word *absolutely* here being used, not as contrasted with *relatively*, but as equivalent to *utterly*.

These instances reveal the general principle that the persons intended to be wronged by a transaction are not bound by it, and also that they are not bound to reject it; they may adopt or confirm it or agree to be bound by it; their consent which, because of the wrong, the law considered as not given, may be given after the wrong becomes known, and then, if given with the deliberation, intelligence and freedom that the law of ratification requires, and in a form adequate to the particular kind of contract, bound equally with the others. They consent to be bound by it if they elect to enforce it, and then they can no longer treat it as a nullity, for that would be to maintain a contradiction or to justify at the same time two repugnant claims; both the nullity and validity of the contract.

Thus he who sues for damages for the fraud affirms the validity of the contract; 2 Shep. 364; 4 Denio, 554; or who knowingly accepts and retains any benefit under it; 7 Serg. and R. 63; 7 Watts. and T. 125; 23 Mo. 168; or who uses the property acquired as his own after the discovery of the fraud; 13 B. Mon. 172; 22 Alap. 249; or who does any positive act forgiving the fraud, or unduly delays claiming back his property or giving up what he received; 20 Barb. 493; 7 Blackf. 501; 4 Harris, 204; or accepts rent accruing after a known forfeiture of the lease; 6 B. & Cr. 519.

But where a conveyance is in fraud of creditors, the act of affirmance must come from them, and they may affirm by accepting dividends, under a fradulent assignment. 2 Barr. 479; 1 Rawle, 171; or by accepting payment of their debt or releasing them, or by advising another to buy under the fraudulent title. But affirmance here is not by becoming a party to the contract, but by putting oneself or others in such a position that one is no longer allowed to assess the wrong done to him. Nor can there be a recission of the contract by the party wronged in this class of cases, because recission can have place only between the parties to the contract and their privies.

A creditor cannot therefore confirm by merely doing nothing after the fraud is discovered. The contract itself must therefore be a nullity as against his rights, though by its performance it may be very far from being a nullity; for if he be not prompt in asserting his rights, it may dispose of all the property so that he can never reach it. It is therefore not absolutely void, but void only in relation to him, in so far as he asserts its nullity in time and form to do it effectively,

Contracts and acts that are absolutely void are contracts to do an illegal act or omit a legal public duty; usually bonds of married women; contracts in a form forbidden by law; official acts of persons having no recognised *de facto or de jure* title to the office; contracts to do an impossible thing, or that leave uncertain the thing to be done, and such like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties, and even a stranger may raise the objection; 2 Leon. 218; Moore 105. The law cannot enforce that the doing of which would be a wrong to itself or to public order.

To say that contracts tainted with fraud or any other kind of wrong against persons cannot be ratified, is to say that the law does not, as to those, allow men to forgive one another their trespasses, and to strike a great part of the law of ratification from our jurisprudence. Of course when two men make contract in fraud of creditors, neither of them can ratify it, for that would be to forgive their own sins. And so when the contract is in substance

or in essential form, illegal, neither party can ratify it, because the wrong done is against the State, and it only can forgive it. For this sort of wrong there can be no private ratification. A ratification that leaves the vice unpurged and unforgiven is itself null,

There is an inevitable distinction between those contracts which the law or the nature of things forbid to be enforced, and those where the person wronged by them may refuse to be bound, and the infirmity in each class is different, and therefore there is a necessity for different terms to express the two kinds of infirmity. Many have restricted the term *void* to the former class of contracts which are absolutely void, and adopted the term *voidable* as the predicate of the latter class which are only relatively void, though it does not exactly express this conception of the infirmity.

The terms void and voidable, as used in our books, would therefore seem to stand for absolutely or relatively void. That is *absolutely void*, which the law or the nature of things forbids to be enforced at all, and that is *relatively void*, which the law condemns as a wrong to individuals, and refuses to enforce as against them. It is void because absolutely or relatively invalid, or not binding. The French Juris Consults adopts this distinction of absolute and relative nullity.

Acts tainted with an infirmity may very well, and in very correct language, be called by some void, and by others voidable, because, regarded in different aspects, they are both. A contract may, for a time, be voidable as against one and void as against the others, whom it was intended to effect, voidable as against the parties doing wrong, and void as against the person wronged, or *vice versa*, voidable in favour of the person wronged, and void in favour of the wrong-doers; void as not binding to fulfil, and voidable after fulfilment, voidable, in fact, because void or not binding in right. And when the party wronged elects to avoid the act, it becomes binding on neither or rescind as to both. Voidable because one party is bound and the other or some other person is not. Bac. Ab. Tit., void and voidable, 4 Co. 123 b.

It is hardly proper to say that such acts are called voidable, only because the the avoidance does not become efficient and certain without the judgment of a court; for all *valid* rights, as well as all nullities may need this; or because there may be a necessity for a re-conveyance or an entry (where entry or livery is needed to vest or revest title,) or a direct action or bill in equity for a recission; for these are only forms in the process by which the nullity is adjudicated. The judgment does not annul the contract but declares or decides that it *is* null, that it has no inherent vice that renders it not binding, not obligatory, void. In this sense it is voidable, or avoidable, because void; just as a good contract is available or enforceable. because valid; and therefore void is not an improper term for such vicious contracts.

Yet, such a contract is not so void, whe only relatively void, are to vitiate a title under it, as against a *bona fide* purchaser for value and without notice; or as to prevent the party intended to be injured by it renouncing the privilege which the law allows him of rejecting altogether, or from ratifying it and thus making it his own; and not so void as to make the wrong-doing party a trespasser for acting upon it, or as to be inconvenience or obstruction to the party seeking to be restored to his rights, especially if it has been in whole or in part performed, or as to need any other or further consideration than that which he is to receive or may retain under the contract by adopting it

I have made the foregoing remarks with the hope of rendering some aid in resolving the confusion that prevails on this subject, and now I have to add the hope that they will be received with such caution as not to add to that confusion. Much of what I have said is needed in the further consideration of this case, and will aid in the next trial of it.

From the authorities above cited, it is apparent that the court was in error, in saying that the plaintiff was not chargeable with any care of the property in his possession if the sale was fradulent. Many of the cases show that he cannot rescind the contract unless he is able, without inevitable accident, to restore the property received in a condition reasonably approximate to that in which he received it, that is, allowing for the wear and tear, that are consistent with reasonable care, and that happen before the discovery of the fraud.

All the counts added by amendment to the declaration go for nothing, except that for money had and received, and we do not see that it is so repugnant to the special count as to forbid its allowance. The special count claims for a recission provided for by a contract, and the other for a recission because of the fraud, and this is something like a suit on a note, with a cautionary count for goods sold and delivered, being the consideration of the note, so that failing in the note, the party may claim for the goods given for it. We cannot say that this is wrong. One count for damages for the fraud and one for a recission *would* be repugnant; 4 Bos. and P. 351.

Nor was it erroneous in the court to say that the plaintiff may waive the action of tort for the deceit, and sue in assumpsit for the money which he paid on the contract, or which the defendant has received under it. But part of the consideration paid in this case was land and claims against other persons, and these cannot be recovered under a count for money had and received, unless, and only so far as the defendant had converted them into money. If he wants more than mere recission, he must sue for damages for the deceit. Recission is the act of rejecting a contract and all its consequences, and its nature is not changed by the intensity of causes that justify it, any more than the nature of a sale is changed by the magnitude of its consideration. If it were otherwise, these terms would be incapable of definition.

And many of the authorities referred to show that the court was also in error in saying that if the contract is tainted with fraud, it is incapable of confirmation or ratification without a new consideration. Ratification is, in general, the adoption of a previously formed contract notwithstanding a vice that rendered it relatively void; and by the very nature of the act of ratification, confermation or affirmance (all these terms are in use to express the same thing) the party confirming becomes a party to the contract, he that was not bound becomes bound by it, and entitled to all the proper benefits of it, he accepts the conisideration of the contract as a sufficient consideration for adopting it, and usually this quite enough to support the ratification. A mere ratification cannot, of course, correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration or for any other defect a mere ratification can add nothing to its binding force.

We are not convinced that there is any other error in the case. Judgment reversed and a new trial awarded.—*Legal Journal.*

GENERAL CORRESPONDENCE.

Law Students—Method of Examination explained.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—As the *Law Journal* has long been the Court of Appeal for law students in their difficulties, I am tempted, although reluctant to give so much trouble, to ask its assistance in the following matter.

The large number of gentlemen who were refused certificates of fitness at the last examination (fourteen out of twenty-two applicants) would seem to suggest that there had been some change in the method of examining; or otherwise, that great indifference had been exhibited by gentlemen, in preparing themselves for the examination.

Under these circumstances, my request is that you will kindly, for the benefit of students (myself among the number) residing out of Toronto, state through the columns of the *Law Journal* what the present method is, in both the written and oral branches of the examination, and by what rules (if any) it is now decided whether the applicant shall pass.

It is rumored that the examination is much more strict than formerly, and that a new system of deciding upon the merit of each candidate to a certificate has been adopted.

Yours respectfully,

London, Aug. 31, 1863. STUDENT-AT-LAW.

[The system adopted by the examiners is a very simple one. A maximum value—say 10 marks—is attached to each question in the printed paper. If ten questions, then the maximum on the whole paper would be 100 marks. If a question be only half answered, then the candidate receives only 5 marks for it, and so a greater or less number of marks in proportion to the merits of his answer. If upon the whole paper—say of ten questions—he has less marks than 50, or one half the maximum, he is not required to undergo an oral examination, and is in fact rejected. The real test is the paper examination. The oral examination is designed to detect and expose "cramming." The standard of examination, it will be thus seen, is not a severe one; and we are assured that it was not more so than usual during last term. —EDS. L. J.

Law Student—Articles—Date thereof.

TO THE EDITORS OF THE LAW JOURNAL.

HAMILTON, 8th September, 1863.

GENTLEMEN,—Among the many questions you have kindly answered through the medium of your valuable journal, in reference to Articles of Clerkship, I have not noticed any which cover my case, viz.:—

My articles are dated on the 24th of October—the day upon which I began to serve under them—but through some oversight they were not executed until the 18th of November following, though I continued to serve under them from the date. The question is, will my time count from the date of the articles, or from the date of execution? If I was not serving under them from the day of the date, the time would evidently only count from date of execution, but as I was serving under them from date, I think the time should count from date of articles. There is this further difficulty: If my time only counts from date of execution, the five years will expire within the 14 days before term. If they operate from date, they run clear of the 14 days. Your answer to the above question, in your next issue, will greatly oblige

A LAW STUDENT.

[Your time will only count from the time the articles were executed. This is evident from the wording of the statute. It is necessary to state the date of execution in the affidavit, and this is for the purpose of showing when the students' time commenced to run.—EDS. L. J.]

Law Students—Articles expiring within fourteen days of Term—Remedy.

TO THE EDITORS OF THE LAW JOURNAL.

KINGSTON, September 19th, 1863.

GENTLEMEN,—An article in the last number of the *Law Journal* caused much disappointment to a great many students of the law—I mean that with regard to the necessity of articled clerks leaving their articles with the Secretary fourteen days before the term, in which they seek admission—by which a great many hard-working young men lose a term, when they can ill afford to do so. To many, therefore, the news you published in the issue before the last, namely, that the Benchers had dispensed with this necessity—was very welcome, and a great many nice things were said about the Benchers. You may imagine, therefore, the vexation that was felt when you were obliged, in your last number, to contradict this welcome news. As you remark, it is exceedingly hard that students, who seldom know anything about law terms before they commence their studies, should, after industriously working through their term of service, find themselves obliged to lose three months, merely because their articles expire four or five days before term, instead of fourteen.

Suffering under what, I can assure you, is a serious grievance, we naturally ask—why fourteen days? The answer is: The statute requires it. That is all very well; but the statute does not require that the period of service should have expired before the articles are left with the Secretary. What reason is there why all students should not share the boon granted to those who were articled before 1859,—viz., to file their articles fourteen days before term, with an affidavit of due service up to that time, and then serve the few remaining days, and make another affidavit of due service during those days? By this simple means the statute would be complied with, and a great substantial benefit conferred on a large number of hard-working young men.

Thanks are due to you, Gentlemen, for the liberality with which you have advocated the interests of law students, who regard your journal as a friend in need. Its suggestions have been adopted, in more than one instance, by the legislature, and can be distinctly traced upon our statute books. So, in this case, it is to be hoped they will be listened to by the Benchers, who are held in the highest admiration and esteem by the law students throughout the country.

Yours, truly, A LAW STUDENT.

[We hope that the Legislature will, during the present Session, interfere and remedy that which appears to us to be an arbitrary exaction without a corresponding benefit. In case such a bill be introduced, those students who stand in need of its provisions, should bring to bear upon such members of the Legislature as they can influence, all the influence in their power.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. NAEF v. MUTTERS.

Summons, writ of—Order to proceed as if personal service had been effected—Common Law Procedure Act, 1852, s. 17.

A judge's order to proceed as if personal service had been effected under the 17th section of the Common Law Procedure Act, 1852, will not be set aside when it is shewn that the defendant carried on business in England when the writ was issued, though it is doubtful he was then actually in England.

IN THE MATTER OF THE ARBITRATION BETWEEN SWAYNE AND BOVILL, AND WHITE AND PONSFORD.

Award—Summary remedy to enforce—Set off, effect of.

If, upon a rule to pay money under an award, it appears from the affidavits in answer that there are reasonable and *bona fide*

grounds for believing that the party called upon to pay has set off to a larger amount, the court will not grant its summary remedy, but will leave the applicant to his remedy by action.

AMOS AND ANOTHER v. SMITH.

Bond—Surety—Cestui que trust—Statute of Limitations—Part payment or satisfaction of interest—Acknowledgment.

A bond given by a surety to a trustee under a marriage settlement, to secure payment of principal and interest to the husband.

Held to have been kept alive by receipts for interest, given by the wife, the *cestui que trust* and her husband, the co-obligor, although no money passed or was ever paid for such interest.

EX. *In re* THE SHERIFF OF ESSEX.

TERRELL v. FISHER, SAME v. SAME, SAME v. SAME.

Practice—Execution—Sheriff—Liability to attachment—Non-Execution of writs—Delay of execution.

The sheriff is not justified in delaying the execution of writs, whether of *ca. sa.* or *fi. fa.*, for the purpose of enabling the judgment debtor to carry on his business (even though the sheriff *bonâ fide* believes that by so doing he may the better enable the debtor to raise the money) and his doing so renders him liable to attachment.

EX. LEWIS v. PEACEY.

Apprentice—Absenting—Deed—Breach of covenant—Damage.

In an action on an apprenticeship deed against the father, the breaches being that the son absented himself, and that the defendant harboured him "a long time," the deed not having been cancelled.

Held, that the plaintiff could only recover damages for the absence up to the time of the writ issued.

EX. CURLEWIS v. BROAD.

Attorney and client—Service of process—Omission of indorsement—Liability to action.

The attorney retained to prosecute an action, and the person employed as process server, are liable to be sued by the client for damage caused through neglect in omitting to make the indorsement of service.

EX. BAYLEY v. GRIFFITHS.

Practice—Interrogatories—Plea of composition—Replication of fraud.

On a composition deed the plaintiff, having replied fraud, was allowed to deliver interrogatories to the defendant, tending to disprove the *bona fides* of the deed, and show it colourable.

EX. LACHBRARME v. THE QUARTZ MINING COMPANY.

Practice—Inspection of documents—Interrogatories as to custody—Attachment—Public company—Liability of directors or officers.

In an action against a public company, an order for inspection of documents having been obtained, first against the company, and then against a director, and a rule for an attachment having been afterwards granted against the director for not obeying the order.

Held, that an affidavit, on his part, merely denying that at the time of the original order, and since then, the documents were not in his custody, possession, nor power, was not sufficient, and he was bound to state, so far as he could, all that he knew or believed of the custody of the documents in question, so as to enable the court to judge how far his non-production of it was excusable.

Q. B. DAVIES AND ANOTHER v. PRICE.

Arbitration — Submission — Authority of arbitrators — Waiver of, objection to.

Plaintiff and defendant were parties to a lease, containing a stipulation that any dispute respecting the construction of the lease, or any other matter connected with it should be referred to the arbitration of two persons, appointed by the parties, and their umpire. Disputes arising respecting the construction of a clause in the lease, and as to what damages, if any, the plaintiff was entitled to recover by reason of an alleged breach by the defendant of the covenant contained in such lease, according to the construction put upon it by the plaintiff, the plaintiff gave the defendant notice of his appointment of an arbitrator to determine such differences in dispute, in reply to which the defendant gave the plaintiff notice of his appointment of a person "to be arbitrator on his behalf, upon all differences of construction, but not otherwise of the lease." Upon the reference, the arbitrators decided in favour of the construction contended for by the plaintiff, and proceeded to consider the question of damages, the defendant objecting that he had no authority to do so, but continuing, under protest, to attend meetings, when the question was gone into, and cross-examining witnesses upon it. The arbitrators made their award, giving £2000 damages to the plaintiff. In an action upon the award, founded on an alleged submission pursuant to the indenture to determine the difference in dispute.

Held, that the arbitrators had exceeded their authority in awarding damages, and

Semble, that the defendant, having objected to their entertaining such question, did not waive his objections by attending subsequent meetings under protest; but that, at all events, the action founded upon the original submission, and not upon some new implied submission, could not be supported.

EX. FISH v. TINDAL.

Practice—Judgment—Satisfaction—Entry of, on registry.

The court, or a judge, will compel a plaintiff who has received satisfaction of his judgment, to execute the proper satisfaction process, in order to have the entries of it on the registers duly vacated. And when the judgment is vacated, the entries of it are, in effect, vacated.

C. P. BAILEY v. STEVENS.

Easement—Right appurtenant to land.

There cannot be a right appurtenant to the land of A. to take a profit on the land of B, which right is wholly unconnected with the enjoyment of the land of A.

EX. LONG v. BRAY.

EX PARTE WRIGHT.

Sheriff—Extortion—Interpleader—Possession money.

When a judge, in an interpleader summons, has ordered that the claimant, as a condition of relief, shall pay possession-money, the claim of an overcharge is not extortion within the statute, but a ground for relief on taxation of costs.

EX. SWAN v. THE NORTH BRITISH AUSTRALIAN COMPANY.

Mandamus to joint stock company—Registry of shares—Forged transfers.

The owner of shares in two companies having sent his broker transfers, in blank, for the purpose of transferring the shares in one company, and the broker having fraudulently retained some of them, and filled them up with the names and numbers of the shares in the other company (of which he had stolen the certificate for the purpose) and sold and transferred them, the court were equally divided as to whether the owner was entitled to recover them from the company.

EX. DUMERGUE v. RAMSEY.

Landlord and tenant—Fixtures—Execution creditor.

On a demise of a music hall, with a covenant by the tenant at the end of the term, to deliver up all things which, during the term, should be fixed or fastened to or upon the premises, and with a proviso that in case of an execution, &c., the demise should determine, and the landlord might re-enter.

Held, that chandeliers and seats, which could be detatched by merely unscrewing, without any injury to the premises, were tenant's fixtures, which could be seized by the sheriff under a *fi. fa.* against him, and to which the landlord could not entitle himself under the proviso by a re-entry after the seizure. But, *quære* whether gas pipes, or such seats or fittings as were meant for permanent use, as parcel of the premises, could be so taken.

Semble, that they could not.

EX. BUSH v. BEAVEN.

Mandamus—Action of—Remedy against commissioners under local Act—Statute of limitations.

An action of mandamus under the Common Law Procedure Act, 1854, s. 68, is not maintainable against the clerk to commissioners under the local Act, for work, &c., done for them, where it is not alleged, and it does not appear that they became indebted as such commissioners, or otherwise than personally indebted; or that the work, &c., was in execution of the local Act, or that they would have power to levy rates for payment, so that there is any charge on the rates. And even if such an action is maintainable in such a case, it is barred by the Statute of Limitations when six years have elapsed since they became indebted.

EX. WOODS v. THEIDMAN.

Contract—Authority to accept against bill of lading—Forgery.

A customer of a bank having desired them to procure to be accepted bills of exchange, which a correspondent of his would draw against bills of lading he should send, and the bank having got their agents to accept the bills of exchange on a document which was sent to them as, and purported to be, the bill of lading referred to, but which was, in fact, a forgery—no goods having been shipped, and the transaction being a fraud on the part of the customer's correspondent.

Held, that they were entitled to recover from their customer the amount they had paid in respect of the bills of exchange.

CHANCERY.

V. C. S. IN RE REYNOLDS.

Practice—Order for costs—Attachment—Clerical error.

Where an order, directing a solicitor's bill of costs to be taxed, goes on to direct payment of what shall be found due within twenty-one days from the date of the certificate, no further order for payment is necessary and no subpœna for costs need be sued out. It is sufficient in order to found an attachment to serve a copy of the order properly endorsed, and a copy of the taxing master's certificate, on the party thereby certified to be liable to pay; and the circumstance that the party to receive it is a corporation makes no difference if they, under their common seal, authorize any one to receive. But if the copy of the taxing master's certificate which is served be not a true copy, however slight the error, the attachment will be discharged with costs.

M. R. EDGE v. BUMFORD.

Bill of exchange—Destruction by drawer—Bill for payment against acceptor—Jurisdiction.

Where A. drew a bill in his own favor on B., who accepted it, and A. then handed the bill to C for value, but without indorsing it, and C. returned it to A. for indorsement, who, instead of indorsing it destroyed it, and afterwards became bankrupt:

Held, that a bill would not lie by C. against B., the acceptor, for payment of the amount of the bill, there being no privity between them.

V. C. ... MIGNAM v. PARRY.

Construction—Antenuptial articles—Postnuptial settlement—Lost instrument—Recital.

The terms of a postnuptial settlement, which purported to carry into effect antenuptial articles, were different from those which were recited to have been contained in such antenuptial articles. The antenuptial articles were lost, and no evidence could be adduced as to their terms, except the recital in the settlement.

Held, that in order to rectify a post nuptial settlement by antenuptial articles, the terms of the latter must be proved, and that in the absence of the articles the court must assume that the recital was incorrect, and must carry into effect the provisions of the settlement.

M. R. EVANS v. WYATT.

Sett'ement—Construction—Implied covenant—Representation.

By a settlement the settlor, after reciting that he was entitled to £7000, part of a distributive share in a certain estate, which was in course of administration in this court, and that it had been agreed that he should settle £5000, part thereof, for the consideration therein mentioned, assigned to the trustees £5000, part of such sum of £7000, upon certain trusts. The settlor died, and the distributive share in the estate under administration did not realize so much as £5,000.

Held, that the settlement did not amount to a representation to settle £5000 at all events, and that the estate of the settlor was not liable to make up the deficiency between the sum realized and the £5000.

V.C.W. RE THE PHŒNIX FIRE INSURANCE COMPANY, BURGESS & STOCK'S CASE.

Joint Stock Company—Extension of business—Power to bind shareholders—Policy—Return of premiums.

A joint stock company, established as a life assurance company, has no power to extend its business to marine insurance by resolutions to that effect, and the shareholders cannot be bound to an illegal course of proceeding by the receipt of circulars announcing the extension, even though the circulars are accompanied by a dividend, the result of such extension, the directors having no power to change their course of business in any mode less formal than a fresh deed of settlement signed by all the shareholders.

But although holders of policies thus illegally granted cannot recover upon them against the company under the Winding-up Act, they are entitled to a return of the premiums paid by them.

V. C. S. WETHERELL v. WETHERELL.

Will—Construction—Gift by implication—Widow's election.

A will contained a bequest in the following terms:—"My will is that the annual interest only of all the residue of my property, of whatsoever kind, &c., shall be divided into as many equal parts or shares as there may be children living and begotten of the body of T. N. W., of, &c., on the body of his present wife, share and share alike, as each of the said children come of age; and in case any one of the said children shall die without any children of their own lawfully begotten, then in that case his or her share of the said annual interest shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and great-grandchildren of the said T. N. W. and of his wife L. W."

The testator then gave to his wife an annuity of £28, on condition of her making no claim whatever upon the residue of his property; but if she made and persisted in any claim upon the residue of his property after his decease, the annuity should not be paid. And his will was that all casual property reverting to his estate, whether of leasehold or copyhold property or mortgages, policies of life assurance, ground rent, &c., that should fall in or be advisable to call in, should, as soon as the amount thereof was obtained, be immediately invested, and the interest received for the aforesaid children.

Held, that children living at testator's death were entitled to the annual interest as tenants in common for life, with remainder to the grandchildren *per stirpes*, as tenants in common as to realty, in fee as to personalty absolutely; shares of children dying without issue to go over, subject to same limitation as original shares; and that the widow was not put to her election between dower and the annuity.

V. C. K. BULL v. JONES.

Will—Construction—Gift of corpus with dividends and accumulations—Vesting—Gift over.

A testatrix leaves a leasehold house and furniture and personal estate to trustees upon trust, to sell, and convert, and invest in the three per cent. consols, and stand possessed of the proceeds on certain trusts, and as to the residue of the consols in trust as to one moiety, and of the dividends thereof to pay the same dividends as

and when received to her daughter E. M. for her separate use, without power of anticipation for her life, and after her decease upon trust as to the said moiety and dividends and accumulations thereof, until it shall be payable and distributable, to pay the same to the children of E. M. who should survive her, sons at twenty-one, and daughters at twenty-one or marriage, with benefit of accruer and survivorship, with a gift in precisely similar terms to her daughter M. E. and her children of the other moiety. And in case, at the decease of either of her said daughters, there should be no child or children who should have lived to attain a vested interest, then that moiety and the dividends and accumulations should be held in trust for the other of her said daughters and her children as before given. And if, before the death of the survivor of her said daughters, there should be no child or children of either of her said daughters, who should have lived to attain a vested interest, then the entirety of the two moieties and the dividends and accumulations to her nephews and nieces absolutely. E. M. having died after the will, but in her mother's lifetime, the testatrix, by a codicil, refers to that fact, declaring that the moiety, the gift of which had so elapsed, should go to her surviving daughter in the same manner as it would to E. M. if she had lived; and there was a gift to the only child of the deceased daughter for maintenance. The surviving daughter died, leaving six children, and the trustees paid the fund into court.

Held, that the event had not happened, under which the nephews and nieces would take by virtue of the gift over: that the interest of the grandchildren was not vested, but their shares must be directed to accumulate until the grandchild attained twenty-one.

L. J. HARTLEY v. SMITH.

Will—Directions as to care of children.

A testator, by his will and codicil, having expressed his wish that his deceased wife's sister should take charge of his children, and the guardian of her children having objected to her doing so:

Held, that unless a case were made against the propriety of the children remaining in charge of the party named in the will, the court would give effect to the directions of the testator.

V. C. K. SANDS v. SODEN.

Parent and child—Promise by letter—Obligation—Settlement.

A marriage being in contemplation, W. and S., the fathers of the parties, write to each other stating what they intend to do, and referring to there being a settlement. The marriage takes place some months after, and the settlement is executed in the Scotch form, containing no specific reference to the letters, except certain expressions which the framers of it in their affidavit state were intended as such reference, the letters not being made the subject of a covenant, out of delicacy to W., the father of the lady. W. by his will leaves certain property and a share in the residue to his married daughters; but subsequently, having transferred a sum of stock to the trustees of the settlement in question, by a codicil revokes these bequests, considering, as he expresses it, that he has done all he can be expected or required to do. On W.'s death, leaving considerable personal property, dissatisfaction is expressed on the ground that the promises in the letter written by W. in contemplation of the marriage have not been carried out; and a bill is filed praying that the parties taking under the settlement may be declared entitled to a share in W.'s estate, according to such promises.

Held, that the letter of W. was only a proposition of something to be afterwards carried out by a settlement; and as that instrument contained no recital of the letter, the expressions used in it, and in the will of W., were not sufficient to bind his estate; and that the bill must be dismissed with costs.

V. C. W. RE THE NATIONAL ALLIANCE ASSURANCE COMPANY. ASHWORTH'S CASE.

Assignor and assignee—Chose in action—Set-off.

Assignees of a chose in action take it, subject to any right of set off which may be enforced against the assignor.

A. assigned to B. a debt due from the company of which he was director, for fees. Calls were made, and the company was subsequently wound up, and a compromise was made by the official manager, by which A. was released from all liability on his relinquishing all claims against the company.

Held, that B., who, although he had given notice of the assignment, had not sued for the debt before the calls were made, was bound by the compromise under which the official manager had set off the debt against A.'s liability for calls.

V. C. S. BAMFORD v. CREASY.

Breach of covenant—Forfeiture—Relief in equity—Terms.

In peculiar circumstances the court will relieve against forfeiture for breach of covenant to repair.

A landlord brought his action of ejectment, assigning breaches of covenant to pay rent, and to keep insured and in good repair. He recovered judgment by default, and entered into possession of the demised premises. The circumstances of the case were peculiar. On bill filed by the tenant, the court granted relief on terms.

V. C. W. STANLEY v. STANLEY.

Will—Issue—Parol evidence—Falsa demonstratio.

Although the court will not grant an issue, nor admit parol evidence for the purpose of negativing or explaining the effect of words (which limit the effect of the devise) admittedly contained in the will at the time of execution, but alleged to have been inserted by mistake, it is at liberty in such a case to construe the will upon the whole scope and spirit of the instrument, taking into account the surrounding external circumstances of the property, and the knowledge possessed by the testator at the time of making his will; and where such external circumstances, as applied to the whole instrument, afford conclusive evidence that the actual letter of the will does not express the intention of the testator, then and then only can the court reject qualifying words of limitation, treating the plaintiff's indicated devise as unaffected by a defective addition.

V. C. S. KNIERIM v. SCHMAUSS, KOHLER v. KOHLER, FORNOFF v. SCHMIDT, BAUER v. BAUER.

Practice—Application to come in and prove after decree—Bill of review.

Where it is desired to obtain a rehearing, or have a decree or order altered, the proper course is by bill of review.

A decision of the court below, which was affirmed by the House of Lords, decided that certain persons were entitled to a fund as next of kin of an intestate, and the fund was paid into court to the credit of certain causes. Subsequently a petition in the cause was presented, praying that the petitioner might come in and establish her claim as next of kin, and that until she had had an opportunity of doing so the fund might not be dealt with. Petition dismissed with costs.

M. R. BARRY v. STEVENS.

Principal and agent—Bill for account—Author and publisher—Remedy at law—Jurisdiction.

Although this court has jurisdiction to entertain a bill for an account by a principal against an agent, it will not do so when the claim is a mere money demand, which may be perfectly well ascertained at law.

Semble, this court will entertain a suit instituted by an author against his publisher for an account, when the latter refuses to render an account altogether; but if such publisher renders an account showing a certain balance due from the author, for which he brings an action, this court will not, in the absence of fraud or mis-statement, allow a suit to be instituted by the author praying an account and an injunction, but will leave the question to be determined at law.

REVIEWS.

THE GENERAL ORDERS AND STATUTES RELATING TO THE PRACTICE, PLEADING AND JURISDICTION OF THE COURT OF CHANCERY FOR UPPER CANADA, with copious notes compiled from English and Canadian Decisions and a Book of Forms. By Richard Snelling, LL.B., student-at-law, and Frederick J. Jones, solicitor. Toronto: Henry Rowsell, Law Bookseller and Publisher, 1863.

In our July issue, we gave a cursory notice of this valuable work, and we think the profession may now be congratulated upon having before it that which it has so long needed, the

orders of the Court of Chancery in a consolidated form, with exhaustive notes upon each, dealing with upwards of 3,000 cases, and reducing this mass of decisions to a shape conformable to modern practice, rendered easy of reference by a very elaborate index. When we last noticed this work it was incomplete. It is now finished. The book is divided into three parts. Part the first, contains all the orders of the Court of Chancery, now in force, in a chronological as well as a consolidated form —the orders of the Court of Error and Appeal—and the orders rules and regulations of the Privy Council. To these orders have been appended, thoroughly exhaustive notes of English and Canadian decisions, and the notes themselves contain some clever dissertations on the subjects suggested by different sections of the orders, for instance, on the practice on "Security for Costs," pp. 5—10, on "Production of Documents," pp. 100-104, on "Receivers," pp. 169-175. A portion of the latter note we give at length:—

"A receiver duly appointed by the court is, from the moment of his appointment, to be considered as an officer of the court itself. He will be protected by it in the proper discharge of the necessary duties of his office, the possession of the receiver not being permitted to be disturbed without the special leave of the court; (*Brooks* v. *Greathed*, 1 J. & W. 178; *Angel* v. *Smith*, 9 Ves. 335;) and it will be considered as a contempt of court if any such interference takes place. (*Broad* v. *Wickham*, 4 Sim. 511; *Johnes* v. *Claughton*, Jac. 573.) The reason for this is explained by Lord Eldon in *Angel* v. *Smith*, *supra*. Even a receiver appointed to get in property, part of which he finds in the possession of another receiver, should not take proceedings to deprive the latter of such possession without the authority of the court. (*Ward* v. *Smith*, 6 Hare, 312; *Tink* v. *Rundle*, 10 Bea. 318.)

The general objects sought by the appointment of a receiver, are to provide for the safety of property, pending litigation, and until the hearing of the cause; (*Tullett* v. *Armstrong*, 1 Keen, 428;) or, during the minority of infants, to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or persons having immediate but partial interests therein. A defendant seeking to appoint a receiver before decree must file a cross bill. (*Grote* v. *Bury*, 1 W. R. 92.)

A receiver cannot be appointed before decree on the motion of a defendant, even though he be the co-executor of the plaintiff, and the bill charges that a receiver is necessary; (*Robinson* v. *Hadley*, 11 Bea. 614;) nor at the hearing, on the application of the defendant, unless prayed for by the bill. (*Barlow* v. *Gains*, 8 Bea. 329.)

A receiver will, in a proper case, be granted before answer; *Duckworth* v. *Traford*, 18 Ves. 283; *Aberdeen* v. *Chitty*, 3 Y. & C. Ex. 379;) and in case of urgency at the earliest institution of the suit; (*Meaden* v. *Scaley*, 6 Hare, 620; *Hart* v. *Tulk*, 6 Hare, 611; *Tamfield* v. *Irvine*, 2 Russ. 149;) and leave to serve notice of motion therefor will be given. Where the defendant sought to, and absconded for the purpose of avoiding service, a receiver was appointed on an *ex parte* motion for that purpose; (*Dowling* v. *Hudson*, 14 Bea. 423, where all the authorities are cited.) Otherwise, if the defendant has not absconded. (*Caillard* v. *Caillard*, 25 Bea. 512.)

As already stated a receiver may be appointed *before* answer, on motion and notice where fraud or danger to the property is apprehended, the affidavits of the respondent on shewing cause having been considered as tantamount to an answer for this purpose. (*Jervis* v. *White*, 6 Ves. 739.) It is unusual, however, to move for a receiver before answer; but in strong cases it has often been done. (*Vann* v. *Barnett*, 2 Bro. C. C. 158; *Dawson* v. *Yates*, 1 Bea. 391; *Lloyd* v. *Passingham*, 16 Ves. 59; *Duckworth* v. *Trafford*, *supra*; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180; *Davis* v. *The Duke of Marlborough*, 2 Sw. 108; *Woodyatt* v. *Gresley*, 8 Sim. 180; *Tamfield* v. *Irvine*, 2 Rus. 149; *Meaden* v. *Scaley*, 6 Hare, 620.) Where, however, facts not founded on allegations in the bill are introduced into affidavits in support of an application for a receiver, the court will disregard them. (*Dawson* v. *Yates*, 1 Bea. 391.)

At any time *after* answer, if a sufficient case is made by the bill, and sufficient admissions contained in the answer, (*Boddington* v. *Woodley*, 8 Sim. 167,) an application for a receiver will be entertained. (*Lancashire* v. *Lancashire*, 9 Bea. 120.) In *Hele* v. *Moore*, 15 Bea. 175, a receiver was appointed *after* decree on the petition of a defendant against his co-defendant, the application having been supported by the plaintiff, and a receiver having been specially prayed for in the bill. See also *Barlow* v. *Gains*, 8 Bea. 329; *Edgecombe* v. *Carpenter*, 1 Bea. 171.

A receiver though not specially prayed for by the bill, may be appointed at the hearing; (*Osborne* v. *Harvey*, 1 Y. & C. Ch 116;) or after decree; (*Bowman* v. *Bell*, 14 Sim. 392; *Brooker* v. *Brooker*, 3 Sm. & G. 475; *Cooke* v. *Gwyn*, 3 Atk. 690; but see *Fallows* v. *Lord Dillon*, 1 W. R 101;) but not before decree. (*Pear* v. *Clegg*, 9 W. R. 216; 3 L. T. N. S. 648.)

It may be considered and stated as a general rule, that a receiver will not be appointed where the rights, as between the plaintiff and defendant, are doubtful, if the defendant has obtained the legal estate without fraud, and no case of danger as to the security it alleged. (*Lancashire* v. *Lancashire* 9 Bea. 120.) Nor will the court interfere to take possession of property from a party who has it under a legal title, except in cases of presumed fraud or waste, (*Smith* v. *Collyer*, 8 Ves. 89,) and in these cases it proceeds against the legal title with reluctance, compelled by judicial necessity, the effect of fraud, clearly proved, combined with imminent danger to the property, if the possession should not be taken under the care of the court. (*Woodyatt* v. *Gresley*, 8 Sim. 180; *Mordaunt* v. *Hooper*, Amb. 311; *Stilwell* v. *Wilkins*, Jac. 280; *Huguenin* v. *Baseley*, 13 Ves. 105.)

The application, that a receiver may be appointed, must be made to the court; (*Grote* v. *Bing*, 9 Hare, App i.,) unless to supply the vacant place of a receiver already appointed when, it seems, it may be made in Chambers. (*Blackborough* v. *Ravenhill*, 16 Jur. 1085; 20 L. T. 88.) A party to the suit may, by special leave, be appointed a receiver. (*Davis* v. *Barret*, 13 L. J. Ch. 301.)

The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree. (*Owen* v. *Homan*, 3 M. & G. 378.)

The court will sometimes grant a receiver *pendente lite*. (*Whitworth* v. *Whyddon*, 2 M. & G. 52.)

The note on the "Master's Office," pp. 184-205, is most complete, as also is that on "Costs," pp. 218-225.

Part the second, contains the book of forms of proceedings—and in this the authors have exercised excellent discretion as to the selection of the precedents they have introduced into their work, and have succeeded in confining within a moderate compass, a selection of forms, which will be found of great use to the practitioner in the conduct of a cause. To these forms have been appended very copious notes and observations—together with references to those parts of the practice and orders to which they are adapted. The index under the title "Forms," is so complete that the particular precedent can be found without any difficulty, while the several subjects of the index also contain references to the forms.

Part the third, contains all the statutes relating to the practice and jurisdiction of the Court of Chancery. These statutes have been collected from the mass of enactments contained in our statute book, the repealed clauses carefully expunged, and the reprint, we might say the consolidation, is most perfect.

The authors' note on the jurisdiction of the Court of Chancery, pp. 475-504, will be found of great value to the profession. Under the several heads of equitable jurisdiction they have digested, (not so far as we can learn from the head notes, but form apparently a most correct appreciation of each case) every reported case which is to be found in the nine volumes of Grant's Chancery Reports, and those of this journal. So that the practioner sees at a glance, in a digested and chronological form, all the decisions which have been recorded in the Court of Chancery under the several heads of its statutory jurisdiction.

The arrangement of the work is good, and the work itself will be found to be a convenient and trustworthy guide to chan-

cery practice—a text book to the student and a *vade mecum* to the practioner.

The thanks of the profession are due to Messrs. Snelling and Jones, who certainly have succeeded in doing much to systematize the practice of the Court of Chancery, to bring much order out of confusion, and to have conferred upon practitioners and suitors a great and lasting benefit. We do the authors only simple justice when we say they have produced a careful, clever, and able treatise, useful both to the legal student and practitioner.

The work is a credit to Canada. We may well be proud that we have among us, men capable of compiling so valuable a work, and a publisher able to send forth a work which so far as its typographical execution is concerned, would reflect credit on any law publisher in the Old World.

THE WESTMINSTER REVIEW, July, 1863. New York: Leonard Scott & Co., is received.

This number is the commencement of a new volume. It opens with a paper on The Growth of Christianity, which is attributed rather to accidental circumstances than to Divine origin. The writer contends that Christianity was the representative religion of the period, gradually embodying prevailing beliefs, or giving expression to the unuttered thoughts of men or stimulating their minds with some alluring imagination. In a word, he contends it was only a popular reform working with popular organs, and that its victory lay partly in its own strength, partly in the weakness of antagonistic religions, and partly in its own inherent imperfection. The second paper is a review of Eugene Sue's work, the Rival Races, and neither the author nor the translator receive much commendation; it is said that the English is generally bald, and frequently so wanting in idiom, that it reads like a school exercise. Stuart Mills' new work on Utilitarianism is next reviewed. This work is said to have been thrown off with great apparent ease, and yet to be full of subtle power, and in many places illumined by passages of clear and manly eloquence. Gamesters and Gaming Purses is the title of the fourth paper. The writer argues that to extirpate from the human breast a taste for gaming is impossible. While his facts are interesting, his arguments are cogent. The next paper is on Marriages of Consanguinity. The writer runs counter to the almost universally prevailing idea that such marriages are hurtful, and endeavours to establish that the idea rests rather on a kind of superstition than on really scientific considerations. The remaining papers are upon Saint Simon and his Disciples; The Naturalist on the River Amazon; Louis Blanc's History of the French Revolution; Poland; and Lancashire.

THE EDINBURGH REVIEW, July, 1863.

This number is also the commencement of a new volume. It opens with a review of Mark Napier's Memorials and Letters, illustrative of the Life and Times of John Graham, of Claverhouse, Viscount Dundee. The author is severely handled. The work is described as a violent partizan pamphlet in three volumes. A wish is expressed that the "Memorials" may speedily go down to the depths of forgetfulness, leaving, when they disappear, a few of the letters which they contain floating on the surface; for so long as the "Memorials" are remembered, it is said, they will be a reproach to the author and the polite literature of the nineteenth century. Rev. John B. Pratt, the author of a work called "The Druids Illustrated," is in the next paper more politely but not less severely handled than Mr. Mark Napier. The milk of human kindness begins to flow in the next paper, wherein Mr. James Ferguson, who has recently published a History of the Modern Styles of Architecture, is much praised. The author, it is said, has traced, and worthily traced, the history of architecture in every country in the world, from its crude infancy through the several stages of its greatness and decay. Louis Blanc's History of the French Revolution is the subject of the next paper. The author is described as a man of eloquence, but of error. His work is not looked upon by its reviewer with much favor, but nothing very harsh is said either of him or of it. In the next paper, which is a critique on the late Sir George Cornewall Lewis' Dialogue on the Best Form of Government, well deserved praise is conferred upon the author, who for many years was a contributor to the *Edinburgh Review*, and who himself for some time superintended its issue. It is said of the deceased Baronet, that his pursuit of literature was free of the smallest taint of low or sordid motives; but that he did not on account of his love of letters abandon the path of politics, nor did that ruling passion impair his influence in Parliament or in the Cabinet. The remaining papers are devoted to Xavier Raymond on the Navies of France and England; the Sources of the Nile; and The Scots in France: the French in Scotland; and Lyell on the Antiquity of Man.

GODEY'S LADY'S BOOK (Philadelphia: Louis A. Godey) for September is received. The embellishments of this number are, as usual, all that can be desired. The first is a line engraving of landscape and figures, called the "Happy Party." The second is a double extension colored fashion plate, containing five figures of great beauty. The third, which is an engraving on wood, is a humorous plate, containing two figures, and called "Raising a Beard." There are besides two plates, each representing the latest style of Riding Dress; front and back view, two plates, each representing a Dinner Dress; a plate representing a Morning Robe; and other plates of lesser importance.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Honorable JOSEPH CURRAN MORRISON, heretofore a Puisné Judge of the Court of Common Pleas for Upper Canada, to be a Puisné Judge of the Court of Queen's Bench for Upper Canada. (Gazetted August 29, 1863.)

The Honorable ADAM WILSON, heretofore a Puisné Judge of the Court of Queen's Bench for Upper Canada, to be a Puisné Judge of the Court of Common Pleas for Upper Canada. (Gazetted August 29, 1863.)

CORONERS.

ROBERT A. CORBETT, Esquire, M. D., and CHARLES M. [illegible]NALD CAMERON Esquire, M D., Associate Coroners, United Counties of Northumberland and Durham. (Gazetted September 12, 1863.)

WARREN H. BLAKE, Esquire, M. D., and JAMES MOON SALMON, Esquire, M. D., Associate Coroners, County of Norfolk. (Gazetted September 12, 1863.)

ARCHIBALD A. RIDDLE, Esquire, M. D., Associate Coroner, City of Toronto. (Gazetted September 12, 1863.)

FREDERICK MORSON, Esquire, M. D., Associate Coroner, County of Lincoln. (Gazetted September 12, 1863.)

LEWIS J. GRUNDY, Esquire, and LAWRENCE McLAUGHLIN, M. D., Associate Coroners, County of Elgin. (Gazetted September 19, 1863.)

WESTON L HERRIMAN, Esquire, M. D., Associate Coroner, United Counties of Northumberland and Durham. (Gazetted September 19, 1863.)

NOTARIES PUBLIC.

HOLLAND VINTON SANDERS, of Port Hope, Esquire, to be a Notary Public in Upper Canada. (Gazetted August 29, 1863.)

ALFRED RYLEY, of Manvers, Esquire, to be a Notary Public in Upper Canada (Gazetted August 29, 1863.)

JOHN J. B. FLINT, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 29, 1863.)

WILLIAM AMBROSE, of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 19, 1863.)

WALTER R MACDONALD, of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 19, 1863.)

CLERKS OF COUNTY COURTS.

FRANCIS ANDREW BERNARD CLENCH, Esquire, to be Clerk of the County Court in and for the County of Lincoln, in the room and stead of Johnson Clench, Esquire, deceased. (Gazetted September 12, 1863.)

TO CORRESPONDENTS.

"STUDENT AT LAW"—"A LAW STUDENT"—"A LAW STUDENT," under General Correspondence.