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DIARY FOR JULY.

1. Wednesday... Long Vacation commences. Last day for County Councils to equalize Rolls of Local Municipalities.
5. SUNDAY..... *5th Sunday after Trinity.*
6. Monday..... County Court and Surr. Court Term com. Heir and Devisee Sittings commence.
11. Saturday ..... County Court and Surrogate Court Term ends.
12. SUNDAY ..... *6th Sunday after Trinity.*
14. Tuesday ..... Last day for Judges of County Courts to make return of Appeals from Assessments.
19. SUNDAY..... *7th Sunday after Trinity.*
21. Tuesday ..... Heir and Devisee Sittings end.
26. SUNDAY..... *8th Sunday after Trinity.*
31. Friday ..... Last day for County Clerk to certify Co. Rate to Municipalities in County.

The Upper Canada Law Journal.

JULY, 1863.

THE LAW OF GUARANTEES.

The statute 26 Victoria, chapter 46, passed during last session of the Provincial Legislature, and entitled, "An Act to amend the laws of Upper Canada affecting Trade and Commerce," deserves some attention.

In considering a new law of a remedial character, it is well to examine the old law—discern the mischief to be remedied—and then the nature and effect of the remedy intended will be the more apparent.

In this manner we purpose to consider the nature and effect of the 26 Vic. cap. 46, sec. 1, which, in a legal point of view, is the most important statute passed during the last session of the Provincial Legislature.

It is provided by the fourth section of the Statute of Frauds (29 Car. II, cap. 3) that no action shall be brought whereby to charge the defendant upon *any special promise* to answer for the debt, default or miscarriage of another person, unless *the agreement* upon which such action shall be brought, or some memorandum or note *thereof*, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

What is required to be in writing? Not the promise, but the agreement or some memorandum or note thereof.

The word agreement as here used is not to be understood in any loose sense as synonymous with promise, but in its legal sense, as signifying a contract based on good consideration. There can be no binding agreement without consideration. A promise without consideration is not a binding agreement. Unless the binding agreement, *i. e.*, the consideration, as well as the promise, appear in writing, the party signing is not chargeable within the meaning of the act. The person to be charged for the debt of another, it is true, is to be charged upon his special promise; but, without a legal consideration to sustain it, that promise would be *nudum pactum*. The statute never meant to enforce any promise which, before the Statute, was invalid, merely because, under the statute, it was put in writing. The obligatory part is, indeed, the promise; but still, in order to charge the party making it, the consideration for the promise, as well as the promise itself, *i. e.*, the agreement, must be in writing.

Such was the construction put upon the statute in the well-known case of *Wain* v. *Walters*, 2 Smith's Leading Cases 146, and in many subsequent cases amply confirmed.

The statute, therefore, according to the legal interpretation of it, required at least two things: first, that there should be a good consideration for the promise; secondly, that the consideration, being an essential part of the agreement, should be in writing.

The law on the first point is unaltered. The law on the second is altered. Until recently it was not considered safe to allow the consideration to be supplied by oral testimony. The consequence was that in all cases it became a question of much nicety whether or not the consideration was sufficiently expressed; and in many cases right was defeated owing to the neglect to express the consideration with sufficient legal precision.

If Smith were to write to Jones—"I will engage to pay you this day fifty-six pounds, and expenses on bill for that amount, which Robinson owes you," this would not be sufficient, because of the omission to shew the consideration for Smith assuming the liability to pay Robinson's debt. But if Smith were to write to Jones—"If you will forbear to sue Robinson for one week on the over-due bill for £56, which you now hold, of his, I will see you paid," this would be held sufficient, because the consideration for Smith's promise is Jones undertaking not to sue Robinson for a week, and so the statute would be satisfied.

Such was the old law in all its strictness. In course of time it became most embarrassing to trade and commerce.

Even the courts appear to have been desirous to relax its strictness. It was soon held that it was sufficient either if the consideration appeared on the face of the writing in express terms, or by necessary implication. Next, evidence was received to explain the meaning of words in themselves really free from ambiguity, so as, in the explanation, to let in evidence of consideration.

Thus, plaintiff in his declaration alleged that one Andrew Little had requested plaintiff to sell and deliver him goods

and chattels, in the way of his (plaintiff's) business of a woollen draper, on credit; that plaintiff had, at the request of Andrew Little, consented to do so, provided defendant would guarantee the payment of the price of the goods so to be sold and delivered to Andrew Little, of which defendant, before and at the time of the making of the promise, had notice; that afterwards, and before Andrew Little became indebted to plaintiff for dry goods, defendant, by writing addressed to the plaintiff, promised in the words following: "I hereby guarantee the payment of any sum or sums of money *due* to you from Andrew Little—the amount not to exceed at any time the sum of £100;" that afterwards, plaintiff confiding, &c, supplied goods to Andrew Little for reasonable prices, amounting to £100, and thereby allowed Andrew Little to become indebted to him in £100; that Andrew Little had not paid, &c. Demurrer, on the ground that the state of circumstances contemporaneous with the making of the promise could not be shewn to supply consideration. *Held*, that the circumstances stated in the declaration might be looked at to explain the meaning of the writing. (*Bainbridge* v. *Wade*, 16 Q. B. 89. See also *Powers* v. *Fowler*, 4 El. & B. 511.)

The leaning of the judges in this case (*Bainbridge* v. *Wade*) was only a bending to the requirements of the age. It was a great departure from the rule established with so much strictness in the old cases. Lord Ellenborough, if alive, would have no hesitation in pronouncing it contrary to the law as understood in his time. But law is progressive; and even judges, with all their desire to adhere to old established rules, at times are somewhat influenced by the spirit of the age in which they live, and, as far as possible, constrained to administer the law as suited to the requirements of that age. Such, we think, was the influence which so sensibly affected the judges in *Bainbridge* v. *Wade*. Such is the influence which has since induced the Legislature both of Great Britain and of Canada to relax the rule of construction placed by Lord Ellenborough and others upon the fourth section of the Statute of Frauds.

On 29th July, 1856, was passed the Imperial statute (19 & 20 Vic. cap. 97) entitled, "An Act to amend the laws of England and Ireland affecting Trade and Commerce." Section 3 enacts that "No special promise to be made by any person after the passing of this act to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

In England this enactment was found to give much satisfaction, and the Legislature of Canada, last session, ventured to copy it.

It is a pity that the copy made was not exact in all its terms. The variance, as we shall presently see, is, however more in grammar, than in substance or sense.

Our enactment reads as follows: "No special promise to be made after the passing of this act to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized, shall be deemed invalid to support an action, suit or proceeding to charge the person by whom such promise *has* (Imperial act, "shall have") been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

We take it that the two enactments are, in law, identical. We take it, also, that the meaning of each is tolerably clear. The intention is simply to dispense with the necessity of stating consideration on the face of the writing. The special promise (and not the agreement involving the consideration) is all that is now required to be in writing. But still there must be, in fact, a good and valid consideration for the promise to make it binding. The statute is not intended in this respect to alter the law. It is only intended to alter the mode of proof. Before the statute the consideration could only be proved by the writing. Now it may be proved *dehors* the writing. But still it must, in order to make the promise binding, be proved either in the one way or the other. If not proved either way—if not, in truth, existing—then the promise, as before the Statute of Frauds, is simply a *nudum practum*. The law of contracts is not altered. The law of evidence is altered.

This would be the interpretation which one disposed to apply the remedy to the mischief intended to be remedied would place upon the act of Parliament. Strange to say, however, in the only case which has been decided under the English statute, and to which we are about to refer, apparently a much less liberal interpretation was placed upon it.

Plaintiff had three counts in his declaration. In the first he stated that in consideration he would, at the request of defendant, lend £400 to one Hook Spooner and one William Cubitt, on mortgage of certain houses and land belonging to them, defendant promised plaintiff to take on himself any responsibility by the said Spooner and Cubitt incurred by reason of the loan, and to protect plaintiff from all loss by reason of the loan. Averment, that

plaintiff relying, &c., did loan £400 to Spooner and Cubitt on the security of the mortgage of said houses and land Allegation, non-payment of money when due; and that houses and land of much less value than sum lent, &c. Breach, that defendant did not discharge the responsibility of Spooner and Cubitt to plaintiff in respect of the loan, &c. The second count was substantially the same as the first, but stated the consideration for the defendant's promise to be a transfer of £100 stock by the plaintiff to Spooner and Cubitt. The third count alleged the consideration to be the loan of money generally to Spooner and Cubitt. The cause was tried at the Bristol Summer Assizes for 1858, when the following facts appeared in evidence: The plaintiff having the sum of £400 in the funds, was advised by the defendant to lend it on mortgage to two persons named Hook Spooner and William Cubitt, who carried on business as builders, upon the security of certain leasehold premises belonging to them; the defendant assuring the plaintiff that he would incur no risk, as the security was good for £600, and telling him that if Spooner and Cubitt would not take *less than £600 he himself* would advance £200 to make up the required amount. The defendant also promised to see Mr. Lyne, his solicitor, upon the matter, and shortly afterwards addressed the following letter to plaintiff:

ENFIELD HIGHWAY, *October* 21, 1856.

DEAR CHARLES,—I saw Mr. Lyne this morning, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. *I will take any responsibility myself respecting it should there be any.*

W. MITCHELL.

Shortly after the receipt of this letter Mr. Lyne called on the plaintiff, and told him that Spooner and Cubitt would be content to take the £400, and the plaintiff consented to lend it. Accordingly plaintiff sold out the £400 stock, and advanced the proceeds to Spooner and Cubitt, upon the security before mentioned, at 6 per cent. interest —solely upon the faith of the defendant's letter of 21st October, 1856.

The interest was not paid when it became due, and the security turned out to be very inadequate, and the plaintiff sustained a considerable loss, and in order to recoup himself, sued the defendant.

It was objected, on the part of the defendant, that the evidence did not sustain the declaration, and the learned judge before whom the cause was tried being of that opinion, nonsuited the plaintiff, reserving him leave to move to enter a verdict (for such sum as should be assessed by an arbitrator to be chosen between the parties) if the court should be of opinion that there was evidence to support the contract alleged in any count of the declaration; the court to be at liberty to draw such inferences from the facts as a jury might have drawn.

A rule was accordingly obtained on the part of the plaintiff, to which cause was shewn. During the argument of the rule, on the part of the plaintiff's counsel, the expressions which fell from the judges of the Common Bench, on the construction of the new statute, deserve to be noted. Byles, J., said: "The statute does not make a promise good which was not good before. Can the verbal consideration be imported into the promise?" "You want to incorporate the parol consideration into the written promise. This you cannot do" "Formerly the consideration *in writing* might be looked at, not only to support but to explain the promise. But the *parol* consideration cannot be looked at to explain the promise." Cockburn, C. J., said: "The statute intended to exclude parol testimony as to the terms of the promise itself. The construction you contend for would raise a conflict of parol testimony as to the limit of the guarantee, which would be getting on the debatable ground from which the statute meant to exclude you. Is not the Statute of Frauds inexorable in that?"

Williams, J., who afterwards delivered the judgment of the court, said: "The question in this case is, whether in a letter written by the defendant to the plaintiff relating to a proposed mortgage, the following words are a sufficient guarantee within the fourth section of the Statute of Frauds:

"I will take any responsibility myself respecting it, should there be any."

"It will be observed that at the time the letter was written no mortgage existed. The letter is silent as to the sum to be advanced, as to the rate of interest, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning. It evidently refers to previous conversations in which these particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires it should be. It cannot be made out without reference to previous conversations.

"The recent statute 19 & 20 Vic., cap. 97 sec. 2, it is true, abrogates the rule laid down in *Wain* v. *Walters*, 5 East. 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration formerly expressed in writing discharged two offices—it sus-

tained the promise, and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further and explain the promise.

"We therefore think that the ruling of the learned judge at the trial was correct, and the rule must be discharged." (*Holmes* v. *Mitchell*, 7 C. B., N. S., 361.)

Supposing this construction of the recent statute to be correct, it follows that, notwithstanding, the statute it will be safer to express the consideration in the writing, as hitherto. The want of the consideration may leave the promise incomplete, and without explanation. And, it is clear from the decision just referred to, that unless the promise be complete on the face of the writing by reference to the consideration, expressed or otherwise, that parol evidence will not be received to aid it, and so the promise will fail.

Thus it will be seen that the Legislature, according to the decision of the Court of Common Bench, while removing one difficulty in the way of the binding effect of guarantees, have raised up another which, in all probability, may neutralize the good effect which it was intended the statute should have. The statute says that the consideration need not be stated in the writing. In few cases will the promise be found complete without reference to the consideration. But the court says that unless the consideration appear on the face of the writing, no reference can be made to it as explanatory of the promise, because the promise entire and complete must appear on the face of the writing. Technically, perhaps, the court is right. But if right, it is plain that more legislation is required to make guarantees—what they are designed to be—binding engagements to pay the debts of others. In general they are contained in letters written by and accepted by men fully cognizant of the requirements of common sense, but entirely ignorant of the refinements of the courts in the construction of the Statute of Frauds, and the recent explanatory act to which we have at so much length referred. The necessity for stating consideration was a refinement which had the effect of defeating numberless guarantees: and so the Legislature has interfered and destroyed it. In its place, however, another refinement has sprung up, which promises to rival the defunct refinement in destructiveness. The difficulty of making common, or, more correctly, statute law harmonize with common sense is, it will be seen, by no means trifling. Those interested in simplifying the laws regulating trade and commerce, must again try their hands at the work of legislation on the important subject of guarantees. The law of England still is too subtle for ordinary comprehension.

In several of the United States of America, the fourth section of the Statute of Frauds has been much more liberally construed. The question for the necessity of the consideration appearing on the face of the writing, came up in 1821, in *Packard* v. *Richardson*, 17 Mass. 122. In that case Chief Justice Parker entered into an elaborate discussion of the question, and arrived at a conclusion the reverse of that of Lord Ellenborough, in *Wain* v. *Walters*. He pointed out that for more than a century after the passing of the Statute of Frauds, it had in England been held sufficient to prove the consideration by parol evidence, and decided that to be the true construction of the act. His decision is now a part of the revised statutes of Massachusetts, viz.:—"The consideration of promise, contract or agreement need not be set forth or expressed in the writing signed by the party to be charged thereunto, but may be proved by any other legal evidence." (Revised Stat. Mass. p. 527.) The doctrine propounded by Chief Justice Parker, in Massachusetts, has been followed in Maine, Vermont, Connecticut, North Carolina, Ohio, Missouri, Texas and New Jersey.

It is a subject for regret that any different doctrine ever prevailed in England. The impolicy of it is now very generally admitted; but the difficulty of getting rid of it is greater than might be expected. The courts must either construe the recent amending act with more liberality than the Judges were disposed to do in *Holmes* v. *Mitchell*, or else the legislature must again interfere and strike a blow of a more decided character than they appear to have done.

LAW SCHOOL.

We are informed that in our recent announcement of books to be read for scholarships there is a mistake. In the first year Williams on *personal* property, and not Williams on real property, is the book intended. Students will please make the necessary correction.

JUDGMENTS.

ERROR AND APPEAL.

Hamilton v. *Holcomb*.—Appeal from Common Pleas. Case reported 12 U. C. C. P. 38. Appeal dismissed with costs (McLean and Draper, C.J.J., dissenting.)

Rutherford v. *Hill*.—Appeal from Chancery. Case reported 9 Grant 207. Appeal dismissed with costs (Spragge, V. C., dissenting.)

Sexton v. *Paxton*.—Appeal from court Queen's Bench. Case reported 21 U.C Q B. 389. Appeal dismissed with costs (Draper, C. J., and Morrison, J., dissenting.)

QUEEN'S BENCH.

Present: McLEAN, C. J.; WILSON, J.

June 15, 1863.

Kelly v. *Moulds*.—Judgment for plaintiff, on demurrer.

Robison v. *Flanigan*.—Judgment for defendant demurrer to fifth plea, and for plaintiff on the other pleas. Leave to apply to amend on affidavit.

Gore Bank v. *Gore Mutual Insurance Company.*—Rule *nisi* to rescind order of Connor, J.

In re West Middlesex Agricultural Society and East Middlesex Agricultural Society.—Rule absolute for mandamus.

Adshead v. *Upton.*—*Held*, 1, that a rule for costs may be issued either in term or vacation; 2, that it may be issued in the vacation of the assize next preceding term (Hagarty, J., *dubitante*); 3, that it is premature to issue it during the sitting of the court of assize for which notice of trial was given. Rule absolute to rescind rule for costs of the day with costs.

Best v. *Boice.*—Rule for new trial; costs to abide the event.

Hum et ux v. *Lasher.*—Rule absolute for new trial; costs to abide the event.

The Queen v. *McLean.*—New trial ordered.

Wells v. *McGarth.*—Rule absolute for new trial without costs.

Dickson v *Haskin.*—Rule discharged.

June 20, 1863.

Wismer v. *Wismer.*—Judgment for defendant on demurrer.

Sykes et al v. *The Ottawa and Prescott Railway Company.*—Held, that until payment made a garnishee is not in a position to plead a plea in bar to an action at the instance of his creditors. Judgment for plaintiffs on demurrer.

Bank of Upper Canada v. *Kuttan.*—Held, that no stranger to a bill or owner can at law sustain an action on it. Rule absolute to disallow amendment and for new trial without costs.

Garner v. *Garner.*—Rule absolute to enter nonsuit.

Grey v. *McMillan et al.*—Judgment for defendants.

COMMON PLEAS.

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

June 15, 1863.

Shaw v. *Moreton.*—Rule absolute to enter nonsuit.

Baskerville v. *Doane.*—Rule discharged.

In the matter of Smith and Henderson, two, &c.—Rule discharged, without costs.

Thompson v. *Kaye.*—Judgment for defendant, on demurrer.

Steuart v. *Clark.*—Rule for new trial, without costs.

Quackenbush v. *Snider.*—Judgment for plaintiff, on demurrer. Rule absolute for new trial; costs to abide the event.

Turley v. *Evans*—Judgment for plaintiff on demurrer, and rule discharged, except as to so much of it as asks for reduction of verdict, which part is made absolute.

Williams v. *Taylor.*—Rule discharged.

Meredith v. *McCutcheon*—Judgment for plaintiff, on demurrer.

Powell v. *Baker.*—Judgment for plaintiff, on demurrer.

Fraser v. *Robertson.*—Judgment for plaintiff on special case.

Smith v. *Dodd.*—Rule discharged.

Roe et al v. *O'Neill et al*—Rule absolute to enter nonsuit, unless plaintiff pay costs in a month, in which case new trial ordered.

Cotton v. *Beaty.*—Rule discharged.

Neilson v. *Jarvis.*—*Held*, that a writ of *fieri facias* cannot be wice renewed, and that the second writ is a nullity. Rule absolute for new trial, without costs.

Watson v. *Perrine et al.*—Rule discharged.

Lawson v. *Ingram.*—Rule absolute for new trial, on payment of costs.

Kennedy v. *Mulligan.*—Rule *nisi.*

Murray v. *Dickenson.*—No rule.

June 20, 1863.

Bank of Upper Canada v. *The Grand Trunk Railway Co.*—Judgment for plaintiffs. (Draper, C. J., dissentiente.)

Campbell v. *Corporation of Elma.*—Judgment for plaintiff on demurrer, with leave to amend on payment of costs.

Carrall v. *McInnes.*—Appeal dismissed without costs.

Benedict v. *McInnes*—Appeal allowed. New trial without costs.

The Queen v. *The Port Whitby Railway Co.*—Rule discharged with costs.

The Queen v. *Lunn.*—Conviction affirmed.

In re Cahill and Clark.—Rule absolute to set aside so much of order of Connor, J., as gives costs of reference to plaintiff.

White v. *Lord et al*—Application in the part of unattaching creditor to set aside judgment and execution obtained by plaintiff against defendants as being collusive. Rule absolute to set aside execution with costs to be paid by plaintiff.

In the matter of Goodwin and the Ottawa and Prescott Railway Company.—Rule absolute but not with costs, as no power to give costs except in cases under the Municipal Institutions Act.

Thompson v. *Kaye.*—Rule refused.

PRACTICE COURT.

Present: RICHARDS, J.

June 20, 1863.

Johnston v. *Jamieson*—*Held*, that the court has no jurisdiction to set aside an award for a mistake in law, unless the mistake appear on the face of the award or in some writing given contemporaneously with it Rule discharged with costs.

Moodie v. *Dougall*—*Held*, that a matter once discussed and decided, cannot be again discussed upon the suggestion that the judge who decided took an erroneous view of the law. Rule discharged without costs.

Glass v. *Whitney.*—*Held*, that plaintiff cannot, after demurrer to a plea in bar decided against him, be allowed to discontinue. *Semble*, his proper course is, at the time of the delivery of judgment against him on the demurrer to apply for leave to amend. Rule discharged with costs.

SELECTIONS.

THE ACTION FOR A NUISANCE.

What is an actionable nuisance? That has become a very difficult question to answer since the decisions of the courts in some recent cases, where the alleged nuisance has been the burning of bricks near the premises of the complainant. In these cases the judicial opinions appear to be most conflicting, and consequently the law on this subject, which is one of frequent occurrence, and therefore of some importance, is in a very doubtful and unsettled state. It is certainly rather remarkable to find it an undecided point at the present day whether, if a man carry on a lawful trade, or exercise acts of ownership on his land, such as burning and making bricks there, he is or is not legally liable to an action for a nuisance at suit of a neighbour whose property has been thereby injured. But so it is. The first case which gave rise to this question, and has since led to so much discussion on the subject, is that of *Hole* v. *Barlow*, 4 C. B. N. S. 334. There the action was for a nuisance alleged to have been caused by the defendant burning bricks on his own land near to plaintiff's house, and Byles, J., who tried the cause, directed the jury that the verdict ought to be for the defendant if he carried on the burning of bricks in a proper and convenient place for that purpose, although the plaintiff's enjoyment of his property might have been rendered uncomfortable by the nuisance. That direction was upheld by the Court of Common Pleas, consisting of Crowder, J., Willes, J., and Byles, J., the Court being of opinion that such direction was warranted by the following passage in Com. Dig. tit. "Action on the Case for a Nuisance:" "So an action does not lie for a reasonable use of any right, though it be to the annoyance of another, as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." In *Bamford* v. *Turnley*,

31 L. J., N. S., 286, Q. B.; s. c. 6 L. T. N. S. 721, the nuisance complained of arose from the use of a brick clamp erected by the defendant for the sole purpose of making bricks on his own land, the clamp being placed on that part of the land which was most distant from the plaintiff's house, and so as to create no further annoyance than would necessarily result from the burning of bricks. Upon this state of facts, Cockburn, C. J. directed the jury, upon the authority of *Hole* v. *Barlow*, that if they should be of opinion that the spot was a proper and convenient one, and the burning of the bricks, under the circumstances, was a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict, whether there was or not an interference with the plaintiff's comfort. The Court of Ex. Ch. held this direction to be wrong, and in fact, overruled the case of *Hole* v. *Barlow*; but it must not, however, be supposed that, because *Bamford* v. *Turnley* has determined *Hole* v. *Barlow* to be not well decided, that therefore the only question for a jury in such an action is, whether the nuisance complained of be such as to render the plaintiff's enjoyment of his life or property uncomfortable. The majority of the judges who composed the Court of Error in *Bamford* v. *Turnley* only concurred in this, that the place being proper and convenient for the purpose of burning bricks or carrying on the defendant's trade would not alone entitle him to succeed in such an action. That this is the correct view of those cases would seem from the observations of Erle, C.J. in the case of *Cavy* v. *Lidbetter*, decided by the Court of Common Pleas in Hilary Term last: (32 L. J., N. S. 104, C. P.) That was also an action for nuisance from burning bricks, and the facts of the case were very similar to those of *Hole* v. *Barlow* and *Bamford* v. *Turnley*. Wightman, J., who tried the cause at the spring assizes for Kent, 1862, left it to the jury to say whether the plaintiff's enjoyment of his life and property were rendered substantially uncomfortable by what the defendant had done, and being required by the counsel for the defendant to leave also to the jury the question whether the defendant had burned the bricks in a convenient place for the purpose, refused to do so. A rule *nisi* for a new trial was obtained on the ground that such refusal was a misdirection, and upon the argument of the rule the case of *Bamford* v. *Turnley* having been cited for the plaintiff, the Court of Common Pleas took time to consider their judgment, and afterwards discharged the rule on the ground only that *Bamford* v. *Turlney* had decided that it was a misdirection to put such a question as Wightman, J. had been asked to put in *Cavey* v. *Lidbetter*, but said Erle, C. J., "beyond deciding that such a form of question was wrong, the judgment in the Exchequer Chamber does not extend. In the present case, if the objection had been that the learned judge told the jury to consider solely the evidence adduced to show discomfort to the plaintiff, and not to take into their consideration, in whole or in part, any evidence showing that the act complained of was an act of ownership on the part of the defendant, which was clearly lawful if it did not cause actionable discomfort to a neighbour, and that it was done with full intention to prevent discomfort in respect of time and place and manner and degree, I think that a misdirection would be made out. It seems to me that life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort; and that in all actions for discomfort the law must regard the principle of mutual adjustment; and the notion that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances is as untenable as the notion that the act complained of, if done in a convenient time and place, must therefore be justified, whatever was the degree of annoyance that was occasioned thereby. And I would add, that the judgment of Willes, J., in *Hole* v. *Barlow*, appears to me sound, although the question left by Byles, J. has been decided to be wrong. In the present case the learned counsel, acting on the precedent of *Hole* v. *Barlow*, contended for a question wrong in form but did not contend for his right in substance, according to the principle I have above attempted to explain."

The judgment of Willes, J., so referred to with approbation by the Chief Justice, was to the effect, that the right of every one to pure air may be taken away for the sake of public convenience, on the same principle that private rights must generally yield to right *pro bono publico*. This ground for making lawful what would be otherwise an actionable nuisance is, however, disapproved of by Bramwell, B. in *Bamford* v. *Turnley*. "That law," says that learned judge, "to my mind is a bad one, which, for the public benefit, inflicts loss on an individual without compensation. But, further, with great respect, I think this consideration misapplied in this and many other cases." Indeed, it is scarcely possible to deduce any clear understood principle from the various opinions of the judges in these recent cases, nor would it seem to be easy to reconcile some of the doctrines which they propound with the older authorities.

In vol. 3 of Blackstone's Commentaries, book 3, cap. 13, p. 217 (by Chitty), it is said to be an actionable nuisance "if one's neighbour sets up and exercises any offensive trade, as a tanner's, a tallow chandler's, or the like; for though these are lawful and necesary trades, yet they should be exercised in remote places; for the rule is *sic utere tuo ut alienum non lædas.*" Again, he says: "If one erects a smelting-house for lead so near the land of another that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance:" (citing as an authority 1 Roll. Abr. 89) "And by consequence," says Mr. Justice Blackstone, "It follows that if one does any other act, in itself lawful, which yet being done in that place necesarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act where it will be less offensive." And after pointing out that it is a nuisance to corrupt a watercourse, or "to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour," he characteristically concludes with the following laudatory remark on the English law: "So closely does the law of England enforce that excellent rule of gospel morality, of doing to others as we would they should do unto ourselves."

The general doctrine contained in the passages above cited from Blackstone's Commentaries is, we believe, still quite correct. It is difficult to understand how the common-law right which a person has to wholesome air can be lost, except by prescription, if the decisions in *Elliotson* v. *Fleetham*, 2 Bing. N. C. 134; and *Bliss* v. *Hall*, 4 Bing. N. C. 183, rest on sound law, which it has never been doubted they do. It may be safely said since *Bamford* v. *Turnley*, that the idea that the place being convenient will justify the act, although it be done to the annoyance of a neighbour, is now exploded, and that "the convenient place" referred to in the passage in Comyn's Digest, which has been already cited, must mean "a place where a nuisance will not be caused to anothor." Still it would seem to be the opinion of several of the judges that the place where the act complained of occurred is proper for the consideration of the jury in determining the question whether there has existed a nuisance or not. If the fitness of the locality is to be considered, it surely ought to be with reference to the situation of both the plaintiff and defendant, as pointed out by Stuart, V. C., in *Beardmore* v. *Tredwell*, 31 L. J. 892, Ch.; s. c. 7 L. T., N. S. 207. "Nobody will doubt," says that learned judge, "that to the brickburner the place may be convenient, and probably the most convenient to him that can be found, but yet I apprehend it is perfectly clear that the mere circumstance of the place being convenient to one party is not enough to justify the continuance of the acts if they make the enjoyment of life and property uncomfortable to the other, or if they may be done elsewhere without these injurious consequences following." Indeed, the

question of fitness of locality, or reasonableness of circumstances under which the trade has been carried on, must surely be subordinate to the question whether it has been so carried on as substantially to render uncomfortable the plaintiff's enjoyment of life and property, for, if in fact his life and property has been injured by what has occurred, there must exist an actionable nuisance, however much the defendant may have endeavoured to prevent the plaintiff from receiving any discomfort from the exercise of objectionable trade in question.—*Law Times.*

THE CHANCES OF THE BAR.

Somers flourished a little before the period when legal honours ceased to depend principally upon intrigue and faction. He made himself useful to his party by some well-written pamphlets, and the young Earl (afterwards Duke) of Shrewsbury was his fast friend; still, when he was proposed as junior counsel for the Seven Bishops, they objected to him as too young (he was then thirty-seven) and too little known. Sergeant Pollexfen insisted on their retaining him, and his speech for the defence laid the foundation of his fame.

Lord Hardwicke, the son of an attorney, and bred up in an attorney's office, was fortunate enough to obtain the patronage of Lord Macclesfield, and that noble and learned but most unscrupulous personage forced him at once into the front rank of the profession. He was only twenty-nine years of age and five years' standing at the bar, when he was called up from his *first* circuit to be made Solicitor-General. Having little or no leading business, it was confidently expected that he would break down; but his talents and knowledge proved equal to the extraordinary call made upon them.

Thurlow dashed into practise with the same suddenness, and was indebted for his first lift to patronage; though he certainly did not obtain it by the quality for which Lord Hardwicke was famous—bowing, smiling urbanity. His favourite haunt was Nando's coffee-house, near the Temple, where a large attendance of professional loungers were attracted by the fame of the punch and the charms of the landlady, which, the small wits said, were duly admired by and at the bar. One evening the *Douglass case* was the topic of discussion, and some gentlemen engaged in it were regretting the want of a competent person to digest a mass of documentary evidence. Thurlow being present, one of them, half in earnest, suggested him, and it was agreed to give him the job. A brief was delivered with the papers; but the cause did not come on for more than eight years afterward, and it was a purely collateral incident to which he was indebted to his rise. This employment brought him acquainted with the famous Duchess of Queensbury, the friend of Pope, Gay, and Swift, and an excellent judge of talent. She saw at once the value of a man like Thurlow, and recommended Lord Bute to secure him by a silk gown. He was made King's Counsel in 1751, rather less than seven years after his call to the bar. He ran greater risks than Lord Hardwicke, because his business had been hitherto next to nothing; but he had far more of the *vis vivida*, and the unhesitating self confidence which enables an untried man to beat down obstacles.

Dunning got nothing for some years after his call to the bar which was about 1756. "He travelled the Western Circuit," (says the historian of Devonshire, Mr. Polwhele,) "but had not a single brief; and had Lavater been at Exeter, in the year 1764, he must have sent Counsellor Dunning to the hospital of idiots. Not a feature marked him for the son of wisdom." He was, notwithstanding, recommended by Mr. Hussey, a King's Counsel, to the chairman of the East India Company, who was looking out for some one to draw up an answer to a memorial delivered by the Dutch government. The manner in which Dunning performed this piece of service gained him some useful connections and an opportune fit of the gout, which disabled one of the leaders of the western circuit, did still more for him. The leader in question handed over his briefs to Dunning, who made the most of the opportunity. His crowning triumph was his argument against the legality of general warrants delivered in 1766. He was indebted for his brief in this famous case to Wilkes, whose acquaintance he had formed at Nando's, the Grecian, and other coffee houses about the Temple, which seventy years ago, were still the resort of men of wit and pleasure.

Kenyon rose slowly and fairly through the general impression entertained at the bar of the extent of his legal knowledge; but this impression was nearly twelve years in reaching the brief bestowing branch of the profession. It has been said that he occasionally supplied Thurlow with law, and was brought forward by him out of gratitude.

Lord Camden (a judge's son, Etonian and Cantab), went the Western Circuit for ten or twelve years without success, and at length resolved on trying one circuit more, and then retiring upon his own fellowship. His friend Henley (Lord Northington) hearing of his determination, managed to get him retained as his own junior in a cause of some importance, and then absented himself on the plea of illness. Lord Camden won the cause and prospered.

Lord Mansfield came to the bar with a high reputation, but it was rather for literary taste, accomplishment, and eloquence, than law. He "drank champagne with the wits," as we learn from Prior; and Mr. Halliday relates, that one morning Mr. Murray, was surprised by a gentleman of Lincoln's Inn, who took the liberty of entering his room without the ceremonious introduction of a servant, in the singular act of practising the graces of a speech at a glass, while Pope sat by in the character of a friendly spectator. It is from a couplet of Pope's we learn how he first became known in the profession—

> "Graced as thou art with all the power of words,
> So known, so honour'd in the House of Lords."

A piece of bathos thus parodied by Cibber—

> "Persuasion tips his tongue whene'er he talks,
> And he has chambers in the King's Bench walks."

He is reported to have said, that he never knew the difference between no professional income and three thousand a-year; and the case of *Cibber* and *Sloper* is specified as his starting-point. The tradition goes, that Serjeant Eyre being seized with a fit (the god who cuts the knot always comes in this questionable shape), the conduct of the defence devolved on Murray who after a short adjournment, granted by the favour of Chief Justice Lee, made so excellent a speech that clients rushed to him in crowds. The case was admirably adapted to his abilities, being an action of *crim. con.* brought by a conniving husband against a weak young man of fortune. But the story is apocryphal at best. There is no mention of the Sergeant's illness in the printed accounts of the trial. On the contrary, a speech by him is duly reported; and it appears that Murray was the fourth counsel in the cause. He certainly made a speech, and probably spoke well; but we disbelieve the tradition which makes him the hero of the day. *Cibber* v. *Sloper* was tried in December 1737. How could a man, "so known, so honoured" for his eloquence be raised from obscurity by a speech? It was a stepping-stone not the key-stone.

When Lord Loughborough first came to London he was a constant attendant at the green room, and associated with Macklin, Foote, and Sheridan (the father of Richard Brinsley) who assisted him to soften down his Scotch accent. But the

* This interesting account of the first success of many distinguished judges and counsel is taken from an old number of the *Edinburgh Review*. CLXIII. January.

main chance was not neglected. It is stated in Boswell's Johnson, that he solicited Strahan the printer, a countryman to get him employed in city causes; and his brother in-law Sir Henry Erskine, procured him the patronage of Lord Bute. When a man of decided talent and good connexion does not stand on trifles, there is no necessity for speculating on the precise causes of his success.

There is hardly a surviving friend of Lord Erskine's who has not heard the history of his first lucky hit from his own lips. The author of the "Clubs of London" has undertaken to report his very words;—

"I had scarcely a shilling in my pocket when I got my first retainer. It was sent to me by a Captain Baillie of the navy who held an office at the Board of Greenwich Hospital; and I was to show cause in the Michaelmas Term against a rule that had been obtained in the preceding Term calling on him to show cause why a criminal information for a libel, reflecting on Lord Sanwich's conduct as governor of that charity, should not be filed against him. I had met during the long vacation, this Captain Baillie at a friend's table; and after dinner I expressed myself with some warmth, probably with some eloquence, on the corruption of Lord Sanwich as first Lord of the Admiralty, and then adverted to the scandalous practice imputed to him with regard to Greenwich Hospital. Baillie nugged the person who sat next to him, and asked who I was. Being told that I had just been called to the bar, and had been formerly in the navy, Baillie exclaimed with an oath, "Then I'll have him for my counsel!" I trudged down to Westminster Hall when I got the brief, and being the junior of five who *should be heard before me, never dreamt that* the Court would hear me at all. The argument came on. Dunning, Bearscroft, Wallace, Bower, Hargrave were all heard at considerable length, and I was to follow. Hargrave was long-winded, and tired the Court. It was a bad omen; but, as my good fortune would have it, he was afflicted with strangury, and was obliged to retire once or twice in the course of his argument. This protracted the cause so long, that, when he had finished, Lord Mansfield said that the remaining counsel should be heard the next morning. This was exactly what I wished. I had the whole night to arrange in my chambers what I had to say the next morning, and I took the Court with their faculties awake and freshened, succeeded quite to my own satisfaction (sometimes the surest proof that you have satisfied others); and as I marched along the hall after the rising of the judges, the attorneys flocked around me with their retainers. I have since flourished, but I have always blessed God for the providential strangury of poor Hargrave."

In a more particular, and apparently more accurate, note of the same story, taken by an eminent poet, it is stated that the other counsel proposed a compromise of consultation; that Erskine stood out, and that Baillie flung his arms round his neck in a transport of grateful confidence. According to this note the number of retaining fees which Erskine said he carried home were sixty-two. Now retaining fees are usually paid to the clerk at chambers; but taking the statement to mean nothing more than that business came in very rapidly in consequence of the speech, still we must be pardoned for suggesting that the reports of the period do not bear out the supposition; and that the speech, excellent as it was, was not of the sort to win the confidence of attorneys, particularly those parts which brought him into collision with the Court The effect in our day would strongly resemble that produced by Alan Fairford in the case of Peebles and Plainstanes:—"The worst of the whole was, that six agents who had come to the separate resolution of thrusting a retaining fee into A'an's hand as he left the court, shook their heads as they returned the money into their leathern pouches, and said, 'That the lad was clever, but they would like to see more of him before they engaged him in that kind of business.'"

He was next engaged to draw up Admiral Keppel's defence, which was spoken by the Admiral. For this service he received a bank note for £1,000, which he ran off to flourish in the face of his friend Reynolds, exclaiming, "*Vale* the nonsuit of cow beef!" He was employed in two or three other cases of public interest on account of his naval knowledge, and the extraordinary powers he displayed in them speedily led to a large general business. It is now acknowleged that Erskine's best quality was the one ordinary observers would give him credit for—sagacity in the conduct of a cause.

Sir William Jones made his forensic *debut* about the same time as Erskine, though according to the account given in Miss Hawkins's "Memoirs," on her brother's authority, without producing an equally favourable impression. He spoke for nearly an hour in a highly declamatory tone, and with studied action; impressing all present, who had ever heard of Cicero or Hortensus, with the belief that he had worked himself up into the notion of his being one or both of them for the occasion. Being little aquainted with the bar he spoke as a case having been argued by "one Mr. Baldwin," a gentleman in large practise sitting in the first row. This caused a titter; but the grand effect was yet to come. The case involved certain family disagreements, and he had occasion to mention a governess. Some wicked wag told him he had been too hard upon her: so, the day following, he rose as the judges had taken their seats, and began in the same high tone, and with both hands extended—"My Lords, I have been informed, to my inexpressible mortification and regret, that, in what I yesterday had the honour to state to your Lordships, *I was understood to mean to say that Miss—— was a harlot.*" He got no further: *solvuntur risu tabulæ;* and, so soon as the judges could speak for laughing, they hastened to assure him that no impression unfavourable to Miss ——'s morals had been made upon the court. Nothwithstanding this inauspicious commencement, and his fondness for literature, Jones obtained a fair share of business. His "Essay on Bailments" is considered the best written English law-book on a practical subject. None can be placed alongside of it, for style and method, except Serjeant Stephen's "Treatise on the Principles of Pleading."

Lord Ellenoorough pursued the most laborious path to distinction. He practised several years as a special pleader, and joined the Northern Circuit with a formed connection. He first rose into fame by his defence of Warren Hastings, who employed him at the instance of Sir Thomas Rumbolt, a connexion of the Law family.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

STAYING EXECUTIONS *EX PARTE.*

We return, to the communication of our correspondent, which has already afforded us a text for commentary, in reference to practice in the Division Courts.

Our correspondent says:—"In one county, the practice is for the Judge to stay executions in the hands of the bailiffs, without notice to the plaintiff or his agent, upon the mere *exparte* verbal or written application of the defendant, which, I need not say, leads to great loss, inconvenience and uncertainty in the collection of debts,

for, when the plaintiff, supposing it collected, calls for his money, instead of getting it, he is comforted with a judge's order to stay proceedings."

We assume that this stay of execution must be ordered under the 108th sec. of the act, which provides that, except in cases where a new trial is granted, the issue of execution shall not be postponed more than 50 days from the service of summons, without the consent of the party entitled to the execution; and then enacts as follow. :—"But in case it at any time appears, to the satisfaction of "the Judge, by affidavit or affirmation, or otherwise, that "any defendant is unable, from sickness or other sufficient "cause, to pay and discharge the debt or damages "recovered against him, or any instalment thereof ordered "to be paid as aforesaid, the Judge may suspend or stay "any judgment order or execution given, made or issued "in such action, for such time, and on such terms as he "thinks fit, and so, from time to time, until it appears, by "the like proof, that such temporary cause of disability "has ceased."

It is obviously improper, under *this section*, to make an *ex parte* order: both parties should be heard before the Judge acts. There may be cases where a sudden emergency may warrant a judge in staying proceedings till a certain day, or till the return of a summons to the plaintiff to show cause; but, as a general rule, no order should be made under the clause that would make it necessary for the plaintiff to apply to rescind it before he could act on his judgment.

This is one of these powers that should be most sparingly used. The power to step between a man and his rights calls for much delicacy in its exercise, and no judge should step between a judgment debtor and his creditor unless he sees the whole facts. How can a judge be satisfied as to facts, hearing only one side? How can he be sure that all the circumstances material to be considered are laid before him unless both parties have an opportunity to be heard? How can he be in a position to know whether he should "suspend or stay" the execution, or say what are proper terms to impose as a condition to doing so, if he does not hear what the plaintiff has to say?

How easy it would be, under the practice stated by our correspondent, for a defendant to make out a *prima-facie* case by suppressing some material or collateral fact, which, if brought under the judge's notice, would induce him to refuse the application.

The judge "*may* suspend or stay" execution—implying the exercise of judgment not arbitrary discretion, but judicial discretion—in view of all the facts. We have no hesitation in saying that the practice of granting *exparte* suspensions is a monstrous perversion of the true meaning of the clause, and a gross violation of the vital principle of justice.

We have taken occasion to speak to two judges on the subject—one of over 20 years, and another of over 15 years experience in the Division Courts—who both hooted the idea of making an *ex parte* order; and, in all their experience, had never made half a dozen orders under the clause.

The proper practice we take to be this:—the defendant applies, on affidavit, to the judge, who grants a summons to hear the matter, with or without stay of proceedings, in the meantime, as may appear proper, or directing that the plaintiff shall be furnished with copies of the affidavits, upon which the application is founded. On the return of the summons, the parties are heard when the order is made, upon such terms as may seem just, or the summons is discharged.

Our correspondent has not, in any case, given us the names of the judge of whose administration he complains; nor do we desire to know them. It is sufficient for us that we have, in the character and position of our correspondent, an assurance that the facts he states are correct, and it becomes us to speak freely of a practice which we believe to be unjust, unexpedient, and dangerous.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 99.)

THE CLERK'S DUTIES.

Clerks are furnished by the County Attorney for their county with forms for making these returns.

The manner in which unclaimed suitor's monies remaining in the court are to be disposed of is given in the following sections.

45—"All sums of money which have been paid into court to the use of any suitor thereof, and which have remained unclaimed for the period of six years after the same were paid into court, or to the officers thereof, and all sums of money, when this Act takes effect or afterwards, in the hands of the clerk or bailiff paid into court or to the officers thereof to the use of any suitor, shall, if unclaimed for the period of six years after the same were so paid, be applicable as part of the General Fee Fund of the Division Courts, and be carried to the account of such Fund, and paid over by the clerk or officer holding the same to the County Attorney of his county; and no person shall be entitled to claim any sum which has remained unclaimed for six years."

46—"No time during which the person entitled to claim such sum was an infant, or *femme covert*, or of

unsound mind, or out of the Province, shall be taken into account in estimating the six years."

Rule No 5, of the General Rules of Practice, provides that the *return of emoluments* shall be made without any special order from the judge, immediately after the 30th of June and 31st day of December, yearly, according to a prescribed form. And Rule No. 6 provides that a copy of the list of unclaimed suitors' monies shall be transmitted in the month of January in each year to the County Attorney, with the monies mentioned in such list.

Bailiffs are required to make returns on oath with regard to process in their hands and monies received by them in the execution of their duties, (Rule 12) as will be more particularly noted hereafter. Rule 7 provides that bailiff's returns shall be filed in the clerk's office, and be open without fee to the inspection of any person interested; and that the clerk shall examine such returns, and if found correct and complete within ten days after the receipt thereof, endorse thereon a memorandum in the following words:—

"I have carefully examined the within return, and find the same to be full, true, and correct in every particular to the best of my knowledge and belief.

"Dated the —— day of —— 18 .

"—— —— Clerk."

If the clerk finds the returns incorrect or incomplete, he shall forthwith notify the judge of the same, and of the particulars thereof.

All fees are payable in the first instance by the party at whose instance the proceedings take place (sec. 50).

The 53rd section declares that bailiffs neglecting to return process or executions within the time required by law, shall forfeit their fees thereon, and these fees "shall be held to have been received by the clerk, who shall keep a special account thereof," and account for and pay the same over to the County Attorney to form part of the General Fee Fund. There is also a general provision that monies arising from any penalty, forfeiture, or fine imposed by the Act, not directed to be otherwise applied, shall be collected by the clerk of the court, and by him paid over to the County Attorney to form part of the Fee Fund (sec. 190).

The primary object of the bond to the Crown before referred to is to secure the due and regular performance of that branch of the officer's duties which relates to the fee fund monies. The quarterly returns, according to the instructions from the Government, are to be made on 31st March, 30th June, 30th September, and 31st December in each year; and any clerk failing to account to the County Attorney for the space of ten days after the examination of his quarterly account by the judge is, according to the instructions to the County Attorney, to be reported to the Attorney General of Upper Canada, with a view to the necessary proceedings being had at law for the recovery thereof.

Clerks of the Division Courts are in some sense public officers, and several of the provisions of the Consolidated Acts of Canada, chap. 12, will be found to relate to them.

In case of the resignation, removal, or death of a clerk, all accounts, moneys, books, papers, and other matters in his possession by virtue of, or appertaining to his office, become the property of the County Attorney of the county, who holds the same till the appointment of another clerk, to whom they are to be delivered when his security covenant is completed (sec. 47). And any person wrongfully holding or getting possession of accounts, books, papers, or matters belonging to the court, is guilty of a misdemeanor, and is liable to be committed to gaol, there to remain without bail til he has fully accounted for, or delivered up to the County Attorney the matter withheld (sec. 48).

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

HENRY MCCABE v. MARY MCCABE.

Will—Construction.

"I, Michael McCabe of the township of S., south half of lot 24, tenth concession, do make and ordain this my last will and testament in the manner and form following all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, whom I appoint sole executrix of t is my last will and testament, hereby revoking all other and former wills by me at any time heretofore made."

Held, that the word *estate* passed the testator's land, notwithstanding its connexion with the personality. [C. T., 26 Vic., 1863.]

Ejectment for lot 10, in the eleventh range east the Garafraxa road, in the town of Owen Sound, and the south half of lot 24 in the tenth concession of Sydenham.

"The plaintiff claimed as heir-law of one Michael McCabe, the defendant as devisee under his will, which was as follows:

"I, Michael McCabe, of the township of Sydenham, south half of lot number 24, tenth concession, county of Grey, Canada West, do make and ordain this my last will and testament, in manner and form following: all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, Mary McCabe, whom I nominate, constitute and appoint sole executrix of this my last will and testament, hereby revoking all other and former wills by me at any time heretofore made."

At the trial at Owen Sound, before Richards, J., it was objected that this was insufficient to pass land, and the plaintiff also contended that the testator when he made it was of unsound mind.

A verdict having been found for defendant,

Robert A. Harrison moved for a new trial, citing *Cliffe* v. *Gibbons*, 2 Lord Rayd. 1325; *Buchanan* v. *Harrison*, 8 Jur. N. S. 965.

HAGARTY, J.—I have read the voluminous evidence at the trial, and am clearly of opinion that the verdict is right on the merits.

It was objected that the will does not pass real estate.

It would in my judgment be a reproach to the law if on such a will a man should be held to have died intestate as to his real estate, including the very lot which he names as his place of abode or residence.

Notwithstanding the older cases cited, I think the real estate would be held to pass at the present day on words like those before us. The tendency of all the modern cases seems to me to be to look at the plain obvious meaning of words, unembarrassed by technicalities which could never have occurred to the mind of the testator. We are asked to say because the word "estate," which by itself is admitted to be quite sufficient to pass realty, is joined

to words of mere personality, that its well known individual significance is to be destroyed.

I have no doubt whatever but that there are cases in which on the whole context of a will the word "estate" may be restricted to personality. But this will before us shews to my mind a clear intention to dispose of every thing he possessed, land as well as chattels, and I see nothing to restrict the meaning of the word.

I refer to *Streatfield* v. *Cooper*, 27 Beav. 338; *Patterson* v. *Huddart*, 17 Beav. 210; *Coard* v. *Holderness*, 20 Beav. 147; *Fullerton* v. *Martin*, 17 Jur 778; *Mayor of Hamilton* v. *Hodson*, 6 Moo. P. C. C 76; *O'Neil* v. *Carey*, 8 U. C. C. P. 312; and *Doe Evans* v. *Evans*, 9 A. & E. 726, from which this case is not distinguishable.

I think there should be no rule.

Per Cur.—Rule refused.

MARY HELEN PHILAN v. THOMAS GRAHAM.

Will—Construction—Estate in fee or in tail.

The Testator, who died in 1829, devised as follows:—

"To my son John Philan I give and devise all that my real estate situate, lying and being lot number five in the fourth concession of Yarmouth, in the London District containing 200 acres, be the same more or less,' (the land in question.) "and also I give and bequeath to my said son John all that my real estate situate lying and being lot number six in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less, to hold unto him, the said John Philan, his heirs and assigns for ever."

"In case of the next surviving male heir arriving at the age of twenty-one years," then he gave to such male heir lot six, "to hold unto the said male heir, his heirs and assigns for ever." To his daughter E. he gave another lot, "to hold unto her, the said E., her heirs and assigns for ever; and in case that the said E. shall die without children, then the said lot of land shall be equally divided between my surviving heirs." To another daughter, C., he gave other land, "to hold to the said C., her heirs and assigns for ever." In case a daughter should be born of his wife, he gave to such daughter other lands, "to hold to the said daughter, her heirs and assigns for ever." In case his son John Philan should die before coming of age, he gave lot five to his daughter C., "her heirs and assigns for ever," and lot six to the daughter that should be born of his wife, "her heirs for ever," and if such daughter should die previous to her having an heir," then he gave lot six to his daughter E., her heirs and assigns for ever." In the event of the decease of C. before she shall have an heir," then he gave lot five to E., "her heirs and assigns for ever." In the event of the death of C. and of the daughter that should be born of his wife, he gave most of the lands devised to them to E., "and her heirs and assigns for ever."

After all these devises he added, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law: at the same time there shall be an incumbrance on the said lots of land, whatever may be considered a fair allowance, according to the interest of the said estate, to be for the support and benefit of the younger heirs."

Afterwards the testator directed that these lots five and six which he called "the home lots," should be leased "until the heir or heirs arrive at age," and made provision for the event of his wife having a son.

Held, 1. That John Philan, by the first part of the will took a fee in lot five, the habendum applying to that lot as well as lot six: and

2. That the subsequent general clause was not sufficiently definite or intelligible to cut down such estate to an estate tail

[E. T., 26 Vic., 1863.]

Ejectment for an undivided moiety of 141 acres of land, being part of lot number five, in the fourth concession of the township of Yarmouth.

Both parties claimed title under one William Windham Philan—the plaintiff by descent, the defendant as grantee of John Philan, devisee of the said William Windham Philan.

The case was brought to trial at St. Thomas, before the late Sir J. B. Robinson, Chief Justice of this court, in October, 1861, when the seisin of the said William Windham Philan was admitted: and it was also admitted or proved that he died in September, 1829: that he was twice married: that on the death of his first wife he married Eliza Moore, about the year 1826: that by his first wife he had two children, John and Eliza, (afterwards Mrs. Doyle,) and by the second wife two daughters, one of whom died when only a few weeks old, and the other was the plaintiff: that his second wife died in 1830 or 1832; and that John Philan, the only son, died unmarried in 1847 or 1848, in the twenty-second or twenty-third year of his age.

The deed from John Philan to defendant was dated October 3rd, 1846, and registered on the 7th of October, 1847.

By consent a copy of the will of the said William Windham Philan was put in, bearing date the 9th day of September, 1829, by which the testator gave and devised to his wife, Elizabeth Philan, all that his real estate situate and being the south-easterly half of lot number seventeen, in the ninth concession or tenth range north of the Long Woods Road, containing one hundred acres, more or less, "to hold unto her, the said Elizabeth, her heirs and assigns for ever." The will then proceeded:—

"To my son John Philan I give and devise all that my real estate situate, lying, and being lot number five in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, and also I give and bequeath to my said son John all that my real estate situate, lying, and being lot number six in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to hold unto him, the said John Philan, his heirs and assigns for ever; but in case of the next surviving male heir arriving at the age of twenty-one years, I give and bequeath to such male heir the aforesaid lot number six in the fourth concession of the township of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to hold unto the said male heir, his heirs and assigns for ever: and if at my death my title to the said last mentioned lot should be questionable, I in that case desire my executors hereinafter named to take such steps as may be necessary to procure a patent for the same from the directors of the College Company at York, or whoever may be legally authorised to do so."

To his daughter Elizabeth Doyle he gave and devised all that his estate being lot number eleven south of the Lake Road, in the township of Southwold, in the London District, containing one hundred acres, more or less, "to hold unto her, the said Elizabeth Doyle, her heirs and assigns for ever; and in case that the said Elizabeth Doyle shall die without children, then the said lot of land shall be equally divided between my surviving heirs."

To his daughter Catherine Philan he gave and devised all that his real estate being the north-westerly halves of lots numbers six seven, and eight, in the seventh concession or eighth range north of the Long Woods Road, in the township of Carradoc, in the District of London, containing three hundred acres, more or less, "to hold to the said Catherine Philan, her heirs and assigns for ever."

The testator then devised certain lands to a child expected to be born of his wife, Elizabeth Philan, in the following manner:—"And in case a daughter shall be begotten by me of the body of my said beloved wife, Elizabeth Philan, I give and devise to such daughter all that my real estate situate, lying, and being the south-easterly halves of lots numbers seven and eight, in the seventh concession or eighth range north-westerly of the Long Woods Road, in the township of Carradoc, and in the District of London aforesaid, containing two hundred acres, be the same more or less, and also all that my real estate situate, lying, and being the south-easterly half of lot number eighteen, in the ninth concession or tenth range north of the Long Woods Road, containing one hundred acres, be the same more or less, to hold to the said daughter, her heirs and assigns for ever."

Then followed these provisions, relating to the land in question:—"In the event of the decease of my beloved son John Philan before he arrives at age, I give and devise all that my real estate situate, lying, and being lot number five in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to my beloved daughter Catharine Philan, her heirs and assigns for ever. Likewise, in the event of the decease of my beloved son John Philan before he arrives at age, I give and devise all that my real estate situate, lying, and being lot number six in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to my daughter that shall be begotten by me of the body of my said beloved wife, Elizabeth Philan, her heirs for ever; and in case my said daughter that may be born should die previous to her having an heir, then and in that case I give and devise the said two hundred acres, being lot number six in the fourth concession of Yarmouth, to my beloved daughter Elizabeth Doyle, her heirs and assigns for ever. Likewise, in the event of the decease of my beloved daughter Catharine Philan before she shall have an heir, then and in that case I give and devise the said two hundred acres, being lot number five in the fourth concession of Yarmouth, to my beloved daughter Elizabeth Doyle, her heirs and assigns for ever."

He also devised over to his daughter Elizabeth Doyle, and her heirs and assigns for ever, in the event of the death of the said

Catharine Philan and of the daughter to be born of his said wife, the north-westerly halves of lots six, seven, and eight, and the south-easterly halves of lots seven, and eight, in the seventh concession or eighth range, also the south-easterly half of lot seventeen in the ninth concession or tenth range, north of the Long Woods Road, containing in the whole six hundred acres, in the township of Carradoc.

Immediately after the several devises already mentioned came the following clause, on which this action chiefly turned:—"*It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir at law; at the same time there shall be an incumbrance on the said lots of land, whatever may be considered a fair allowance according to the interest of the said estate, to be for the support and benefit of the younger heirs.*"

He then directed that his farming stock, &c., should be valued by his executors immediately after his decease, and that his son-in-law Lawrence Doyle and the rest of his family should occupy "the home farm" until such time as his debts were liquidated and affairs all arranged, with sufficient security for the said Lawrence Doyle to return the stock, &c., when his son John Philan should arrive at age; and if the said Lawrence Doyle would not agree to these terms, then the stock should be sold.

He also directed that "the home lots numbers five and six in the fourth concession of Yarmouth," should be leased "until the heir or heirs arrive at age:" that lot eight in third concession of Yarmouth, and the easterly half of lot thirty-eight south on the Talbot Road east, in the township of Southwold, should be leased until sold, giving certain directions as to the mode of cultivation, preservation of trees, &c., on the lots so leased.

Then came several devises of personal property, not material to notice.

In case a son should be begotten by him of his said wife Elizabeth, then he devised to his daughter Catharine Philan the south-easterly halves of lots seven and eight, in the seventh concession or eighth range north-westerly of the Long Woods Road, and the south-easterly half of lot eighteen in the ninth concession or tenth range, north of the Long Woods Road, and the north-westerly halves of lots six, seven, and eight, in the seventh concession or eighth range, north of the Long Woods Road, in the township of Carradoc, containing in all six hundred acres, "to hold to the said Catherine Philan, her heirs and assigns for ever." He added after this devise, "It is my request that if my son-in-law, Lawrence Doyle, shall wish to live in the home farm on the terms hereinbefore mentioned, that my beloved wife Elizabeth Philan shall reside on the said home farm as usual as long as she remains my widow:" and after some intervening bequests of personality, "It is my request that my son-in-law, Lawrence Doyle, shall occupy both the home farms at such rent as the executors shall consider to be fair." Lawrence Doyle and two others were appointed executors.

The plaintiff relied upon the clause above mentioned relating to all the testator's estate, as cutting down the estate of John Philan in this lot to an estate tail; and contended that in that case the conveyance by the said John Philan to defendant, not having been registered within six months from the execution, could have no operation under the statute to bar the entail—Consol. Stats. U. C., ch. 83, secs. 4, 81. He contended also, the testator having died before 1834, that the devise to John Philan gave a life estate only in lot number five, for that the *habendum* in fee applied to lot six alone.

The defendant, on the other hand, argued that the *habendum* clearly applied to both lots, five and six: that at all events the word *estate* would carry the fee; and that the general clause relied upon was not sufficiently intelligible to have any definite effect in opposition to this and the several other clear previous devises in fee, or could at most amount only to a trust.

At the trial a verdict was taken for the defendant, and leave reserved to move to enter a verdict for the plaintiff.

Owing to the various changes in the Bench, which will be found stated at 21 U. C. Q. B. 583, and 22 U. C. Q. B. 282, this case was three times argued:—in Hilary Term, 1862, before Robinson, C. J., and Burns, J.; in Trinity Term, 1862, before McLean, C. J., Burns, J., and Hagarty, J.; and in Hilary Term, 1863, before McLean, C. J., and Connor, J.

Adam Crooks obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to leave reserved. He cited *Doe Ford et al.* v. *Bellet al.*, 6 U. C. Q. B. 527; *White* v. *Coram*, 3 Kay & Johns. 653; *Burton* v. *White*, 7 Ex. 720; *Doe dem. McIntyre* v. *McIntyre*, 7 U. C. Q. B. 156; *Towns* v. *Wentworth*, 11 Moo. P. C. C. 526; *Jenkins* v. *Lord Clinton*, 4 Jur. N. S. 887, S. C. 26 Beav. 108; *Jenkins* v. *Hughes*, 8 H. L. Cas. 671, S. C. 6 Jur. N. S. 1043; *Marshall* v. *Grime*, 28 Beav. 375; *Earl of Tyrone* v. *Marquis of Waterford*, 6 Jur. N. S. 567, S. C. 1 DeG. F. & J. 613; *Lucas* v. *Goldsmid*, 7 Jur. N. S. 719; *Jordan* v. *Adams*, 7 Jur. N. S. 973; *Greenwood* v. *Verdon*, 1 Kay & Johns. 74; *Woodhouse* v. *Herrick*, Ib. 352.

Christopher Robinson shewed cause, and cited Jarm on Wills, 2nd Ed., Vol. II., p. 225, 227; 3rd Ed., Vol. II., p. 255, 467; *Biddulph* v. *Lees*, 28 L. J. Q. B. 215; *Towns* v. *Wentworth*, 31 L. T. Rep. 274; *Jervoise* v. *The Duke of Northumberland*, 1 Jac. & W. 559, 574, 575; Powell on Devises, 3rd Ed., Vol. II., p. 451.

McLEAN, C. J.—There is no doubt in my mind that the testator intended by the will to devise to his son John what he calls the home farm, consisting of lots five and six in the fourth concession of Yarmouth, and that the words of inheritance which follow the devise of number six, apply to both lots. It cannot be supposed that the testator intended to give an estate in fee in the latter lot and only an estate tail in the other lot, especially as all the other devises to his several children are to them and their heirs and assigns for ever.

The words, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever," do not of themselves create an estate tail or change the nature of the estate previously devised in fee. They seem rather to convey a wish on the part of the testator that the several devisees should entail the properties devised to them respectively, so that the individual who would have been heir-at-law if the law of inheritance had not been changed would have the whole property. The subsequent part of that clause of the will shews a desire on the part of the testator to impose a charge on the several lots for the support and benefit of younger children, so that, while the heir-at-law was to be the sole owner of the lands, the younger children should also derive some measure of support from them; but the clause is in all respects so ambiguous that it must be inoperative, and the plain words of the several devises cannot be affected by it.

The devise to John Philan, to hold to him and his heirs and assigns for ever, created an estate in fee simple with the usual power of alienation in the devisee, and I am unable to see anything in the will which must be taken to qualify that devise and reduce the estate to an estate tail. Some of the property is devised in fee to a child not born at the time the will was made, and lot number six, one of the lots devised to John Philan, is devised over to that child in the event of John Philan dying before he became of age. It seems impossible to suppose that the testator could have intended, in the event of that lot becoming the property of that child, to create an incumbrance on the lot "for the support and benefit of the younger heirs," as expressed in the clause of the will referred to.

Under the circumstances I am unable to come to any other conclusion than that John Philan took under the will an estate in fee in the lot in dispute, and that his conveyance to the defendant must be held valid, and the plaintiff's rule must be discharged.

HAGARTY, J.—The first devise of lot five (with the other lot, number six) to John Philan, is in my judgment a devise of the fee simple. I think the *habendum* to him, his heirs and assigns applies to both lots.

The next mention of this lot is in a subsequent part of the will, which declares that in the event of John's death before he arrives at age, then lot five is devised to the testator's daughter Catherine, her heirs and assigns for ever.

In a subsequent clause, if Catharine die before she shall have an heir, then he devises lot five to his daughter Elizabeth, her heirs and assigns for ever.

He afterwards directs that lots five and six be leased until the heir or heirs arrive at age.

On these devises we would have, lot five to John in fee, defeasible on his death under age, then over in fee to his sister Catherine, and if she die before she shall have an heir, which I suppose we are to read heir of her body or direct heir, then over to her sister Elizabeth in fee.

This is clear enough, and as John did not die under age, his estate in fee became indefeasible.

Then comes the very singular clause, worded as follows:—"It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an encumbrance on the said lots of land, whatever may be considered a fair allowance according to the interest of the said estate, to be for the support and benefit of the younger heirs."

It is not easy to discern with reasonable certainty what was the testator's meaning in this clause. If the testator meant to cut down (for instance) John's estate in fee in lot five to either an estate tail or a mere life estate, so as to ensure it passing to his son or children generally, I am surprised at not finding a direction that the lots should not be *sold*, as well as not divided. In such an inartificially drawn clause I would naturally expect this, a most common direction from testators drawing their own wills and endeavouring to keep land in the family. Its absence is not without significance. I do not think the testator clearly understood the meaning of the words, "entailed to their heirs and successors for ever," followed, as they are, by the directions as to the heir-at-law and the proposed encumbrance.

If John be made tenant in tail, and died under age, but leaving issue, such issue should in ordinary cases take in tail. But the will expressly gives the estate over in such case to Catherine in fee; so with her, if she die before having issue, then it is given over to Elizabeth in fee.

Nothing can be more explicit than the devise absolutely in the earlier parts of the will to the devisee's heirs and assigns for ever.

Who are the "younger heirs," in whose favour he creates the proposed encumbrance? Is it not to be read as a perpetual charge for the heir apparent in tail, to attach on all existing tenacies in tail? Who is to determine the amount and apportion the encumbrance? Or does the testator contemplate a future settlement of his estate, arranging all these matters?

If Lord Eldon felt the difficulty so great in the far simpler and more intelligible devise in *Jervoise* v. *The Duke of Northumberland*, (1 Jac. & W 569,) that he would not force the estate on an objecting purchaser, he would, I think, have felt the difficulty increased ten-fold if this case were before him. There the words were, "To my son, R, I leave all my estates at, &c., to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing £2500 to be raised upon the estates for female children each."

Mr. Jarman says, 2nd ed., vol. ii, 292, that Sir T Plumer, in a suit to ascertain rights of parties, held that R. took an estate tail; that on R's marriage the estate was afterwards settled, and under a power of sale in the settlement the Duke purchased; and that it was on his objecting to the title that Lord Eldon's decision was given.

In Sugden's V. & P., 14th ed, 390, note, after noticing *Jervoise* v. *The Duke of Northumberland*, it is said that in a family suit R. was held to take an estate tail.

Here we have to deal with a clause hardly possible of being carried into affect without an equity suit, and following express devises in fee of the lands.

I think it highly probable that the testator in this confused expression of desire, did not wish to alter his previous express devises: that the heirs and successors that he mentions so loosely may be the named "heirs" and objects of his bounty specially provided. For instance, Catharine, as an heir, if John died under age; Elizabeth, as an heir, if Catharine died before she should have "an heir;" and in the many cases in which somewhat similar words are used respecting his other lands.—"None of the lots to be divided, but to be the sole property of the heir-at-law;" in this he possibly means "the heir I have designated;" his object is to prevent division, but, as I have already remarked, not apparently to prevent a sale.

When his will was made a tenant in tail could not alien in fee, and fines and recoveries were practically unknown in Canada. It may naturally be remarked that he may be assumed to know that a tenant in tail could not cut off the entail by sale, but his frequent previous use of the words "heirs and assigns for ever," rather induces me to think that he contemplated, as in John's case, an absolute estate in fee, if he survived the age of twenty-one years.

If the clause as to entailing had been devising the land "to my son John, to be entailed to his heirs and successors for ever," &c, &c., to the end of the clause, then we might venture perhaps, considering the comments on *Jervoise* v. *The Duke of Northumberland*, to hold that John was seised in fee tail, though Lord Eldon's doubts would press very hard. But we have here to deal with the whole will, and on the whole I feel very great difficulty in ascertaining the testator's meaning.

Feeling, however, the impossibility of giving an intelligible effect to this extraordinary clause, I prefer on the whole to let the previous clear words of devise prevail, and not to cut down the estate thereby given by the loose and confused expressions adopted by the testator.

I repeat that with much hesitation I arrive at the conclusion, that John Philan having attained full age the estate in fee devised to him became indefeasible, and that he had the right to alien in fee.

I may add that the late Mr. Justice Burns, before whom the case was argued, had formed a strong opinion concurring in the decision now given. The late Sir John Robinson, who also heard the first argument, had considered the case, but had not arrived at a conclusion, and we have therefore not the advantage of his opinion.

Rule discharged.

Cameron v. Todd.

Action for rent by assignee of reversion—Mortgage—Estoppel—Liability of mortgagee of the term

S. having mortgaged certain land in fee afterwards leased it for 21 years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P. the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold, expressly subject to the lease to J., who received a conveyance from S and P. and the plaintiff each using apt words ("bargain sell and release") to convey a legal estate in fee. On the same day J mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action, by certificate duly registered; and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage.

Held, 1 That defendant, as assignee of the term by way of mortgage, was liable on the covenant for rent, though he had never entered. 2. That though S. when he leased had only an equity of redemption, yet as this fact did not appear in the lease he had a legal reversion by estoppel as against the tenant; and that such reversion passed to the plaintiff by the first conveyance from S., (which contained apt words to pass the legal estate) though in it the mortgage was recited. 3 That the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P and J: and that the plaintiff being still bound by the lease, defendant was so as well. 4 That the plaintiff's discharge of the mortgage did not destroy his right of action for rent previously accrued: And that he was therefore entitled to recover.

This was an action brought by the plaintiff as assignee of the reversion against defendant as assignee of the term, to recover the same arrears of rent sued for in the case of *Jones* v. *Todd*, reported, 22 U. C. Q. B, 37.

It will be seen that the court there, in granting a new trial, expressed doubts whether this plaintiff was not the proper party to sue, not the then plaintiff, Jones, and this action was in consequence brought in his name.

The declaration in this case was the same as in that, except that after averring the grant of the reversion by Robert Stanton, the lessor to Jones, it was alleged that Jones during the term granted to the plaintiff.

The pleas were, 1. Denying the execution of the lease by Stanton and March. 2. Traverse of the grant of the reversion by Stanton to Jones, and by Jones to the plaintiff. 3 That before making the lease Stanton on the first of June, 1830, mortgaged the fee simple to one Carfrae for £600, and such legal estate at the time of executing the demise was outstanding in Carfrae's devisees: and Stanton, when he leased had only an equity of redemption, and was not seised of fee, as alleged: that the devisees, by indenture of the 4th of May, 1849, granted and assigned

the fee simple and the mortgage money to one Patterson, by whom the equity of redemption was duly foreclosed in Chancery; by means whereof it was alleged that Stanton ceased to have any interest in the lands, and the reversion alleged to be reserved to him upon the term granted to March became merged and extinguished in the legal estate and inheritance of Patterson, so that such alleged reverson did not vest in the plaintiff as alleged.

Pleas 4, 5, 6 7 and 8, the same in effect as pleas 2, 3, 4 and 5 in the former suit.

It is unnecessary to repeat the facts here, as they were the same as in that case, and are there fully stated.

At the trial, at Toronto, before *Richards*, J., a verdict was taken for the plaintiff for £721 12s., subject to the opinion of the court.

In addition to the authorities referred to in the previous case, *Cameron, Q. C.*, and *Anderson*, for the plaintiff, cited *Bickford* v. *Parson*, 5 C. B. 920; Platt on Covenants, 538; Cru. Dig. vol. vi., p. 492.

Galt, Q. C., and *Adam Crooks*, contra, cited Doe dem Viscount Downe v. Thomson, 9 Q. B., 1037; *Paryeter* v *Harris*, 7 Q. B. 708; *Harrold* v. *Whitaker*, 11 Q. B., 147, 163; *Whitton* v *Peacock*, 2 Bing. N. C. 411; *Wootton* v. *Steffenoni*, 12 M & W. 129; In re Williams' Estate, 5 DeG. & Sm. 515; Burton R. P. 428; Coote on Mortgages, 336; Spencer's case, Sm. Lea. Cas., Ed. of 1862, 43, 76; *Moss* v. *Gallimore*, Ib. 553.

McLEAN, C. J.—This action was brought by the plaintiff, as assignee of the reversion, against the defendant as assignee of a term created by a lease from Robert Stanton, as owner in fee of the demised premises, to Charles March, which lease has been assigned to the defendant.

The lease bears date the 29th of February, 1844, and is made by Robert Stanton, in consideration of the yearly rent therein reserved, and of the covenants therein contained on the part of the said Charles March, his executors, administrators and assigns, to be respectively paid, observed and performed, to have and to hold the said piece or parcel of ground and premises thereby demised, with the appurtenances, unto the said Charles March, his executors, administrators and assigns, for and during the term of twenty-one years, to be computed from the 1st day of March, 1844, and then fully to be complete and ended; yelding and paying during the said term unto the said Robert Stanton, his heirs and assigns, the clear yearly rent of £100, by four quarterly payments on the first day of March, the first day of June, the first day of September, and the first day of December, in each and every year. The lessee covenants to pay or cause to be paid the said yearly rent by four equal quarterly payments on the days before mentioned for the payment thereof, and the lessor covenants that the lessee, Charles March, his executors, administrators and assigns, paying the said yearly rent, and performing the covenants therein contained, shall and may quietly and peaceably have, hold occupy and enjoy the said piece or parcel of ground, without the lawful let, suit, interruption or disturbance of the said Robert Stanton, his heirs or assigns, for and during the said term.

Under that lease the tenant, March, and all persons claiming under him or through him, are estopped from denying the title of the lessor, and under the statute 32 Hen. VIII., ch. 34, are liable to pay the rent and to perform the covenants contained in the lease so long as they hold the demised premises under that lease. The lessor has assigned his reversion to Edward C. Jones, and all persons claiming any interest or estate therein have joined in the conveyance, using apt words to pass a reversion in fee. After Stanton's conveyance to the plaintiff, March the tenant, would be estopped from denying the title of his lessor or his assignee, and so a legal reversion in fee by estoppel would entitle the plaintiff as assignee to enforce the terms and enjoy all the benefits of the lease. By the decree in Chancery all parties interested joined in conveying the premises in fee to Edward C. Jones, and it appears to me that the reversion by estoppel must necessarily have passed to him under that deed.

On the same day that that deed was made to Edward C. Jones, 27th July, 1853, he executed a mortgage in fee to the plaintiff to secure payment of the sum of £637 2s., to be paid on or before the first of March, 1865, with interest thereon half yearly, on the first days of January and July in each year, until the principal money and interest should be fully paid and satisfied. The plaintiff had the legal estate under this mortgage from its date till the payment of the mortgage money and interest, during which period the rent sued for accrued on March's lease, and was payable to the plaintiff as the holder of the reversion.

When the mortgage money was paid the plaintiff executed the usual certificate of payment required by the Registry Act, Consol. Stats U. C., ch. 89, the 59th section of which provides that such certificate shall, when registered, be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs and assigns, of his original estate; and if given *after* the expiration of the period within which the mortgagor had a right in law to perform the condition, shall have the effect of defeating any title remaining vested in the mortgagee or his heirs, executors, administrators or assigns, but shall not have the effect of defeating any other title whatsoever.

It is contended that since the registry of the certificate of payment of mortgage money the plaintiff's reversionary interest has wholly ceased, and that the premises have become vested in the mortgagor as if the mortgage had never been made. It may be admitted that since the registry of the certificate the estate has become vested in the mortgagor precisely as it was before the mortgage was given, but while he held the reversion a right of action had vested in him for rents accruing due while seised of such reversion, and that right is not affected by any assignment made after the period when it became due.

In Platt on Covenants, page 538, cited by Mr. Cameron in the argument, it is said, "A right of action once vested and attached in the grantor for a breach in his own time will not be defeated by his assignment over, * * for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone" Then in Comyn's Landlord and Tenant, p. 268, it is even more clearly laid down, that "if a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with his estate."

I do not think that the mortgagee in this case by the assignment or surrender of his reversionary interest divested himself of a right of action which was vested in him before such surrender. If that were the case, then the holders of the term would be entitled, notwithstanding the breach of covenant, to set the reversioner at defiance, and might claim exemption from the payment of any rent for the period during which the plaintiff held the reversion.

The facts of this case are the same in all respects as in the case of *Jones* v. *Todd*, and are so fully stated in the report of that case that I have not thought it necessary to state them more fully here. After full consideration of the circumstances I have arrived at the conclusion that the verdict for the plaintiff cannot be disturbed, and that the rule *nisi* must be discharged.

HAGARTY, J.—The facts of this case appear so fully in the report of *Jones* v. *Todd*, that I do not deem it necessary to make any detailed statement of the various conveyances in evidence.

In *Jones* v. *Todd* the court in granting a new trial suggested the the existence of grave difficulties in the way of the then plaintiff, Jones, recovering for arrears of rent accrued while the reversion was in Cameron as mortgagee. The present suit is brought in the name of the latter.

I would first notice the question of defendant's liability as a mortgagee of the term to convenants running with the land, assuming that he never actually entered.

Williams v. *Bosanquet*, (1 B. & B. 238,) decided in error, by ten judges, who were unanimous in their view, seems to settle the law unless it has been since over-ruled. It is an elaborate review of conflicting authorities, and seems fairly to meet all the difficulties suggested, and decides that a mortgagee of the entire interest in the term is liable without entry.

In Coote on Mortgages, edition of 1850, page 121, it is said: "It is therefore now clear, both on principle and sound authority, that if a mortgagee accept an assignment of all the remaining interest in the term, he will be liable to the payment of the rent and performance of the covenants in the original lease, so long as

he shall be the legal owner of the lease, although he shall not take actual possession of the premises."

Since 1850 I have not found this view of the law questioned

I now turn to another branch of the case Stanton, the original lessor, when he demised to March had only an equity of redemption, and no legal reversion. As the true state of his title does not appear in the lease, I consider it clear that there is a reversion by estoppel, and that this reversion would for the purposes of this suit vest in his assignee, Cameron.

I at first apprehended a serious difficulty from the fact that in this transfer of the reversion it is recited that a mortgage in fee had been made to Carfrae. But the very carefully considered judgment of the Court of Exchequer in *Cuthbertson* v. *Irving*, subsequently confirmed in error, (4 H. & N. 742, 6 H. & N. 135,) has removed that difficulty from my mind. There the lease did not shew any want of title, assignment did shew it.

Martin, B., who delivered the judgment of the court, says, (4 H. & N. 754,) "Upon consideration, we think the authorities shew that the defendant is estopped from disputing that the lessor was seised of an estate in reversion, and, as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favour, notwithstanding the assignment to him shews the want of title. The estate in reversion by estoppel was created before the assignment was executed, and in our opinion was not destroyed by it. It would have been otherwise if the want of title had appeared on the face of the lease itself; in that case, the true facts being their disclosed, there would be no estoppel at all."

Again, "Where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel; and an action will lie by the assignee of the reversion against the tenant on the covenants in the lease." This latter sentence may be referred to on another branch of the case.

In the assignment by Stanton to Cameron, there are certainly "apt words to convey a legal estate in fee in reversion," although the outstanding mortgage in fee to Carfrae is mentioned. The conveyance is by lease and release, and recites that Stanton is seised in fee simple, and the usual words to convey a reversion in fee are used, with *habendum* to the assignee and his heirs.

But the point chiefly laboured by the defendant arises on the following facts:—Patterson, assignee under Carfrae of the legal estate, filed his bill to foreclose the mortgage, and a sale was ordered. The conditions of sale under the decree provided that the sale was to be subject to the lease granted by Stanton to March for twenty-one years, at £100 per year.

At the sale Magrath was the purchaser for £1420. Magrath then transferred all his right to Jones, and by agreement between all the parties a deed was made on the 27th of July, 1853, between Patterson, Cameron, Stanton, (and his children), Magrath and Jones. The Carfrae mortgage is recited, its assignment to Patterson, and that Stanton has conveyed all his estate and interest in the premises, subject to the mortgage, to Cameron and his heirs, on certain trusts.

It recites the decree in Chancery, in the suit in which Stanton, Cameron, and the younger Stantons were defendants, the reference to the master, the decree, the report, the conditions above noticed, and the sale to Magrath and transfer by the latter to Jones; that Jones, instead of paying the money, paid to Patterson the mortgage money and costs, and the balance, £637, was to be secured by mortgage to Cameron as trustee, on the same trusts as in Stanton's deed to him. Then, in pursuance and performance of the decree, &c., Patterson, according to his estate and interest as mortgagee, and at the request of Magrath, bargains, sells, and releases to Jones and his heirs and assigns; Cameron, Stanton, and the *cestuis que trust*, the younger Stantons, all convey to Jones in fee, with reversions, remainders, estates, and equities of redemption of the granting parties, *habendum* to Jones, his heirs and assigns, "subject to the said indenture of lease granted by the said Robert Stanton to the said Charles March."

On the same day the mortgage is executed from Jones to Cameron, reciting the former conveyance in trust by Stanton, the Chancery suit of Patterson, the decree and sale, and then containing a conveyance in fee, with a defeazance on payment of £637 and interest at specified times. There is endorsed a registrar's certificate of discharge of this mortgage as of the 2nd of September, 1861, prior to the commencement of this suit.

The defendant argues that on this state of facts whatever reversion the plaintiff may have acquired from Stanton is merged, as it were, or lost by its union with the legal estate derived through Patterson and Carfrae; and that the deed executed by all the parties after the Chancery sale sets forth the whole facts, and leaves the whole matter at large, and puts an end to the estoppel.

This is a very serious proposition, amounting as it does simply to this:—that after a lease has been granted by one who has only an equitable estate, and on which as between him and the lessee there is clearly a legal reversion by estoppel, and afterwards such proceedings are had that a deed is executed by all parties interested both in the legal and equitable estates, by which a clear title in the premises is conveyed to a third person, expressly saving the term created by the lease, and declaring that the estate conveyed was to be expressly subject to the lease, describing its nature and effect, it still lies in the power of the tenant and those claiming through him to insist that the term is gone, and his covenants at an end.

I think we should require the most unmistakeable authority binding upon us before we should be asked to accede to such a result, so unjust in its nature, and so completely opposed to the express declaration of all the parties interested as owners in the property.

The authority relied on is Doe ex dem. *Lord Downe* v. *Thompson*, (9 Q. B. 1037,) decided by Lord Denman in 1847. The facts were these:—

Burton seized in fee mortgaged to Bromet to secure £1000. After this he leased to defendant Thompson for 31 years. In the same year £900 was paid on the mortgage. In 1828 Burton became bankrupt. In 1834 Messrs. Swann paid Bromet £100, and took from him a deed in fee. Three months after Burton's assignees sold the premises to Lord Downe for £245, £100 of which was paid to the Swanns, and they, by the assignees' directions, conveyed to Lord Downe in fee, the assignees being parties and joining in the conveyance. The deed recited the conveyances to Bromet and the Swanns, the bankruptcy and assignment, describing the premises as formerly in the tenure and occupation of Burton, but now of Thompson, his under-tenants or assigns, but did not refer to the lease. Messrs. Swann bargained, sold, and released; the assignees released, ratified, and confirmed.

Lord Downe, after receiving rent for two years, gave notice to quit and brought ejectment, insisting that the term was at an end.

Lord Denman, in a very short judgment of a few lines, says, "The lease was good against Burton by estoppel only. He had not the legal estate when he granted it, nor did he acquire it afterwards; nothing passed to his assignees but the equity of redemption, and they could pass nothing else to Lord Downe. The legal interest had passed to Lord Downe wholly and entirely from Messrs Swann, who were not privies to, nor in any way estopped by the lease; neither can Lord Downe be estopped in respect of the interest which he took from them. Doubtless, if Lord Downe had taken the legal interest from Burton, he would have been estopped in the same manner that Burton would. * * But, as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them; and as those from whom he did take were not estopped, neither is he. We think that the fact of the assignees joining in the conveyance cannot place him in a different situation from that in which he would have stood had the Messrs. Swann alone conveyed."

It was much pressed upon the court that on the face of the deed to Lord Downe the assignees appeared to have no legal interest, and the lease to defendant was not mentioned; also that the deed would show that Burton (or his assignees rather) had conveyed no legal title, and that there is no estoppel by a deed shewing the true facts.

I must say, with great submission, that this very brief judgment of Lord Denman is anything but satisfactory to my mind, and reading it by the light of the subsequent explanation of the law of estoppel between landlord and tenant in *Cuthbertson* v.

Irving, I cannot regard it as supporting the defendant's view to the extent claimed.

The facts, moreover, are very different from those before us. The assignees of Burton there apparently did not use (in Martin, B's language) "apt words to convey a legal estate in fee in reversion"; they merely "release, ratify and confirm," while the Messrs Swann, who have the legal estate, "bargain and sell," &c. Lord Denman says,—"Doubtless if Lord Downe had taken the legal interest from Burton he would have been estopped in the same manner that Burton would, as was held in *Trevivan* v. *Lawrance*, 1 Salk 276." I presume his lordship means had he taken a deed professing to assign to him Burton's legal estate in fee in reversion, with apt words, &c., he would be estopped. He cannot have meant if Burton really had conveyed the fee, because the whole case is based upon the fact that Burton had not the fee to convey. If read in this way the judgment may be reconciled with the other cases, and it is probable he so meant it, as the case in Salkeld to which he refers, says, "If a man makes a lease by indenture of D., in which he hath nothing, and after purchase D. in fee, and after bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; and where an estoppel works on the interest of the land, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel."

Again, Lord Denman says, "as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them." This, I think, must have the same meaning as the sentence quoted above.

In this case, as already noticed, Stanton certainly conveyed to Cameron, with apt words, to pass a reversion in fee.

In the deed executed after the Chancery sale, Patterson, "according to his estate, right, title and interest as such mortgagee as aforesaid," bargains, sells, and releases; and Cameron, "according to his estate, right, title and interest as such trustee as aforesaid," bargains, sells, and releases; and Stanton, (with no words as to his estate,) grants, bargains, sells, aliens, releases, ratifies and confirms to Jones, his heirs and assigns, the land, and the reversions, remainders, rents and profits, and all the estate, right, title, inheritance, use, trust, property, possession, benefit and equity of redemption, claim and demand at law and in equity, of the parties thereto. *Habendum* to Jones and his heirs in fee, subject to March's lease, as already noticed.

It may be that as this deed is worded it may be argued that Cameron, then the assignee of Stanton, does not profess to give any greater estate than he had by Stanton's deed to him; that he only conveys "according to his estate as trustee."

But, according to Baron Martin's exposition of this kind of estoppel, it may be well suggested whether the estate in reversion by estoppel was not created by the lease, and passed certainly to Cameron by Stanton's first deed to him; and having so vested in Cameron, was there any thing in the deed after the Chancery sale to destroy such reversion?

In this deed we find Cameron only conveying according to his estate as trustee, joining with Patterson, the legal owner, who also conveys according to his estate as mortgagee, and all uniting, as it were, in the one grant and one *habendum*. This would seem to amount to "apt words," or, at all events, does nothing to negative the idea that he is conveying the full estate already vested in him (and which was a legal reversion in fee by estoppel) to Jones. In the deed in *Cuthbertson* v. *Irving*, by which the lessor sold to the plaintiff, the mortgage is recited, and the lessor (owner only of the equity of redemption) declares that he sells "in exercise of all powers enabling him." He uses general words sufficient to pass the fee, though the recitals shew the fee was not in him, and he conveys subject to the mortgage already given, and subject to the outstanding lease.

Can it be said, as in Lord Downe's case, that the purchaser took nothing, that is, professed by the deed to take nothing, from the party representing the equity of redemption? So far from taking nothing from Cameron, the purchaser, Jones, by the deed, declares that it is part of the bargain by which he acquires the estate that as a large surplus of purchase money remains after paying off Patterson's mortgage, he is to mortgage the premises to Cameron for the express purpose of applying such surplus to the trusts already created, and he obtains the several parties interested to join in the deed, by which he obtains a complete title to effectuate this purpose.

My impression is that the deed, as far as Cameron is concerned, is sufficient, under the rule laid down in *Cuthbertson* v. *Irving*, to pass a reversion in fee by estoppel to the purchaser.

All this argument is urged by defendant to shew that Jones could act as Lord Downe was permitted to do, and wholly repudiate the lease to March; and that as the estoppel is gone as to the assignee of the landlord, so it is equally at an end if the assignee of the tenant desires so to consider it.

We must now look at the express reservation of March's lease as an existing term recognised both by the owner of the fee simple and the party holding the whole of the landlord's interest Jones purchased from Magrath, who bought at the Chancery sale, on the express condition of sale that it was to be subject to March's term. Then in the deed the owner of the fee simple, who was not of course bound by the lease as executed long after his mortgage in fee, expressly assents to the term, and conveys to Jones, to hold to him subject to the interest thereby created.

It is here proper to notice the doctrine already alluded to as laid down by Martin, B.: "Where a lessor by deed grants a lease without title, and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest, and not by estoppel"

If we assume a good legal reversion by estoppel in Stanton, conveyed by him to Cameron, and by the latter to Jones, then if Jones, having, before this, no legal title, acquires the legal estate from Patterson, the above doctrine may apply. In this case the same instrument by which Jones comes in under Cameron, vests in him the legal estate. This may suggest doubts, but I am not prepared to say they must necessarily prevent the application of the rule.

The case of *Sturgeon* v. *Wingfield*, (15 M. & W. 226,) may be noticed. The tenant sued the assignee of the reversion on a covenant running with the land In May, 1835, one Hogarth leased to the plaintiff for twenty-one years. The farm was leased by the Broderers' Company to one Foster for one hundred years, from Michaelmas, 1741, with covenant for renewal. In 1827, the term vested in one Bray, who assigned to Fleming and others in mortgage. After this Hogarth made the lease, having then nothing at law.

In January, 1836, (after the lease,) Fleming, Hogarth, et al., surrendered the term to the Broderers' Company, and on the same day the company made a new lease to Hogarth for one hundred years, and soon after the residue of this term vested in defendant.

Parke, B., said, "Here the reversion by estoppel, being a reversion in fee, never was surrendered: it remained, therefore, (so far as regarded the plaintiff,) in Hogarth, until he assigned it to the defendant. The lease to the plaintiff was at first good by way of estoppel only, but when Hogarth took from the Broderers' Company for one hundred years the lease to the plaintiff became a lease in interest, and the reversion upon it was afterwards assigned to defendant. * * The estoppel was fed by the demise for one hundred years from the Broderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest."

My opinion on this point is, that either the plaintiff, Cameron, on the chain of title shewn to us, is in under Stanton, and holds his reversion by estoppel, and is clothed with all his rights as against the lessee and all in privity of estate with him; or that the effect of the deed executed after the Chancery sale, in which the owner of the legal estate assents to the lease, and conveys the whole estate subject thereto, and with that term carved out of it, and thereby the lease from Stanton to March is set up and becomes "good in point of interest."

It remains to consider the objection as to the present plaintiff, Cameron, having before this action was brought executed a certificate of discharge.

It is urged that as the plaintiff executed the statutable certificate of payment, the registration thereof destroyed all his right as completely as if the mortgage had never existed.

The 59th section of the Registry Act, (Consol. Stats. U. C., ch. 89,) provides that the certificate of payment shall, when registered,

be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, &c, of his original estate, and if given after the time for performing the condition, "shall have the effect of defeating any title remaining vested in the mortgagee, or his heirs, executors, administrators, or assigns, but shall not have the effect of defeating any other title whatsoever."

I read this clause as simply providing for an easier method of discharging the mortgage and clearing the registered title than the ordinary course of a re-conveyance, which would require registration as any other deed, and I do not think it introduced any new or destroyed any old right as between mortgagor and mortgagee, or those holding under them, or in any way altered the rules of law affecting a case like the present.

I therefore treat it as if on a day previous to this suit the mortgagee had re-conveyed the estate to Jones, the mortgagor. In a court of law I think I must treat it precisely as if the plaintiff, Cameron, owning the entire reversionary interest, had conveyed it to Jones or any stranger, and notwithstanding such sale brings an action against a tenant for rent accruing due before he so parted with his estate.

It appears to me he can bring such an action. In Platt on Covenants, 538, it is said, "A right of action once vested and attached in the grantor for a breach in his own time, will not be defeated by his assignment over, * * for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone" He cites *Midgley* v. *Lovelace*, (Carthew 289; S. C. 12 Mod. 45, Holt 74,) Anon Skin 347 The same view seems taken in Platt on Leases, vol. ii, p. 386. In Comyn's Landlord and Tenant, 268, the same principle is adopted: "If a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with the estate."

I do not feel pressed by any of the difficulties suggested in applying this rule to the case of a mortgagee. In this court I treat him as the owner of the reversion, and as such entitled to the rents accrued due whilst seized of the reversion. The application of such rent when recovered can only be a question between him and the mortgagor. In an ordinary case, and most probably in this, the suit would be brought by an understanding between the parties in the case of a paid up mortgage in fee, it would be, doubtless, prosecuted beneficially by the mortgagor, though necessarily in the name of the then reversioner.

I have arrived at the conclusion that the three questions on which the suit seems to depend must be answered in favour of the plaintiff:

That defendant as mortgagee of the whole term is liable for the rent without entry;

That the facts shew no destruction of the term by the alleged union o the equitable with the legal estate; and,

That the position of the plaintiff as mortgagee, bringing this action after registration of the statutable certificate of payment and cofnsequent discharge of the mortgage, does not prevent him from suing for arrears of rent accruing due to him whilst seized of the reversion. Judgment for plaintiff.

CHAMBERS.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-Law.*)

In re Babcock, landlord, and Brooks, tenant.

Con. Stat. U. C, cap. 27, s. 63—Overholding tenant—Jury discharged—Second Jury—Who entitled to apply.

Held, 1. That the fact of a jury being unable to agree, and so discharged in an overholding tenancy case, does not determine the authority of the commissioner to summon a second jury.

2. That the fact of the jury having been discharged by consent of parties does not prevent the writ being still proceeded upon.

3. That if a receiver has been appointed by the Court of Chancery to whom the tenant has attorned, or if the interest of the original landlord has been sold to another, in either case the original landlord is not the proper person to take proceedings to turn the overholding tenant out of possession.

[Chambers, June 18, 1863.]

This was a summons taken out by the landlord calling on the tenant to shew cause why a new precept should not be issued by the commissioner—formerly appointed to execute the writ between the parties, for the sheriff to summon a jury to try the question between the landlord and tenant, or why a new writ should not issue because the jury formerly empanelled being unable to agree were discharged.

The commissioner certified the evidence taken, and that he told the jury there was no evidence of any subsequent tenancy after the expiration of the lease put in.

Ten of the jury signed the memorandum—stating their opinion to be for the landlord—but as the whole jury could not agree the commissioner discharged them.

The commissioner reported the jury should, in his opinion, have found for the landlord.

W. H. Burns showed cause. He filed an affidavit that the counsel for both parties consented to the jury being discharged. He also contended that the writ of inquisition and all proceedings under it had been exhausted, and that nothing further could be done under it. He urged that no new writ should be issued, because Mr. Babcock, the lessor, had been enjoined by decree in Chancery from collecting the rents of the property, and had been ordered to deliver over all deeds, &c., to the receiver to be appointed by the Court. And that a receiver had been appointed who has for a considerable time past collected the rents of the property; and also that the property had been sold, and one James Moore became the purchaser of it, and is now the real owner of it as landlord. Also, the mere fact of the jury disagreeing is strong evidence "that the tenant does not hold over without any right or color of right." (Con. Stat. U. C., cap. 27, s. 63.)

Wilson, J.—The case of *Woodbury and wife* v. *Marshall*, in 19 U. C. Q. B., 597, determines that in just such a case as the present, when the jury did not agree, the authority of the commissioner was not determined, and that another jury might be summoned and an effectual inquisition be held.

I think the consent of the counsel that the jury should be discharged does not prevent the writ being still proceeded upon.

In case a receiver has been appointed to receive the rents—and to whom the tenant Brooke has been ordered to attorn, so as to give the receiver a right to distrain, I should hold that he is the proper person to apply (whether in his own name or in the name of the former landlord is of no consequence for me now to decide) against the tenant as overholding. But if he is not, and if a sale has been made to Moore, it would appear to me the title is out of Babcock rather than in him.

I therefore discharge the summons but without costs.

Summons discharged without costs.

Rigney, et al v. Durie.

Con. Stat. U. C, Cap 22, sec. 237—Amendment of Endorsement on fi. fa.—Proper parties to Application.

Plaintiffs, without having previously issued process on 3rd of October, 1857, took a confession of judgment, neglected to file it or a copy of it, within a month, as prescribed by the statute. On 11th February, 1858, entered judgment. On 24th October, 1858, issued a *fi fa* goods; had same returned *nulla bona*. On 10th August, 1861, issued a writ of *fi fa* lands Had same renewed 10th August, 1862 On 2nd February, 1863, amended their endorsement of levy on writ, and afterwards obtained a summons, calling on defendant to shew cause why they should not have leave to amend their endorsement on writs of *fi. fa.* lands, in the hands of the sheriff, by increasing the amount endorsed to be levied: or why a new writ of *fi fa.* lands should not issue. *Held*, that so long as the confession was open to the objection of not having been filed within the month, and so not valid to support the judgment that the amendment could not be allowed *semble*; if relief could have been afforded to plff., it could only have been by making the other execution creditors of defendant, and the Sheriff parties to the summons.

(Chambers, June 27, 1863.)

Plaintiffs obtained a summons, calling upon the defendant to shew cause why they should not have leave to amend the endorsement on their *fi. fa.* lands, in the Sheriff's hands, by increasing the amount endorsed to be levied; or why a new *fi. fa.*, against lands, should not issue.

This summons was founded upon the following affidavits and Exhibits:

1. An affidavit by Mr. Brown, one of the plaintiffs, stating that judgment was entered on a confession about the eleventh of February, 1858, for £800 damages, and £4 10 2 costs. That the confession is identical with the confession referred to in Exhibits A. & B.; and that balances of account struck in these exhibits

were made at the times they bear date, and signed and acknowledged by the defendant as correct That the defendant has not complied with the conditions in Exhibit A.; nor has he paid the two notes there referred to, nor any part thereof, nor the mortgage to the Building Society, nor procured the mortgage to be discharged; but the deponent has been obliged to pay off the balance due thereon, to protect the property. In consequence of the defendant's default, there was due on his judgment, at the time of issuing the *fi. fa.* against lands, the full amount settled to be due by Exhibit B., namely, $1320 01—excepting thereout certain solicitors' fees, and the proportion of interest which accrued due between the time of issuing the *fi. fa.* and the date of Exhibit B. By indenture of 14th June, 1862, the judgment debt and interest were assigned by plaintiffs to one Arthur McDonald, who is now the beneficial owner thereof. On or about the 10th August, 1861, *fi. fa* against lands was delivered to sheriff, endorsed to levy £166 8 9 for damages, together with certain costs and fees. In endorsing the damages, plaintiff's solicitor committed an error the amount endorsed being very much less than the amount really due, which should have been the amount stated in Exhibit B., with the rebate of solicitors' fees, and interest, as before stated. The error arose, as it is believed, from the plaintiffs solicitor being ignorant of the true state of accounts between the plaintiffs and defendant at the time of issuing the *fi. fa.*, and from his supposing that the balance struck in Exhibit A. was the only sum then due. That the deponent did not discover the error until the beginning of 1863, when the exact sum due upon the judgment, or secured thereby was established between the defendant and the deponent, acting for McDonald, by Exhibit B., which represents the exact sum due upon the judgment, with interest and costs up to the date of that Exhibit. That the *fi. fa.* is still in the Sheriff's hands.

2. Exhibit A. is dated 23rd Dec., 1857. It states the principal damages, interests and costs upon a draft, making the total, to the 12th of Dec., 1857, (costs being $61 10.)..... $3245 76
Credit given to the amount of 2580 00

Leaving a balance then due of $665 76
for which two notes, payable in six and nine months, from 1st Dec., have been taken

"Defendant to indemnify plaintiffs against the mortgage to Commercial Building Society, on lot, in Innisfil, and to discharge the same within 3 months.

"Confession to stand as collateral security for the performance of this, and the payment of the notes, and that the lot in Flos to stand as collateral security for this also."

Confession of Judgment, (Signed) W. S. DURIE.
Entered Feb. 11, 1858, for £800. " ADAM CROOKS,
Costs, £4 10 2. For Rigney & Co.

3. Exhibit B. is dated the 26th of Jan., 1863, and is a debtor and creditor account between Mr. Durie and Mr. Brown.

1858.		
June 4.	To your note, due this day, with protest,.....	$343 88
Sept. 4.	" " " "	350 93
1862.		
June 30.	To Cooper's costs, paid for *fi. fa.*, ...	10 60
Oct. 13.	" Money advanced to pay mortgage to Building Society, ...	125 00
1863.		
Jan. 26.	To interest on above, to date, at 6 per cent. ..	189 60
		$1020 01
Jan. 26.	To paid Building Society, in full, on assignment of mortgage.....	300 00
		$1320 01

"I hereby acknowledge the foregoing sum to be truly and justly due by me, this day, unto James Brown, the younger, on a certain judgment recovered against me, and referred to in a settlement of accounts, on the 23rd of Dec., 1857, between myself and Adam Crooks, on behalf of Rigney & Co.

"Toronto, 26 January, 1863. (Signed)
" W. S DURIE."

Confession of Judgment,
Entered Feb. 11, 1858, for £800.
Costs £4 10 2.

In answer to this summons, the defendant made affidavit to the effect, that, at the time the settlement, referred to in Exhibit A., was made, he entered into it with the understanding and belief that the sum of $665.76 was the amount of his indebtedness to the plaintiffs at that date. That his object in investigating and settling the further state of accounts on the 26th of January, 1863, was at the request of Mr. Brown, for the purpose only of ascertaining his indebtedness to the plaintiffs at that date, and for no other purpose.

John Hoskin, on the part of the defendant, also made affidavit to the effect, that he has searched the proceedings; that the confession was first filed in court on the 11th of February, 1858; and that it bears date the 3rd of Oct., 1857; that it was given without any process, and that it is subject to a certain defeasance, contained in a memorandum at the foot of it, as follows:—

"This confession is given to secure the said debt above-mentioned; but the amount thereof is subject to be reduced by a reference to such one person as the said parties may agree upon; and if such one person cannot be agreed upon, then, by the usual reference to two arbitrators, chosen by one party, and with liberty to appoint a final arbitrator, either as a third abitrator or an umpire.

"(Signed) ADAM CROOKS,
" For Plaintiffs."

That neither the confession, nor a copy, has been filed in the Cognovit book, as required by s. 237 of the C. L. P. Act, within one month from the execution of the confession; nor was the confession ever filed in court till judgment was entered thereon, as aforesaid. That *fi. fa.* against goods issued the 29th of Oct., 1858, to Sheriff of Simcoe, endorsed to levy £166 8 9, being the balance due on damages and costs in this cause, with interest from 23rd Dec., 1857; also, £2 for writ and certificate of judgment, together with sheriffs' fees, &c. That the *fi. fa.* against goods was returned *nulla bona*, and filed on the 10th of August, 1861, and thereupon two several writs of execution against lands were issued—one to Sheriff of Simcoe—the other to the Sheriff of York and Peel. That the one to the Sheriff of York and Peel is endorsed to levy £166 8 9, being the balance of damages due; also, £4 10 2, for costs taxed, with interest on both sums from 11th February, 1858, and also £5 for this and former and concurrent writs, together with Sheriffs' fees, &c. This writ has marked upon it, "Renewed for one year, from 1st August, 1862. Chas. C. Small." That in addition to the above endorsement there is another dated the 2nd of February, 1863, upon the writ, in these words:—

"In addition to the above levy for damages, £163 11 3, making in all, for damages, the sum of £330, or $1320, as acknowledged by defendant to be due on the 26th of January, 1863, with interest on £330 from that date, interest on costs as above; £7 7 4 for this renewed writ and concurrent.

"(Signed) ADAM CROOKS,
" Plaintiff's Attorney.'

That there is a suit in Chancery, now pending, by a Mrs. Coleraine, against the defendant, to which suit the now plaintiff and others, who are specialty creditors of the defendant, have been made parties in the Master's office, and a contest as to priority has arisen between the now plaintiffs and divers of such creditors; and the plaintiffs claim priority over them by reason of the *fi. fa.* against lands to the Sheriff of York and Peel, and by reason of the endorsement thereon, of the 2nd of Feb., 1863; some of such creditors being execution creditors, and some being creditors by mortgage. That he believes this application is made by the now plaintiffs with the view of prejudicing the just rights of the other specialty creditors of the defendant, who are contesting the plaintiffs priority as aforesaid, in Chancery.

WILSON, J.—It appears a confession was given by the defendant on the 3rd of Oct., 1857, with the memorandum or defeasance upon it that it was so given to secure the debt of £800, but that it was to be subject to be reduced upon a reference.

On the 23rd of December, 1857, a statement of accounts was agreed to between the parties, by which the balance was struck after certain credits were given at $665 76, and for which two notes at six and nine months, were given, the defendant engaging to indemnify the plaintiffs against the Commercial Building Society, on the land in Innisfil, and to discharge the same in three months, and agreeing that the confession should stand as collateral security

for the performance of this agreement about the mortgage, and for the payment of the notes.

This statement of accounts seems to have been in lieu of the reference stipulated for in the defeasance to the confession, and, no doubt, rendered that reference quite unnecessary.

Judgment was entered on this confession on the 11th of Feb., 1858—no copy of the confession, nor the confession itself, having been filed or entered in the cognovit book, as required by the 237 sec. of the C. L. P. Act.

Execution against goods issued on the 24th Oct., 1858, to the Sheriff of Simcoe, endorsed to levy £163 8 9, being the balance due for damages and costs, with interest, &c., from 23rd December, 1857.

This execution was returned *nulla bona*, and was filed in the Crown office, on the 10th of August, 1861, and thereupon two executions against lands issued to Simcoe and to York and Peel.

The execution against lands was delivered to the Sheriff of York and Peel on the 13th of Aug., 1861, and was endorsed to levy as above, £166 8 9, balance of damages (not as before, being balance of damages and costs,) and £4 10 2 for costs, and interest on both sums from 11th Feb., 1858, (instead of as before, from the 23rd Dec., 1857,).

This execution against lands was then renewed from 1st Aug,, 1862.

On the 26th Jan., 1863, the plaintiffs and the defendant have a further accounting, in which the two notes, given upon the first settlement are restated, with interest; and a further sum of $10.60 for costs of *fi. fa.'s*, and two additional sums of $125 and $300, for money paid on account of the Building Society's mortgage, making the total claim, at that date, $1320 01.

Then, in order to make the endorsation on the *fi. fa.* against lands correspond with their new statement of accounts, the plaintiffs, on the 2nd of Feb., 1863, make this further endorsation, that the Sheriff shall levy the further sum of £163 11 3, for damages, with interest on the whole damages from the 26th of Jan., 1863—the interest on costs as above.

Then, on the 16th of June, 1863, the plaintiffs apply, by summons, to a Judge in Chambers, as before stated, for leave to amend the endorsation on the *fi. fa.*, by increasing the amount endorsed, by shewing, among other facts, these statements of accounts, and that they, the plaintiffs, have paid these moneys to the Building Society, &c., &c., as above stated.

The 1st objection which is made to this application is, that the cognovit, or a copy of it, was not filed according to the 237 sec. of the C. L. P. Act, within one month after it was given; and, as the statute declares that "No confession of judgment shall be valid or effectual to support any judgment or writ of execution, unless this is done:"—that so soon as this defect is brought to the notice of the Judge, he should not make any o der upon it, or with respect to it, which may have the effect of maintaining or confirming it.

The 2nd objection is, that the plaintiffs have already made the very endorsement themselves, which they now desire the sanction of the Judge to have made.

The 3rd objection is, that the plaintiffs do not state, correctly, that the sum of $1320 was due as by Exhibit B., when the *fi. fa.* against lands issued for that *fi. fa.* was issued on the 10th of Aug., 1861, while Exhibit B. shews the payments to the Building Society were not made till Oct., 1862, and Jan., 1863.

The 4th objection is, that the plaintiff's affidavit does not state truly when it represents that the endorsations made on the *fi. fa.* against goods on the 28th of Oct., 1858; and the endorsations made on the *fi. fa.'s*, against lands, on or about the 10th of Aug., 1861, and again made, in effect, on the 1st of Aug., 1862, when they were re-renewed, were made as sworn to in *error* by the plaintiff's solicitor, for the Exhibits A. & B. shew clearly there was no error in the endorsations, as it was the only sum which could properly have been endorsed for.

The 5th objection is, that the additional sums in the new endorsement of the 2nd of Feb., 1863, cannot be claimed upon this cognovit; that they formed no part of the original debt for which the confession was given.

And the 6th objection is, that this application is made for the mere purpose of procuring for the plaintiffs a priority over the other creditors of the defendant, which is now the very subject of a contest in the Court of Chancery, between the plaintiffs and the other creditors of the defendant.

As to the 1st objection, our section, which is general in its application, appears to be taken from the Imperial Act, 12 & 13 Vic., ch. 106, sec. 136, which applies to confessions, &c., &c., given by traders.

Under the Act 3, Geo. 4, ch. 39, sec. 1, and the 1 & 2 Vic., ch. 110, which avoids confessions, as against assignees in bankruptcy, &c., unless the confession, or a copy thereof, has been filed within twenty-one days from its execution, it has been held that, although the execution has been executed, and the money paid to the execution creditor before the bankruptcy, that the assignees may, nevertheless, recover it from the creditors. *Bettleston* v. *Cooper*, 14, M. & W. 699.

Acraman v. *Herminan*, 16, Q B. 998, decides that under the 12 & 13 Vic., ch. 106, sec. 136, the warrant to confess judgment and judgment are void as against assignees, if the warrant be not filed within 21 days, even although the judgment be entered, and the warrant entered with the judgment, within the 21 days; the warrant must be filed with the proper affidavit, which the act requires, which is the only filing which will be sufficient.

I think it is impossible to do otherwise than to say, that while such a confession and judgment would seem to be open to the objections suggested, it would not be expedient to make the amendment prayed for.

It is not necessary, therefore, to pursue these objections further; but if it had been, and if relief could have been afforded to the plaintiffs at all, it could only have been by making the other execution creditors of this defendant, and the sheriff, also, parties to this summons, as I intimated on the argument, they ought to be, and which I find to be expressly so decided in *Hammond* v. *Navin*, 1 Dowl, N. S. 351.

After a careful perusal of all these affidavits and papers, I must say that this case has not been submitted to me in a very ingenuous manner. These plaintiffs make an application in June to justify an act which they have themselves completely performed in the month of February before, without bringing this fact expressly before the Judge; and I must say, also, that it is a complete misstatement of their case to call the first endorsation an error of the plaintiff's solicitor, when it is the only endorsation which the plaintiffs themselves could have made in Aug., 1861, when they sued out their execution against lands, as they had not at that time, nor for more than a year afterwards, paid any portion of the money which they claim the right to add to the original endorsement. The plaintiffs case is not one of error at all: it is as a right to add moneys to the original endorsation, which, although they had not accrued as a claim to the plaintiffs when the endorsations were made, were, nevertheless, as the plaintiffs contend, moneys within the provision and protection of the confession, by the express terms of the settlement of accounts of Dec., 1857, and which was in lieu of the defeasance underwritten upon the confession itself. This is their case, and not one of mistake or error in any form. But I do not feel at liberty, or called upon, to express any opinion upon this branch of it, for the reasons already given. I wish to say nothing either upon the amendment already made by the plaintiffs of the endorsation upon the writ.

I discharge the application with costs.

Summons discharged,

With costs.

NOTE.—If an application is made by one of several execution creditors to amend the endorsement on a writ by increasing the amount of the sum to be levied, the other creditors, and the officer to whom it is directed, should be made parties to the rule. *Hammond* v. *Neven*, 1 Dowl. N. S., 351 S. C.; 9 M. & W., 221.

If the writ has been endorsed for too small a sum, the plaintiffs may, in the case of a *fi. fa.*, be allowed to issue a fresh writ for the residue. *Street* v. *Passmore*, 2 Dowl. P. C. 404. *Smith* v. *Dickenson*, 13 Law J., Q. B. 121, 1 D. & L. 155 S. C.

CHANCERY.

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

BANK OF UPPER CANADA v. BEATTY.

THE SAME v. THOMAS.

Judgment creditor—Fraudulent conveyance.

In order to retain the lien created by the registration of a judgment recovered at law, it is necessary that the bill to enforce such lien should have been filed on or before the 18th day of May, 1861.

When a judgment creditor files a bill to enforce his judgment against the lands of his debtor, it must be shewn that the creditor has sued out execution on such judgment.

The agent of a bank having become indebted to his principals in a large sum of money, proceedings were taken to enforce payment thereof; and when execution therefor was on the eve of being sued out, the agent absconded from the country; and, with the avowed object of defeating the claim of the bank, but, as the agent alleged, for the purpose of paying his other creditors, conveyed away to a person to whom he was only then introduced, a large quantity of valuable lands to be paid for in goods at long dates, returning at night for the purpose of executing the conveyances, and which were executed without any investigation of the title to the property; and the agent subsequently signed the agreement for the delivery of the goods to his son, taking, in payment, his notes payable over a period of several years. The court, under the circumstances, set aside the sale as fraudulent against the bank.

The bill, in the first mentioned cause, was filed by the Bank of Upper Canada against James Beatty, George Thomas, and John Stephens, for the purpose of having enforced the payment of a judgment recovered by the bank against Thomas, under the circumstances set forth in the judgment. That cause, together with a suit instituted by Beatty against Stephens and the Bank of Upper Canada, came on to be heard at the same time.

Strong and *Cruickmore* for the Bank.

Blake and *Blain*, for the defendants.

In the suit instituted by Beatty, the usual decree was pronounced. In the other, after taking time to look into the authorities cited, the following judgment was delivered by

VANKOUGHNET, C.—This is a bill to set aside a certain conveyance of lands by one of the defendants, Thomas, to one other of the defendants, Stephens, on the ground that it was made with the fraudulent intent of putting the property out of reach of the plaintiffs, and during the pendency of an action by them against the defendant Thomas, which resulted in a judgment at law for an amount of which the plaintiffs, by means of this bill, seek to obtain payment out of the property in question. The bill alleges that the conveyance to Stephens was voluntary and without consideration. This latter allegation is disproved. The bill prays in reference to the lands so conveyed, that the same, upon which the plaintiffs' judgment is a lien or incumbrance, or a competent part thereof, may be sold, and the proceeds applied to the payment of the judgment. The bill also impeaches a judgment recovered by the defendant Beatty against Thomas; but this portion of it is not material to the questions under consideration here, as Beatty, prior to the 18th of May, 1861, filed a bill on that judgment as a judgment creditor, making the plaintiffs parties defendants to it as judgment creditors of Thomas, and has obtained, since this cause was heard, the ordinary judgment creditor's decree. The plaintiffs, in their bill, which was filed in June, 1861, do not allege that upon their judgment they have issued any *fi. fa.* against lands, but they set up, as giving them a right to obtain the aid of this court to execution on and of their judgment, the bill filed by Beatty as a judgment creditor on the 14th of May, 1861, and to which, as stated, they were made parties defendants, and they set forth that they had put in their answer in which they claimed to be paid the judgment in question, as well as a prior judgment recovered by the Savings Bank, and assigned to them, but about which there is no dispute, as Beatty offers to redeem and pay it off. The plaintiffs rely upon this allegation, true in fact, as bringing them within the 11th sec. of the act 24 Vic., ch. 41, and therefore keeping alive their judgments as liens upon the lands of Thomas available for the payment of his debts, and they also contend that that act did not take effect till the 1st of September, 1861, whereas the bill in this case was filed in June previously, and that so their lien is preserved.

I think the plaintiffs fail to maintain either of these positions, and that they filed their bill too soon to give them the benefit of any rights which they might have acquired as judgment creditors by virtue of Beatty's suit. The bill simply sets up the bill filed by Beatty, and the answer of the defendants filed long subsequently to the 18th of May, 1861. Beatty might, at any time, have dismissed that bill. The plaintiffs' right at the time this suit was commenced to preserve their lien as judgment creditors by means of Beatty's suit was inchoate, and until decree they could claim no benefit of the suit. This they anticipated, and, therefore, have in respect of it filed their bill too soon, just as when a judgment is no lien on any specific lands the plaintiff seeks equitable execution in this court without first having issued execution on his judgment at law. *Neate* v. *Marlborough*, (3 M. & Craig, 407.) *Angell* v. *Draper*, (1 Vernon, 399.) Had the plaintiffs' right to retain their lien matured before filing their bill by a decree at Beatty's suit I should, in accordance with the *Bank of Montreal* v. *Woodcock*, (9 Grant, 141,) have held that they had made out a title, so far, to ask the aid of this court. But, as I have already said, they have been premature, neither having a decree establishing their position in this court in Beatty's suit, nor execution at law when they filed their bill. As to the last clause of the 24 Vic., ch. 41, providing "This act shall take effect on the 1st day of September next," no doubt some uncertainty as to the time the act is to operate is created by it. It was probably hurriedly inserted in the bill after it had been introduced, but I think its effect must be limited to keeping registered judgments in their places or order of priority (but not as liens *per se*) until the 1st of September, in order that they may as to such priorities sustain writs of execution which shall have been issued on them in the meantime, and that in all other respects the act came into operation immediately on its passing. This view is confirmed by the act 25 Vic., ch. 21, passed to cure an omission in the other act relative to the registry of certificates of discharge of mortgage. It recites that it is expedient "to remove all doubts as to the sufficiency of such registration since the *passing* of the said act"—that is, the 24th Vic., ch 41, and provides, in its 3rd section, that every certificate of mortgage registered since the 18th of May, 1861, which, before that date, would have been a sufficient discharge of a mortgage, "shall have the same effect and validity as if the second section of this act had passed and been the 8th sub-section of section number seven of the said act 24 Vic.," from which by an oversight in repealing the clause of the old act for the registration of such certificates provision therefor in the future had been omitted. The legislature here plainly shew that they treat the act of 24 Vic., as having come into force on the 18th of May, 1861, the date of its being passed.

The objection to the plaintiffs being in a position to ask the aid of this court having been taken by the answer, I must give the defendants their costs and dismiss the bill, but without prejudice; if that leave be necessary to the plaintiffs' filing another in respect of the same matters.

After this judgment had been delivered the Bank instituted proceedings in another suit against the same parties and one F. A. Thomas, a son of the defendant Thomas, to whom his father had transferred his claim upon Stephens.

Evidence was taken in the suit, and the case argued before his Lordship the Chancellor at the sittings of the court at London in March and April, 1863.

Becher, Q. C., and *Fitzgerald*, for the plaintiffs.

Blake and *Blain*, for defendants.

Corlett v. *Ratcliffe*, (4 L. T. N. S. 1), *Skarf* v. *Soulby*, (1 M. & Gor. 364), *Buckland* v. *Rose*, (7 Grant, 440), *Wood* v. *Dixie*, (7 Q. B. 892), *Thompson* v. *Webster*, (5 Jur. N. S. 668, S. C. on app. 7 Jur. N. S. 531), *French* v. *French*, (D. M. & G. 95). *Hale* v. *The Saloon Omnibus Company*, (4 Drew, 492), *Turnley* v. *Hooper*, (2 Jur. N. S. 1081), were, amongst other cases, referred to and commented on by counsel.

VANKOUGHNET, C.—The bill in this case is filed by the plaintiffs to have declared void as against them, and all other creditors of George Thomas, one of the defendants, certain conveyances of real estate executed by him to John Stephens, another of the defendants, under the following circumstances: Thomas having for some years been agent of the plaintiffs in Chatham, became

indebted to them in about the sum of $78,000, in respect of various transactions, and to secure its payment, executed to the plaintiffs, on the first day of March, 1858, a mortgage of certain lands, estimated at the time by a gentleman employed by the plaintiffs to value them, as worth $98,000. On the 13th of November, 1858, the Toronto Savings Bank, represented by Messrs. Henderson, Proudfoot and Robinson, recovered a judgment against Thomas for £1798 9s. Other parties were also liable to the Savings Bank for this debt, but whether they were or are solvent or not does not appear. The Savings Bank also hold as security for the debt a transfer of 7000 or 8000 acres of wild land, the title to which is still in the Crown, but one instalment; viz., one-tenth of the original purchase money having been paid; whether this security is of any value does not appear. On the 16th of November, 1858, this judgment was duly registered in the counties where the lands in question here lie, and writs of execution against the lands of the defendant Thomas were duly issued, and placed in the hands of the sheriffs of the said counties, and have been duly kept alive. This judgment remains unsatisfied. On the 4th of October, 1860, it was assigned to the plaintiffs, who then became, and still are, entitled to the benefit of it. Thomas having made default in payment of one instalment of the money payable to the plaintiffs under the mortgage to them, was, in the early part of the year 1860, sued by the plaintiffs therefor. In this suit he made defence, as he says, for time to enable him to secure his other creditors, and a verdict having been rendered in it against him at the Chatham assizes, which commenced on the 16th of April, 1860, judgment was entered up upon it for the sum of £2393 17s. 4d., on the 18th of the same month, and writs of *fieri facias* against his lands duly issued and delivered to the sheriffs of the said counties, in whose hands they remain unsatisfied. On the 18th and 19th days of the same month of April, the said judgment was duly registered in the same counties. On the 6th of June, 1862, the plaintiffs recovered judgment against Thomas for $64,036 65, the balance of the amount secured by the mortgage to them.

In April, 1860, the outside value of the property mortgaged by Thomas to the bank, appears to be $15,000. How such exaggerated value as that put upon it in March, 1858, (before which the revulsion in the value of the real estate in the country had taken place,) was arrived at by the gentleman who thus estimated it, I do not know.

On the morning of the 18th of April, 1860, Thomas left Chatham, and arrived on the same day in Detroit, where he has ever since remained, having returned to Canada only on the occasion of his attending as a witness in this case, under the protection of a subpœna. When Thomas thus absconded from Chatham he was indebted to divers parties in sums not secured by judgment or otherwise, to an amount of from £4000 to £5000. On the day of his arrival in Detroit, Thomas met with the defendant Beatty, with whom for many years he had been on terms of intimate friendship. They met in the street, and Thomas at once proposed to Beatty that he, Beatty, should buy Thomas's property, giving, as his reasons for desiring to sell, that the plaintiffs were pressing him hard; that he thought he had sufficiently secured them, and if they succeeded against him he would not be able to pay other creditors whom he owed. Beatty, as he swears on his examination, was personally aware that Thomas had got into trouble with the bank, and had had a settlement with them, and that he had lost his position as bank agent; and he next heard, as he states, of Thomas's troubles when the latter came to see him in Detroit, that is, on the occasion of the interview just mentioned. Beatty declined to make the proposed purchase, not being then, as he says, in a position to buy. Thomas then requested Beatty to propose to the defendant Stephens, his partner in business, to become the purchaser, and Beatty promised to do so; subsequently, on the same day, Thomas went down to the store of the defendants Stephens and Beatty, and was introduced to the former by the latter. What then passed between Thomas and Stephens is told by the former in the following words:

"I gave Stephens a list of the property I wanted to sell, and told him Beatty would explain the value to him; that I had put it in as low as possible, to induce a purchase; I had put the price at $50,000; I gave him a list of the incumbrances, which would be deducted from this price; my interview with him lasted five or ten minutes; I told him that the whole amount of the Proudfoot judgment (that is the Savings Bank) was not to be considered as due, as they had other securities: I put down Beatty's judgment among the incumbrances: Stephens said he would take time to consider: I left him, and returned in about an hour; I considered the incumbrances to be about one-third of the price named by me: when I returned, Stephens asked me my terms for payment: I said I wanted part cash, and the balance in groceries. He said there was no use of further discussion, as he would not pay any cash; I told him I wanted means to pay off creditors, and that next to cash I considered groceries the best thing: we then spoke of the price to be paid. Stephens said he must take off one-third of the $50,000 for the incumbrances, one-third for taxes, and to cover any defect in title, and for profit in the transaction: he then offered me $16,000: I tried to get more; Stephens refused it, saying I might take that or nothing: I agreed to his offer: this interview lasted about one-quarter of an hour: Stephens then told me he had determined to purchase: I met Mr. Prince and Mr. Bernard there, (the members of the firm of Prince & Bernard, solicitors,) the latter was to draw up the agreement: he did draw it while I was there; then Stephens read it over, but was not satisfied, as he said that provision ought to be made by it against Beatty's judgment, and he did not see why I should not give him this indemnity if I felt satisfied, as I said I was, that there was other property sufficient to pay it: Beatty's judgment was not estimated among the incumbrances deducted as one-third of the price of the lands: I then added to the paper so drawn by Bernard the provision in regard to Beatty's judgment, and with this Stephens was satisfied: he would not sign it till he had got the deeds: Bernard said he would set his clerks to work to prepare the deeds: Stephens said he would have to be quick about it, as he was going away in the cars that evening: Bernard proposed a power of attorney: Stephens said he would prefer signing the agreement himself: finally, it was determined to have a power of attorney, in case Stephens was gone when the deeds were ready: I did not see Stephens again that day: he had left before the deeds were ready: I went to Windsor at night to execute the deeds, because they were not ready before, and I feared if left till next day I might, if I then went over, be arrested."

Thomas also states that after the deeds were ready for execution by him, Mr. Bernard, whom he had consulted, advised him that if he returned to Canada after selling his lands, the bank, being annoyed thereby, would probably arrest him; that having sold his property he remained in Detroit to look after the proceeds, and to realize them; that he did not think it was safe to go back to Chatham, unless he could make some arrangement with the bank, as he feared they would capias him; that Mr. Bernard advised him to cross over to Windsor to execute the deeds, as the bank might procure his arrest, and that he crossed over to Windsor between 10 and 11 o'clock at night, to execute the deeds to Stephens. These deeds being those impeached in this suit were there and then executed. On the following morning was executed by Beatty for Stephens under power of attorney the agreement by the latter to purchase. The deeds covered a quantity of land in the Counties of Kent, Middlesex, Essex, and Lambton. The consideration, therefor, was the agreement of Stephens, which, after reciting that Thomas was about to commence business in Detroit, and had bargained with Stephens for groceries to the amount of $16,000 to be used in such business, he, Stephens, agreed to supply the same to Thomas in the following manner: to the amount of $3,000 at any time within one year thereafter, to the amount of $3,000 at any time within the year following, and to the amount of $2,000 within each one of the five following years. In relation to this transaction of sale and purchase, defendant Beatty, on his examination, says that he introduced Thomas to Stephens, and left them together, and heard nothing more of the matter till Stephens brought him a list of the lands offered by Thomas for sale, for his opinion thereon; that he valued the lands at $50,000, deducting one-third for incumbrances, and one-third to cover taxes and defects in title, and the probable profit in the transaction, leaving one-

third as the net price to be paid for the property; that the interview between him and Stephens on this occasion lasted a couple of hours; that he and Stephens discussed Thomas' reasons for selling, as already given. He says he advised Stephens to make the purchase, and did not consider that the matter had been carried on in a very hasty manner. He says he never visited any of the property except the Chatham property, and that in his estimate of value for Stephens, he did not take the amount of the rents of this Chatham property into account, as he did not know what they were. Since he took Stephens' purchase off his hands he says he enquired the value of the Chatham property, and he thinks of some of the other lands, but he is not positive. Mr. Prince swears that in this transaction of sale and purchase, he was acting for both parties, the consideration for the sale was, as he understood from all parties, the setting up Thomas in business as a grocer in Detroit; that he himself was at the time acquainted with Thomas's position with the bank and his creditors generally, but he thinks Stephens was ignorant of it. That Stephens was not ignorant of it, is shewn by the evidence of Beatty, who also swears that he must have found out about the time he signed the agreement for Stephens on the following morning that Thomas had been over late to Windsor on the previous night to execute the deeds, and he then suspected that Thomas had absconded from Canada. Mr. Prince says he investigated the title to the lands for Stephens. This must have been after the execution of the deeds, for it was impossible to have done it before. The deeds, when executed, were retained by Messrs. Prince & Bernard, as solicitors for Stephens, and Bernard procured the execution by Beatty for Stephens of the agreement of the latter. Thus, then, we have a party, five or six days before a judgment is or can be recovered against him in a pending suit, flying from Canada to the city of Detroit, in the United States, and on the very day of his arrival there introduced to a man, up to that time a stranger to him, and a resident of Detroit, and within the space of about two hours thereafter, conveying to him, without any knowledge by the latter of, or any enquiry by him, except of the defendant, Beatty, as to their value, and without any knowledge by him of the state of the title, a large quantity of lands, valued at the lowest rate at $50,000, and for the avowed object of defeating the Bank of Upper Canada in recovering payment of the amount for which they were then seeking judgment.

Now, as against this short statement, of what actually occurred could these conveyances, so executed, stand? But it is said there is something more; while on the one hand Thomas desired to defeat the claim of the Bank of Upper Canada, on the other hand he sought by so doing to produce the means for paying his other creditors. Let us see how far this pretence is real and *bona fide*. Thomas, besides this property, which he conveyed to Stephens, had little else left—a few lots in the town of Chatham, sufficient, he thinks, and as Beatty swore he thought, to satisfy the judgment which defendant Beatty held against him (and which had been registered) for about £1,500. Its value, so far as I could gather from the evidence, was not nearly equal to this, but if it was, it would be swept away under Beatty's judgment, and no available property was therefore left for those other creditors whose debts, to the amount of £4000 or £5000, were not in any way secured, and which Thomas, as he stated, was so anxious to pay. How do he and Stephens, to whom Thomas' double object was made known by Beatty as the latter swears, go about it to effect this object? Thomas transfers himself and all his property out of the country, conveying the latter to a foreigner, resident within a foreign jurisdiction, thus putting everything out of the reach not only of the Bank of Upper Canada, but of all his other creditors, and in consideration of this, Stephens, or Stephens and Beatty are to set him up in the grocery business, providing him with a supply of goods by instalments extending over a period of seven years, out of which I suppose they mean us to understand the creditors are to be paid. I am now speaking of the transaction in its inception and formal completion, without any regard to what took place subsequently, and so treating it, I cannot look upon it otherwise than as a gross fraud by Thomas to cheat his creditors, knowingly concurred in by both Stephens and Beatty. Knowing Thomas' design to hinder, delay, and defeat, if he could, the Bank of Upper Canada, did Stephens take any care to see that Thomas' other professed object of paying certain creditors was secured? Did he not at once put it in Thomas' power to cheat all his creditors indiscriminately, and thus aid him in doing so; and how can he now complain that their joint action to this end should be frustrated? Fraud is not very often apparent in the transaction which it affects—it is to be gathered from many circumstances, including the conduct and demeanour of the parties to it, and every contrivance is usually resorted to to hide it, and to baffle enquiry. Here there was not much time for contrivance, so hurried was every thing, least the expected judgment, at the suit of the bank, should reach the property. What need for Stephens to have entered into the transaction? What inducement to close it in so hurried a way without the very ordinary enquiries which any man, the most ignorant, would make before committing himself to a purchase, unless induced to do so by Beatty, the friend and connection of Thomas, to aid the latter in the accomplishment of his scheme? Was there not sufficient to have aroused the suspicion of any prudent man—to have caused him to hesitate—to make enquiry?

Let us now look at the conduct of the parties afterwards, and see whether in it there is anything which will remove the grounds of fraud presented in the transaction originally. We find that Thomas for some time afterwards does nothing towards establishing himself in the grocery business, or in receiving groceries, but in the month of September, in the same year, he proposes to his son, the defendant F. A. Thomas, a partnership in the business, in which they should share equally, and accordingly gives directions to Mr. Bernard to prepare the articles of partnership, when he is advised by that gentleman to sell out his interest in the agreement with Stephens, as it would be unsafe for him to go into business, the Bank of Upper Canada being determined to push him hard. Acting on this advice the elder Thomas sells out to his son, and assigns to him the agreement with Stephens, and takes his son's notes for $16,000, payable in instalments extending over a period of between 8 and 9 years. Thomas, the son, thereupon enters upon the grocery business in his own name, receiving groceries from time to time from Stephens and Beatty, and being credited up to the present time with $3000, and $2577 as payments due him under the agreement with his father. In October, or the beginning of November following, Stephens being dissatisfied with his bargain, because, as alleged, the lands were not paying him any thing, though how he expected them to do so, unless by sales which he does not appear to have attempted, one does not very well see, applies to Beatty to take it off his hands. On this, Beatty feeling, as he says, bound in honour to do so, as having advised Stephens to make the purchase, consents on the terms that he is not to be charged with the goods delivered under the agreement until he had realised the amount out of the property conveyed to Stephens, he, Beatty, paying, however, to the firm ten per cent. interest in the meantime for this delay. Accordingly on the 5th November Beatty, with the assent of both the Thomas's assumes Stephens' agreement, and the latter some months afterwards executes deeds of the property to Beatty. These transfers between the parties appear to have been kept secret for some time till they came out in evidence in 1862, in a former suit between these parties. The deeds from Stephens to Beatty were not registered, Beatty says because of Stephens' title being disputed, that is to say, by the bank.

In the arrangement, such as it was, between Stephens and Beatty either a great deal of indifference or a great deal of confidence was felt, as nothing was said or done about passed accrued rents, or of the lands or mortgages which had been released by Stephens at the instance of Thomas out of those conveyed to him. Altogether the other dealings between and among all parties subsequently to the original sale to Stephens were not of a character to strengthen it in any way. It is evident that the original sale can obtain no support from what followed after it, but, on the contrary, if it appeared in its circumstances free from taint, the subsequent acts of the parties would go far to cast discredit, at least grave suspicion, upon it. I quite admit that we are not to try men's rights upon mere suspicion, however strongly entertained, that all is not honest, but in this case, as I have already explained, in the view which I have taken of the facts there is much more than suspicion; indeed, as strong evidence as you can

ever expect in such a case of the fraud by which it has been attempted to deprive a plaintiff of the fruits of his judgment. I quite admit also that a mere transfer of property to one creditor with the intent to prefer him to another, and so hinder and defeat that other's execution, will not be invalid either by the common law, or the statute of Elizabeth, but I deny that a transfer can stand made not to a creditor to pay a debt, but as a sale to prevent the operation of an execution, although there be but one such, notwithstanding that language is to be found in *Wood* v. *Dixie*, and *Hale* v. *The Saloon Omnibus Co.*, which read literally would almost sustain that proposition A man may commit just as great a fraud in his design of defeating one creditor as of defeating a dozen, and indeed it was not contended otherwise on the argument of this case. Beatty, if he ought not to stand in any worse, certainly stands in no better position than Stephens. He was privy to the original transaction, and any suspicion he entertained then must have been amply confirmed by what transpired afterwards, and before he purchased from Stephens.

I should remark that it was stated in evidence that the elder Thomas had paid some debts to creditors in Canada since he had lived in Detroit, but they do not appear to have amounted to $300 in all. Though after Beatty had sworn that Thomas had given to him as one of his reasons for selling the property his desire to save it from the bank as well for himself as his other creditors, he, on his evidence being read over to him asserted that he had not meant to say that Thomas proposed to save any of it for himself. Yet it seems from what has taken place that it is for himself Mr. Thomas has saved it, and not for his creditors, and I should be ashamed of our jurisprudence if in such a case as this the court could not step in and wrench from the parties holding it, property which should never have been withdrawn from the reach of the creditors.

The law applicable to such cases as the present is plain enough. The only difficulty was in adjudging upon the facts to ascertain whether the conveyance has been contrived of malice, fraud, covin, or collusion to delay, hinder, or defraud creditors, or others of their just and lawful debts; and whether notwithstanding such intent in the one party the lands, &c., have been conveyed on good consideration and *bona fide* to a person not having notice of such covin, fraud, &c. Of recent cases on this subject I may refer to *Corlett* v. *Ratchie*, (L Times N. S p. 1) before the Privy Council; to *Thompson* v *Webster*, (5 Jurist N S. 668, and 921,) and in 7 Jurist. N. S., on appeal to the House of Lords. And to *Hale* v. *The Saloon Omnibus Co.*, already cited. It was contended that the whole conveyance here could not be declared void, inasmuch as it covered mortgages, and that there was no allegation that writs against goods of Thomas had issued so as to have entitled the plaintiffs to seize such mortgages had they remained the property of Thomas. The allegation in the bill is that the writs against lands were *duly* issued, and this was admitted on the hearing. Although as against a demurrer this form of allegation might not be sufficient, yet I think, coupled with the admission, it enables the court on the hearing to make a decree as to the mortgages. The writs against lands could not have *duly* issued had they not been preceded by writs against goods, and the mortgages were held out of the country at the time of bill filed.

The decree must be to declare these several conveyances from Thomas to Stephens void as against the plaintiffs, with costs as against the defendants George Thomas, Stephens and Beatty, and for the usual necessary consequential relief. I give no costs to or against the defendant F. A. Thomas. I think he was a proper party to the bill, but he very unnecessarily in his answer enters into a defence of his father in his affairs with the bank. If on being served with the bill he had disclaimed all interest in the suit, and the plaintiffs had nevertheless continued proceedings against him, he would then have had a claim to his costs.

At the opening of the case I ruled that the plaintiffs could not in this suit impeach the judgment of *Beatty* v. *Thomas*, as that question has been disposed of in a former suit between the same parties, but inasmuch as the conveyances from Thomas stand good as between him, Stephens, and Beatty, the result is that Beatty cannot enforce his judgment against the property covered by those conveyances.

U. S. LAW REPORTS.

Wells v. Cook.

(From the *Legal Journal.*)

Where there is a contract to sell or manufacture, and the vendor or manufacturer is guilty of a tort, either in fraudulently representing the quality of the article sold or in negligently making or labeling it, the general rule is that he is only liable to his immediate vendee for the wrong, because damage to third persons is not the necessary and natural consequence of his act, and to them the vendor owes no duty.

To this general rule there are two exceptions in which the vendor is liable to third persons, not parties to the contract, who sustain a particular injury.

(1.) When the wrongful act or neglect is imminently dangerous to the lives of others, as if a dealer sell for resale a dangerous poison labelled as a harmless medicine, which is resold, and injures the person to whom it is administered.

(2.) Where the vendor or manufacturer, from the nature of the contract or service rendered, owes a duty to the public, and does a wrong aimed at the whole public, or the necessary and natural consequence of which is to injure whomsoever may come in the way, as if a bridge builder negligently build a bridge *per quod* a traveller is injured

Where there is no contract, and a party is guilty of some wrongful act or omission of duty in violation of the Common Law, and which is aimed at the whole public, and the natural and necessary effect of which is to injure some or many indiscriminately, the party so guilty is liable to any one injured. As if a team is left unguarded in the street, or a loaded gun is placed in the hands of a child, or a pit is left open in a public place, any one who thereby, without his fault as a proximate cause, is injured, can maintain an action against the wrong-doer.

Where such wrongful act or omission of duty violates no rule of the Common Law, but only a statute, or violates both, a party who sustains a particular injury, not common to the whole public, can only recover, when the wrong is imminently dangerous to human life, or its natural and necessary effect is to injure some or many indiscriminately, or where the wrong is to a party to a contract.

But these principles do not authorize a person to maintain an action against a vendor of sheep infected with foot-rot for fraudulently selling them as sound, in violation of a penal statute and of the Common Law duty to disclose the disease, when such person is not a party to the contract but a purchaser, in ignorance of the fraud, from the vendee of the fraudulent vendor before the vendee discovered the fraud. This is so, because, damage to the second purchaser is too remote a consequence of the wrong, and is not a natural and necessary consequence of it.

When a false representation is fraudulently made to the prejudice of another relying thereon, the party injured may recover in an action against the guilty party for the deceit, provided the false representation is made to him, directly or indirectly, or is made to and with the design to defraud the public indiscriminately But a false representation made to one person not designed to influence the conduct of others, can not give the latter a right of action.

An agent to whom false representations are made to the prejudice of his principal, not designed to influence personally the agent, has no right to rely on such representations in subsequent dealings with his principal, and if he do so, he has no right of action, because no contract with him is violated, nor is any duty to him personally violated. There can be no misfeasance, malfeasance or nonfeasance, except where there is an obligation or duty

The petition filed February 26, 1863, is as follows:—

Orlando Wells, plaintiff, against Solomon Cook, defendant.

Court of Common Pleas, Union County, Ohio, Petition.

The defendant, on or about the 1st day of November, A.D. 1861, sold to the plaintiff, as the agent of his brother, Osmond Wells, and for the said Osmond Wells, twenty-three head of wethers, and three head of buck sheep, the defendant well knowing, at the time of said purchase, that the said sheep were to be turned in with a large flock of sheep owned at that time by the said Osmond Wells, of eleven hundred head, all of which said eleven hundred head of sheep, at the time of said purchase, and turning in of the said twenty head of wethers and three head of buck sheep, were sound and healthy, and free from any disease.

The defendant, at the time of said purchase, wrongfully and fraudulently represented to plaintiff, that said sheep purchased of him were sound and healthy, and free from any disease, whereas the said sheep, although apparently healthy, were not sound and healthy, as the defendant then well knew, and wrongfully and fraudulently concealed the same from the plaintiff.

The plaintiff, afterwards on or about the 1st day of December, purchased of his brother, Osmond Wells, all of the before-mentioned sheep, including those purchased of defendant, solely relying, as to the soundness of said sheep, upon his own knowledge of the said eleven hundred previous to the purchase of the twenty-three head of wethers, and three head of bucks, of the plaintiff, and relying solely upon the representations of the defendant to him, as to the soundness of those purchased of him. The plaintiff avers, that said sheep, purchased of the defendant were, at the time of said purchase, unsound, and had a disease known as the "foot-rot," which is contagious, and which was communicated to the rest of said flock by the turning in of said sheep with said eleven hundred head.

And the plaintiff further avers, that at the time of his said purchase from his brother, Osmond Wells, of said sheep, said disease had not made its appearance among said flock so as to be noticed by plaintiff or his brother, they being, at that time, unacquainted with the nature of said disease, but that it has since broken out among said flock, so as to render them almost entirely valueless. To the damage of the plaintiff four thousand dollars, for which he prays judgment.

Demurrer that petition does not state sufficient facts.

James W. Robinson, for demurrer.

There is no privity. 2 Hilliard on Torts 141 ch. 26. The tort or cause of action is not assignable *Zabriskie* v. *Smith*, 3 Kernan 322.

It is not even averred that it is assigned. The petition seeks damages for the impaired value of the sheep sold, and for injury to the other flock.

As to the first, there is no authority to sustain it.

As to the injury to the flock, no case has yet gone so far as to give damage therefor.

P. B. Cole and George Lincoln for plaintiff cited.

1 Smith's Leading cases 132 *n Lobdell* v. *Baker*, 3 Metcalf R 472. 1 Greenleaf's Evidence, sec. 18. *Benton* v. *Pratt*, 2 Wendell 385. 19 Johns R. 381. 19 Wend. R. 345. 4 Denio R 317 4 Denio 454, 464. 6 Hill 292.

On the ground of contract, *Gearhart* v. *Bates* 20 Eng. L. & E 130 Chitty on Cont. 8 Am. Ed. 591 n 2 Parsons Cont 276 *Benton* v *Pratt*, 2 Wend 385 *Weatherford* v. *Fishback* 3 Scane 170. *White* v. *Munot*, 8 Selden 356.

Hope v *Alley*, 9 Texas 394.

If a surgeon unskillfully treat his patient, he is liable, though the contract was with the third person, 1 Billiard on Torts 253 *Pippin* v *Shepherd* 11 Price 40. *Gladwell* v. *Stegall*, 5 Bing. N. R 733.

Plaintiff must recover, or there is a wrong without a remedy. Brooms Legal *maxims* 147, and see *Caveat Emptor* 622 15 Ohio R 739. No *privity* is necessary to sustain an action for tort. 1 Billiard on Torts. 9 *n Gerhard* v *Bates*, 2 E. & B 476. *Lansdale* v. *Tenney*, 2 M & W 519. *Wright* v. *Defrees*. 8 Indiana 298. *Corraux* v *Male*, 25 Barb. 578. 1 Hilliard on Torts 13 14. *Pasley* v. *Freeman*, 3 D. & E 50.

On the authority of *Thomas* v *Winchester*, 2 Selden R. 397, the Ohio Statute gives a right of action, the remedy to be pursued on common law principles. It is as follows:

An Act to prevent the spread of disease among Sheep.

(Passed Feb 17, 1857)

Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That any person, being the owner of sheep, or having the same in charge, who shall turn out, or suffer any sheep, having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway, or uninclosed ground; or who shall sell any such sheep, knowing the same to be diseased, without fully disclosing the fact to the purchaser, shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than twenty dollars, and not more than five hundred dollars, to be recovered like other penalties of a like nature; Provided, That nothing herein shall change the right of any one sustaining damage from the running at large, or sale of such sheep, in bringing suit for the recovery thereof, or in defending against any suit brought upon a sale of such sheep.

Section 2. This act shall not be so construed as to prevent any person, owning such diseased sheep, from driving the same along any public highway.

BY THE COURT.

WM. LAWRENCE, JUDGE.—At Common Law there is a distinction recognised between a wrongful *act* or negligent omission of duty *imminently dangerous to the lives of others*, and one that is not so. In the former case the party guilty of the negligence is liable to the person injured, whether there be a *contract* between them or not; in the latter, the negligent party is liable only to the person with whom he contracted, and on the ground that negligence is a breach of the contract.

Longmeid v. *Holliday*, 6 Eng. Law & Eq. R. 562, *Kerr* v. *Clason* 4 West, Law Mo. 488.

Thus the owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence. *Lynch* v. *Nurdin*. 1 Ad. & Ellis, N. S. 29. *Illidge* v. *Goodwin*, 5 Car. & Payne 190. So the owner of a loaded gun, who put it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned thereby, 5 *Maule & Selwin*, 198.

So a dealer in drugs and medicines, who, by himself or agent, carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, is liable to all purchasers, however remote, who, without fault on their part, are injured by using it as such medicine, in consequence of the false label. *Thomas* v. *Winchester*, 2 Selden R 397.

So a bridge builder, who, in violation of his contract, so negligently erects a bridge on a public highway that a traveller, not a party to the contract, is personally injured, is liable for the injury. *Longmeid* v. *Holliday* 6 Eng. Law & Eq R. 562. *Griswold* v. *Gollop*, 22 Conn. R. 208. 1 Hilliard on Torts 116. *Ashby* v. *White*, 2 Ld. Raym 953, 6 Exch 752, 7 *Ib* 469. *Fergusson* v. *Kennout*, 9 Cl. & F. 289 *Johnson* v. *Barber*, 5 Gilman 425. *Beardley* v *Same*, 1 McLean R. 333. Broom Legal maxims 619. *Caveat Emptor*. *Langridge* v. *Levy* 2 M. & W. 519. *Winterbottom* v. *Wright*, 10 M. & W. 109. *Priestly* v. *Fowler*, 3 M & W. 1. *Pilmore* v. *Hood*, 5 Bing. N. C. 97, E. C. L R. 35. *Vane* v. *Cubbold*, Exch 12 Jurist 61.

These are instances of wrongful acts or neglects *imminently dangerous to the lives of others*, and where the party liable, from the nature of his acts or omissions, *owes a duty to the public* on common law principles, independently of statute, to protect them against injury.

Where a wrongful act or omission of duty *dangerous to the lives of others* is criminal or indictable by statute or common law, a person injured by such act or omission, though not in privity of contract or otherwise with the party guilty of the wrong, may, nevertheless, maintain an action against him, for "so highly does the law value human life, that it admits of no justification where ever life has been lost, and the careless-ness or negligence of one person has contributed to the death of another." *Regina* v. *Swindall*, 2 Car. & Kir. 232, 368, 371. *Tessymond case*, 1 *Levin's Crown Cases* 169. *Thomas* v. *Winchester*. 2 Selden R. 409, 411. *Kerr* v. *Clason*, 4 Western Law Monthly, 488.

The injury, to be actionable, must be some particular damage to the individual, not common to the whole public 1 Smith's Leading cases (131) 265. *Ross* v. *Groves*, 5 M. & Gr. 613. *Butler* v. *Kent*, 19 Johns R. 228.

But these principles do not apply where an obligation or duty *grows exclusively out of a contract*, without necessarily involving a duty to the public, or the party injured

Thus in *Winterbottom* v. *Wright*, 10 Mees & Welsby 109, a party contracted with the Post-Master General to provide a coach to convey the mail bags along a road, and another party agreed to run the coach. The coach, in consequence of a latent defect, broke down and injured the driver. But Baron Rolf decided that the driver could not maintain action against the man who furnished the coach, because his duty was to the Post-Master General, and not to the driver.

In all these cases where there is an obligation or duty *to the public*, a person *injured in his property* by the wrongful act or neglect of the person under such obligation, or owing such duty, might, perhaps, have his action, since it is the policy of the law to afford a remedy in favour of every person having a right to demand of another the performance of a duty, the failure to do which results in a wrongful injury. *Beardsley* v *Swan*, 4 McLean 333 *Bartholomew* v. *Benily*, 15 Ohio R. 666. *Johnson* v. *Barber*, 5 Gilman 425. *Bess* v. *Lupton*, 7 Ohio R. 216.

Now, a *statutory prohibition* upon any act—that is, a statute making any act criminal, may impose duties, or prohibit acts in which, from the very nature of them, the *whole public* may have an interest, or they may be such that a wrongful act or omission may affect only the original person primarily affected by the criminal act.

Thus it is a crime to obstruct a road. The act, from its nature, is aimed at the whole public, or whom never may travel the road. The injury results directly to each person so travelling, but no

case could probably be found where a second person, not travelling the road, but who might sustain some loss in consequence of an injury to one who did, could because of that have a civil action against the one obstructing the road. The injury is too remote 1 Smith's Leading cases (131) 266, 8 East 1, 5 B. & Ad. 545. 1 Tuant, 39.

An unlawful act or neglect in violation of some *express statute* is a tort and a party injured by it has an action *Ashley* v. *White*, 2 Ld. Raym. 953, 6 Exch. 752. 7 Exch 460. 1 Hilliard *on* Torts 116. *Griswold* v. *Gallop*, 22 Conn. 208. *Ferguson* v. *Kennaut*, 9 Cl. & F. 282.

But a right of action thus created by statute, in the absence of qualifying provisions, *must*, *on* principle, be governed by the rules of law applicable to rights of action at common law. *Couch* v. *Steel*, 3 E. & B. 402.

But the statutory prohibition upon the fraudulent sale of diseased sheep gives no new or additional *civil* action, because the common law gives it, for similar reasons, independently of the statute. A statutory prohibition upon an act can have no greater effect than a common law prohibition, unless it be more comprehensive, which this statute is not. If the Common Law civil action did not exist then, a sale in violation of the statute would give a civil action to the party primarily injured. With the common law in force the statute merely adds a penal sanction to the unlawful sale. Besides the *proviso* to the statute expressly limits its operation so that actions for damage exist only as at common law.

But an unlawful sale is not in its wrong aimed at the whole public, but *only* at the individual to whom the sale is made. At Common Law, remote persons, who are only injured because the first purchaser is injured, could not maintain an action against the original vendor.

The unlawful *sale*, and the false *representations* complained of, are not *imminently dangerous to human life*; nor did defendant owe to the plaintiff or the public the duty of disclosing the truth. His duty arose from contract, and was to a person whose agent the plaintiff was. Hence, upon the authority of the cases referred to, the plaintiff shows no reason to enable him to recover. Damage to the plaintiff was not a natural, probable or necessary consequence of any act of defendant. 2 Greenl Ev. 256.

It is not pretended that Osmond Wells' right of action against defendant for fraud, was assignable, or was, in fact, assigned to plaintiff, but the plaintiff claims an independent distinct right of action. If he can recover, there may be two distinct recoveries, for the same wrong, for Osmond Wells can certainly recover. The fact that he sold to plaintiff before the fraud was discovered, does not defeat his action.

On Common Law principles a right of action, arising from the fact of a fraudulent or unlawful sale, is limited to the same persons who could sue for *fraudulent representations* to induce the sale.

The same difficulty did not arise in *Thomas* v. *Winchester*, 2 Selden 397, as here. There the vendor was liable to a remote purchaser for injury done to his *health*. He was not liable at all to his immediate vendee, and, if guilty of fraud, the liability to him only would have been for the difference between the value of the medicine, as it was a fact, and as it was labelled to be. The two actions were for distinct things.

But here, if the vendor is liable in this case, he is liable for two actions for the *same wrong* and injury to *two different persons*, and so on *ad infinitum* as the same sheep may be sold again and again.

It is no answer to this to say that Osmond Wells, the first purchaser, having sold the sheep without loss, sustained no damage. His action is not defeated, nor his damages reduced by his sale. The price for which he sold can not be enquired into to defeat or reduce damages in such action, for if so, as said in *Medbury* v. *Watson*, 6 Metcalf 246, it might make the question of fraud depend upon the rise and fall of the property in the market, or upon the skill exercised in selling. The sale may have been for more or less than the sheep were worth. 1 Bouv. Institutes, 498. See Chit. Cont. 468, *Street* v. *Blay*, 2 B. & Ad. 459—7 Bing. 418, 5 M. & P. 284.

The plaintiff says he is without remedy unless he can recover here That often happens At common law, if a vendor sells defective goods, as sound, without fraud, the purchaser has no remedy—that is just what happened the plaintiff here.

If, therefore, the plaintiff can recover, it must be because the defendant has done a wrong to him. It is clear that if the plaintiff were about to buy sheep of a party, and another person should make fraudulent representations as to the sheep, inducing the purchase, the plaintiff could recover against him. The fraud is aimed at plaintiff, and perpetrated upon him. *Weatherford* v. *Fishback*, 3 Scammon, 170, *Pasley* v. *Freeman*, 3 *Term*, R. 51, 1 *Hilliard* on Torts 9, *Evans* v. *Edmonds*, 13 C. B. 786.

He is directly injured *in that transaction*

But can the plaintiff maintain an action for *fraudulent representations* made to him as agent of another person, not designed to influence his conduct personally?

He does not sue for the *criminal act* of *selling*, and hence, derives no benefit from the statute. If he did thus sue, he is not within the principle of such cases, where a recovery has been had because of the *violation of a duty to the public*, or on grounds of public policy *in favorem vitæ*, and so could not recover.

These are the only grounds upon which such actions have been maintained: 2 Selden, R. 400—*Mayor of Albany* v. *Cunliff*; 2 Comst 180—*Broom on Parties to Actions*, 246; *Bush* v. *Steinman*, 1 Bos. & Pull. 409.

In *Thomas* v. *Winchester*; 2 Selden, R. 408, it is said:—

"If a horse be defectively shod by a smith, and a person hiring the horse from the owner, is thrown and injured, in consequence of the smith's negligence in shoeing, the smith is *not* liable for the injury."

And the reason assigned is because:—

"The smith's *duty* grows exclusively out of his contract with the owner of the *horse*; it was a duty which the smith owed to *him* alone, and to no one else. * * Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the smith's negligence."

The authorities show that damages can only be recovered, generally when they are the natural and necessary consequences of the act complained of. 2 Greenleaf on Evidence, sec. 256. Sedwick on *damages passim*; 1 Smith's Lead cases (132) 266; *Vicars* v. *Wilcox*; 8 East 1, "*legal* and *natural* consequences;" *Butler* v. *Keat*; 19 John's R. 228; 1 Smith's Lead. cases (132) 312.

It makes no difference that the wrong complained of is by statute a penal offence.

A person guilty of larceny may injure the creditors of the party whose property is stolen, but no creditor ever yet sued for such injury.

The plaintiff claims to recover because a false representation was knowingly made by defendant, which induced plaintiff to buy the sheep, and so plaintiff was injured by defendant's wrong; Broom's Legal Maxims, 621; *Caveat Emptor*; 1 Hilliard on Torts, 10 n; *Weatherford* v *Fishback*; 3 Scammon, Ills., R. 170; *Pasley* v. *Freeman*; 3 Term, R. 51.

But the plaintiff can not recover upon this ground. His loss is *damnum absque injuria*—damages without a legal wrong.

In *McCracken* v. *West*, 17 Ohio, it was held that:

"If a person write a letter to another, desiring him to introduce the bearer to such merchants as he may desire, and describing him as a *man of property*, and the person having such letter do not deliver it to the person to whom it is directed, but use it to obtain credit elsewhere, the persons so giving the credit can not maintain an action for deceit, though the representations in the letter are untrue."

In that case, Reid, Judge, says:

"If a false statement should be made to one person to induce him to do a particular act, the balance of the world have no legal right to rely upon it; and if they do so, and suffer from it, they can not recover compensation against the person who made the false statement." And see *Edwards* v. *Owen*, 15 Ohio R 502. *Allen* v. *Addington*, 11 Wend R. 375. *Snell* v. *Moses*, 1 Johns R. 96. *Perry* v. *Aaron*, 1 Johns R. 129. *Beach* v. *Cutlin*, 4 Day R. 284. *Smith* v. *Blake*, 1 Conn. R. 262. 1 Hilliard on Torts,

106. *Young* v. *Hall*, 4 Geo. 95. *Boyd* v. *Brown* 6 Barr 310, 2 Selden. 253.

A fraudulent *act* and, perhaps, a fraudulent *representation*, may be aimed at the public generally; and in such case, any one suffering injury thereby, may maintain his action; *Bartholomew* v. *Bentley*, 15 Ohio, R 659.

It can make no difference that the fraudulent representations in this case were made to the plaintiff as agent. His right to maintain an action, according to the principle of the decisions, depends on the question, whether there was an intention to deceive him, or whether he was induced so to believe, and whether defendant violated any duty to plaintiff. Fraud consists in intention; 5 Cranch, 351.

Demurrer sustained.

GENERAL CORRESPONDENCE.

Assessment of persons liable only to Poll-tax—Collection—Voters at Municipal Elections—Same at Parliamentary Elections—Aliens.

To the Editors of the Law Journal.

Picton, *June* 29, 1863.

Gentlemen,—May I trouble you, through the columns of your valuable journal, to enlighten me on some municipal points.

1st. Is it the duty of the assessor of a town to enter on his roll the names of persons from the age of 21 to 60 years liable to pay a poll-tax?

2nd. In what manner should poll-tax be collected? May a Council order a roll, containing the names and amounts, to be prepared and collected any time previous to the regular Collector's Roll being completed; or should the amounts and names be inserted on the regular roll?

3rd. If the names of such poll-tax payers are entered on the Assessor's Roll, are they included as *rate-payers*, in counting up the names of the *resident rate-payers* appearing on the roll? *Vide* Mun. Act, 22 V., ch. 54, sec. 152.

4th. Can non-residents vote at the municipal elections, held annually?

5th. In making out the list of voters for member of Parliament elections, what course is pursued in respect to joint-tenants, owners or occupants? The Statute says such persons must establish their right to be entered on the list, and vote, according to the Assessment Law. Now, the law of assessment provides only one mode of changing the names on the roll, that is by a notice given within fourteen days after the return day of the roll. If no notice is given to the Court of Revision, that there is an error in assessing as joint-tenants owners or occupants, is the absence of such notice *prima facie* evidence that such right to vote and be entered on the list of voters is established *silently;* or must every person jointly assessed, come before the court and shew his right to be so assessed? *Vide* Con. Stat., C., ch. 6 sec. 4, sub-sec. 3, and Con. Stat, U. C., ch. 55, sec. 60, sub-secs. 1-2.

6th. Can a Deputy Returning Officer administer the Oath of Allegiance to a person at the Polls, if such person does not produce a certificate of having taken the Oath of Residence (3 years)? There is, in the Alien Act, an Act referred to by which persons attain to political as well as civil rights by taking the Oath of Allegiance *alone*, but it seems impossible to procure it—(12 V., c. 197, *special*). *Vide* Con. Stats., C., chap. 6, sec. 56, and chap. 6, sec. 12.; *ib.*, cap. 8.

Having to apologise for such a lengthy epistle,

I am, Gentlemen,

Your obedient servant,

C.

We are at all times willing to comply with any reasonable request made to us by a subscriber, to answer questions of general interest to correspondents. But it is scarcely reasonable for one correspondent, in one communication, to put no less than six distinct questions—the answer to any one of which will be of much more value than the amount of his subscription to the *Law Journal*.

We intend no discourtesy to our correspondent "C.," so far as his present communication is concerned. We merely avail ourselves of the present opportunity of giving a hint to correspondents similarly disposed. In future, we shall deal more strictly in such matters.

The questions put by our correspondent are not free of difficulty.

First.—We cannot say that under the general law it is the duty of an assessor of a town to enter on his roll the names of persons from the age of 21 to 60 years liable to payment of a poll-tax only. The duties of an assessor in respect to the preparation of the assessment roll are declared in s. 19 of Con. Stat. U. C., cap. 55. These, all have relation to taxable persons having taxable property in the Municipality. Persons liable to the payment of poll-tax only have no taxable property. They are in the Act described as persons "who have not been assessed upon the assessment roll." (Ib., s. 79). It is usual, however, we believe, for assessors either to make out a separate roll for such persons, or otherwise to furnish the municipal clerk with a copy of it. (See *Regina* v. *Morris*, 21 U. C Q. B., 392.)

Second.—The Act is by no means explicit as to the proceedings necessary to the rating of such persons and the collection of rates from them. We take it that their names must be made to appear on some roll. They need not appear on the assessment roll. They ought, we think, to appear on the collector's roll. We know of no one authorised to put their names on the collector's roll except the municipal clerk. If the collector be not able to collect the amount payable by such persons, and no sufficient distress to satisfy the same can be found, then the head of the municipality or a justice of the peace having jurisdiction in the locality, upon complaint shewing,

1. That the person appears upon the collector's roll to be rated for a certain sum;
2. That the same has been duly demanded;
3. That the party has neglected to pay the same;
4. And that no sufficient distress can be found;

May issue a warrant under his hand and seal, and commit the party to the common gaol of the county for any time not exceeding six days, unless the taxes and the costs of the warrant and of the execution thereof be sooner paid (Con. Stat. U. C., cap. 55, s. 86; *Regina* v. *Morris*, 21 U. C., Q. B., 392).

Third.—For the reasons already mentioned, we think the names of persons liable to the payment of poll-tax only need not appear on the assessment roll. Such persons, if named on the roll, may perhaps be said to be "resident ratepayers," within the meaning of s. 152 of the Municipal Institutions Act; but reading that section in connection with the following sections, we scarcely think it was intended by the Legislature that they should be included in the return made necessary by that section.

Fourth.—Non-resident freeholders who are natural born or naturalized subjects of Her Majesty, and of the full age of twenty-one years, and who are rated on the last revised assessment rolls for real property in the municipality of the value prescribed by law, held in their own right or that of their wives as proprieters, are qualified to vote at municipal elections; but householdors merely can only vote when resident in the municipality for one month next before the election (Con. Stat. U. C,, cap. 54, ss. 75-76).

Fifth.—We do not think, as at present advised, that Con. Stat. Can., cap. 6, sec. 4, sub-s. 3, makes it necessary for persons assessed jointly to go before the Court of Revision and establish before that court their right to be so assessed. It is, however, necessary that the assessment should be such as directed by the Statute, and that it should be true in fact.

Sixth.—The section of the Elections Act allowing returning officers to administer oaths of allegiance must be read in connection with the Con. Stat. Can., cap. 8. The latter is a consolidation and re-enactment of the 12 Vic., cap. 197, to which our correspondent refers. Aliens residing in the Province on 18 January, 1849, upon taking the oath of allegiance, without the oath of residence, may become naturalized. But aliens who have come into the Province since that date must not only take the oath of allegiance but the oath of residence for three years (Con. Stat. Can., cap. 8, s. 1).—[Ed L. J.]

Parliamentary Elections—Voters' Lists.

To the Editors of the Upper Canada Law Journal.

Sirs,—Our late Elections have called forth some questions in regard to the voters' lists, respecting which I as well as others desire information, as Township Clerks will soon be required to make out new lists for voters. The question is this: If the assessor takes down the assessment thus—"A., occupant; B., owner"—have both A. and B. a vote on the same land? If not, which of them should the Township Clerk put down as entitled to vote?

An answer in your next issue will oblige Yours, &c.,

Rowley Kilborn, *Tp. Clerk.*

[To entitle a person to vote at a parliamentary election, two things are necessary: first, that he should possess the necessary property qualification; and, secondly, that his name should appear on the list of voters.

The following persons, and no others, being of the full age of twenty years, and subjects of Her Majesty by birth or naturalization, and not by law disqualified, have the right to the insertion of their names on the voters' lists:—

In any city or town, entitled to send a member or members to the Legislative Assembly, every male person entered on the last assessment roll revised, corrected and in force in such city or town, as the *owner* or as the *tenant or occupant* of real property therein, as bounded for municipal purposes, of the assessed value of $300 or upwards, or of the assessed yearly value of $30 or upwards.

In the limits of any city or town for the purposes of representation, but not for municipal purposes, every male person who is entered on the last revised and corrected assessment roll of any township, parish or place as the *owner, tenant* or *occupant* of real property within the limits of a city or town for purposes of representation, but not for municipal purposes, of the assessed value of $200 at least, or of the assessed yearly value of $20 or upwards.

In any township, town, village or place, not being within any city or town entitled to send a member or members to the Legislative Assembly, every male person entered on the last assessment roll revised and corrected, as the *owner, tenant* or *occupant*, of the assessed value of $200 or upwards, or of the yearly assessed value of $20 or upwards.

Whenever two or more persons, whether as being partners in business, joint tenants, or tenants in common, are entered on the assessment roll, revised and corrected, as the *owners, tenants* or *occupants* thereof, each of such persons is entitled to be entered on the list of voters in respect of the property, if the value of his share or part be sufficient to entitle him to vote if such property were assessed in his individual name.

It is the duty of the clerk of each municipality, after the final revision and correction of the assessment rolls, forthwith to make a correct alphabetical list of *all persons entitled to vote* at the election of members of the Legislative Council and Assembly within such municipality, according to the provisions already noticed, together with the number of lot, or part of lot, or other description of the real property in respect of which each of them is entitled to vote.

Where the real property is of the value already indicated, in the city, town, village, township or place already indicated, and not occupied by the owner, though assessed in the name of owner and tenant or occupant, both the owner and tenant or occupant are entitled to have their names placed on the voters' list, and to vote in respect of one and the same property.

This is the answer desired by our correspondent. (Con. Stat. Can., cap. 6, sec. 4, sub-sec. 1, 2, 3, 4, sec. 6, sub-sec. 1, 2.) —Eds. L. J.]

Officer acting out of office hours—Regularity of the proceedings.

Sarnia, 22nd June, 1863.

To the Editors of the Law Journal.

Gentlemen,—One point which, as I now see, was not sufficiently prominent in my last letter, was not noticed in your reply thereto in last number of the *Law Journal*, under date of 5th inst., viz.:

That the judgment then referred to was signed *out of office hours*, say at 9 A. M., although the clerk's office is not legally

open, except in term time, before 10 A. M., or after 3 P. M. (Con. Stat. U. C., cap. 15 sec. 26).

Under these circumstances is a judgment so signed out of such office hours regularly signed?

LAW STUDENT.

[We answer our correspondent in the language of the late Sir John Robinson:—"We take it that the appointing office-hours, during which the office must be kept open for the despatch of business, is a regulation for the convenience of suitors, that they may know when they will certainly find the office open. But we have found it nowhere held that an officer of the court is not competent to act before or after office hours, as he has always been held competent to act on those holidays when he is not bound to attend his office at all." (*Walker et al* v. *Fuller*, 10 U. C. Q. B. 477.]—EDS. L. J.

Student—Call to the Bar—Admission as Attorney—Age.

Kingston, June 24th, 1863.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Could you inform me, through the pages of your excellent periodical, whether or not a student would be permitted to pass his examinations for "call" and "attorney" before he has attained his majority.

Of course he could not be sworn in until he is of the full age of twenty-one years.

And oblige,

AN INFANT STUDENT-AT-LAW.

[We have made inquiry, and so far as we can learn, infancy is no bar to examination, either for admission as an attorney or call to the bar. The student, however, must have attained twenty years before he can either be admitted as an attorney or called to the bar.]—EDS. L. J.

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 and Frederick T. Jones. Toronto: Henry Rowsell, Law Bookseller and Publisher. 1863.

It is with much satisfaction that we have examined a copy of this publication. The Editors appear to have done their work well. The book is all that the title professes, and more too. In it are collected not only the various orders of the Court of Chancery in Upper Canada from 1853 to the present time, with copious practical and explanatory notes, but the orders of the Court of Error and Appeal, the orders, rules and regulations of the Privy Council, miscellaneous points on the orders, a collection of forms, and all the statutes of Upper Canada relating to the practice and jurisdiction of the Court of Chancery.

The Editors have done much to popularize the Court of Chancery, by not only collecting in one volume the orders of that court hitherto to be found, if found at all, in several volumes of the Reports, but by appending to these orders exhaustive notes on every point of doubt or difficulty likely to arise to a practitioner in the course of his practice. No man who studies this work can be otherwise than well up in the practice of that court. It is, so far as we can learn, decidedly the best work of the kind, on the subject to which it relates, that has been issued in Upper Canada. We have been told that Mr Taylor, of the Equity bar, has issued a somewhat similar work, but as yet have never seen a copy of it. Those who have seen it, and on whose judgment we can rely, tell us that the work of Messrs. Snelling and Jones is superior to it; that it contains not only about 300 more pages, but that the notes are more elaborate and in every respect more valuable. We bespeak for the work under consideration a ready sale. It in all respects deserves it. The Editors are in receipt of letters of approval, as well from the judges of the Court of Chancery as leading members of the bar in that court. Their testimony is no unmeaning tribute to the Editors, but we trust the Editors will receive a still more substantial tribute in the shape of adequate remuneration for their valuable services to the profession.

The senior Editor of the work is a man of no ordinary industry. He has, in the publication of this work, acquitted himself with immense credit. It is a good sign to know that in this Province we have so far progressed as to make it worth while for men of talent and industry, inclined to literary pursuits, to apply themselves according to the bent of their inclination. The work before us would be a credit not only to any man but to any country. It is really more elaborate than the well known work of Morgan on the Statutes, General Orders and Regulations relating to the Practice, Pleading and Jurisdiction of the English Court of Chancery.

It is pleasing also for us to add, that Mr. Rowsell, the publisher, has acquitted himself with great credit. Both the type and paper are excellent. The appearance of the book is all that can be desired. It is convenient in size; so portable that it may be used with ease in court or on circuit; besides, the notes are in general so complete as to render references to the reports of the decided cases unnecessary. The book is a library in itself.

The price is only $7 50. This was the price announced at a time when it was intended to limit the work to 500 pages. We are glad however to learn, that the support which the work has received, and is likely to receive, is such as to enable the publisher to give the additional matter, more than 200 pages, without additional cost. Such conduct deserves encouragement. The best encouragement will be a wide support, which day by day will rapidly expand till the whole edition is sold.

APPOINTMENTS TO OFFICE, &C.

CORONERS.

WILLIAM POTTER, Esquire, Associate Coroner United Counties Leeds and Grenville. (Gazetted June 6, 1863.)

JOSEPH D. BOOTH, Esquire, Associate Coroner, County of Simcoe. (Gazetted June 6, 1863.)

WILLIAM B. QUARRY, Esquire, M.D., Associate Coroner, County of Middlesex. (Gazetted June 13, 1863.)

NOTARY PUBLIC.

MARTIN O'GARA, of Ottawa, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 6, 1863.)

TO CORRESPONDENTS.

C.—ROWLEY KILBORN—LAW STUDENT—AN INFANT STUDENT-AT-LAW—Under "General Correspondence."