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DIARY FOR SEPTEMBER.

1. Satur.. Paper Day Common Pleas. New Trial Day Queen's Bench.
2. SUN... 14*th Sunday after Trinity.*
3. Mon... Paper Day Queen's Bench. New Trial Day Common Pleas. Recorder's Court sits. Last Day Notice of Trial County Court.
4. Tues... Paper Day Common Pleas. New Trial Day Queen's Bench.
5. Wed... Paper Day Queen's Bench. New Trial Day Common Pleas.
6. Thurs.. Paper Day Common Pleas.
7. Friday. New Trial Day Queen's Bench.
8. Satur... Trinity Term ends
9. SUN... 15*th Sunday after Trinity.*
11. Tues... Quarter Sessions and County Court Sittings in each County. Last day for service for York and Peel.
16. SUN... 16*th Sunday after Trinity.*
21. Friday *St. Matthew.* Declare for York and Peel.
23. SUN... 17*th Sunday after Trinity.*
29. Satur.. *St. Michael.* Michaelmas Day. Last day for notice of Trial for York and Peel.
30. SUN... 18*th Sunday after Trinity.*

THE

Upper Canada Law Journal.

SEPTEMBER, 1866.

LAW BILLS OF LAST SESSION.

A short review of the legislation that took place during the Fifth Session of the Eighth Provincial Parliament will be peculiarly interesting, in view of the statement made in the Governor General's closing speech, that it is "the last session likely to be held under the Act for the union of the two Canadas." It has been a session of much labour to the legislature, and we may hope of some profit to the country.

The number of Acts which have passed are one hundred and seventy-six, besides one reserved for the consent of the Queen. Of these, the large majority are of a local or private nature—such as acts for granting or amending charters of various companies, or providing for some special case; some refer exclusively to Lower Canada; whilst, of the remainder, we may class about fourteen as acts having peculiar relation to law, or its due administration, besides others of great general interest, such as the Municipal and Assessment Acts—acts to prevent the unlawful training of persons to the use of arms—to provide for the issue of Provincial notes—respecting the Militia, and its maintenance—to regulate the egress from public buildings—to amend the Medical Act, and the Act for the protection of sheep, &c., &c.

The law bills which have received the Royal Assent, and to which we intend at present principally to refer, are as follow:—

1. An Act to amend Chapter 98, Con. Stat. U. C. This act makes further provision for the prosecution and punishment of lawless aggressors against this country and its peaceable inhabitants. It will be found in full in another place.

2. An Act to amend the Act respecting the Court of Impeachment in Upper Canada, which introduces some new provisions in respect to the mode of procedure under the act, and makes it applicable to Recorders as well as County Court Judges.

3. An Act respecting the hearing of causes in the Court of Chancery, which empowers any one of Her Majesty's Council, learned in the law, at the request of the Vice-Chancellors, to hold the sittings of the Court of Chancery for the hearing of causes, and therein to "possess, exercise and enjoy all the powers and authorities of a judge of the said court." We transcribe this act for the benefit of our readers, merely referring to the remarks we have before now made with reference to this "slip shod" attempt to remedy the evil arising from the suicidal policy of overworking the judges.

4. An Act to amend an Act respecting the Superior Courts of Civil and Criminal Jurisdiction in Upper Canada. This is also given in full in another place, an important addition having been made to it subsequently to its first introduction. We conceive that the main features of it, namely, doing away with Trinity Term, and adding a week to both Easter and Michaelmas Term, and enabling the courts to hold sittings in Banc for the hearing of special cases and motions for new trials, &c., will be of great convenience. It has been a subject of remark, that more work is done during the *last* week of *one* term than in the *first* week of any other *two* terms put together; besides this, Trinity Term comes at an inconvenient season. The power which is given to the courts to hold sittings in vacation will do away with any inconvenience that might arise from there being only three terms in the year.

5. An Act to amend the law of Crown and criminal procedure and evidence at trial in Upper Canada. This act is not altered from

the bill as originally introduced, and is to be found at page 173 of this volume.

6. An Act to amend the Common Law Procedure Act. This was also printed by us, as introduced, (p. 171,) it will not therefore be necessary to give it again; but it is to be observed, that the fifth section of the bill, as introduced, relating to sheriff's poundage, has been struck out. This section was evidently designed to relieve sheriffs from what they considered to be the injustice of depriving them of their poundage, after a levy had actually been made, and the writ satisfied under pressure of the writ, though not directly by the action of the sheriff, according to the doctrine laid down in *Buchanan et al.* v. *Frank*, 1 U. C. L. J., N. S. 124, and other cases; the amendment being intended to bring the rule back to that given by Mr. Justice Burns in *Morris et al.* v. *Boulton*, 1 Cham. Rep. 60. the Legislature, however, did not see it in this light, being somewhat influenced, it is said, by considerations which should not have affected their judgment. The amendment is needed in the interest of sheriffs, and would not, we think, unduly prejudice suitors. The second section of the act provides for the recovery of interest on claims after verdict, instead of after judgment, as formerly, thus getting rid of a difficulty often felt by practitioners, but which reached its climax when it touched such an immense sum as was in litigation in the *cause celebre* of *The Commercial Bank* v. *The Great Western Railway Company.*

7. An Act to amend the law of Upper Canada relating to Crown debtors. This was passed as introduced. It puts the Crown in the same position as regards its debtors, (so far as bonds and other securities referred to in Con. Stat. U. C. Cap. 5 are concerned,) as an ordinary creditor. It is doubtless all very well that the Crown as representing the public should be protected, but there is a limit to everything, and the public would be more convenienced by the repeal of this act than the reverse.

8. An Act respecting persons in custody, charged with high treason or felony—another measure to ensure the safe keeping of those afflicted with the Fenian disorder or otherwise dangerous to the well being of the state.

9. An Act for more effectually securing the liberty of the subject. This is an important addition to the Statute Book and is taken from the English Act with some additions and alterations. We had intended giving a copy of it, but want of space forbids. The effect of it is to extend the remedy given by the writ of *Habeas Corpus*, and it makes provision for the more effectual and easy relief of parties in custody.

10. An Act to amend the law in respect of view by jurors. This provides that a view by jurors in civil and criminal cases may be had out of the County or Union of Counties in which the venue is laid, and it repeals sec. 124 of Con. Stat. U. C. Cap. 31.

11. An Act to amend the law respecting the appointment of Recorders.

12. An Act to amend the Act respecting the administration of justice in the unorganized tracts.

13. An Act to amend the law respecting appeals in cases of summary convictions and returns thereof by justices. These last three are not of much interest to the profession, a remark which does not apply to the last of this series that we shall notice, that is to say:—

14. An Act to amend the act respecting attorneys-at-law, a copy of which has already been given to our readers (p. 173.) The Benchers have had the subject referred to in this act, that is to say the new scheme for reporting, before them this term for discussion; but of this more anon.

The Act of most general importance perhaps to the country at large is the Municipal act. We are not, we are sorry to say, in a position to give any thing of a *resumé* of it at present, having been unable as yet to obtain a copy which can be relied on as correct, owing to the corrections and alterations that have been made in it. Of a cognate nature is the act to amend and consolidate the assessment acts. Farmers and others in that line will be interested doubtless in an amendment of the act for the protection of sheep which can only be said to be of remote interest to the profession. Office-seekers in general, and office-seekers amongst the lawyers in particular, will be more interested by the act to complete the separation of the County of Peel from the County of York. There seems to us to be but little use in the separation of Peel from York except the formation of a few more offices; but the separation is an accomplished fact, and it only remains for us to hope that

proper and efficient officers will be found to administer the affairs, judicial and otherwise, of the County of Peel. Of one thing we are confident, and that is, that they will go long before they find one preside over the new courts with the same kind courtesy, sound common sense, and judicial capacity, as the gentleman who has for so many years sat as the County Judge of the United Counties of York and Peel.

Of the Bills that have *not* become law it is idle to speak. If they are of sufficiently good material they will probably keep till a session of what is likely to be a differently constituted Parliament meets for the despatch of business at Toronto; but if not, they will go to swell that immense mass of rubbish by means of which certain would-be legislators prove their legislative incapacity, and whereby the Queen's Printers grow fat.

NEW APPOINTMENT.

At length a step has been taken by the Government which will, it is to be hoped, do something towards relieving the Judges of the Court of Chancery from some part of their labours, and facilitate the more speedy and correct despatch of business in the west wing of Osgoode Hall. An office new to us has been made, and has been filled by the appointment of Thomas Wardlaw Taylor, Esq., Barrister-at Law. His duties will be to draw up or revise special orders and decrees, to take Chambers in the absence of the judges, and in other ways render them assistance, as well as other duties which cannot at present be definitely described. We doubt not, however, he will find plenty to do, and that it will be well done, no one who knows Mr. Taylor will question. We congratulate the Judge's Secretary upon his appointment, and the Chancery practitioners upon having such a pleasant painstaking man in the position he occupies. Orders of court have been promulgated, defining the duties of the new official.

THE LAW REPORTERS.

A similar agitation to that which was lately quieted in England by the arrangements resulting in the "Law Reports" now supplied to the profession, has during the last few months affected us in Upper Canada. Numerous schemes have been suggested and discussed, but the one which has found favor in the eyes of the Benchers, and which is to be carried out is the following:—The three reporters are to be paid a fixed salary by the Society, and the Society become, so to speak, their own publishers. A volume of reports containing Practice Court, and Common Law Chamber decisions, will also be published, and thus make the series complete. All the reports will be furnished to the profession free. To pay expenses, practitioners will be required to pay $15 for their annual certificates under the authority of the late act. An allowance has been made by the Society towards the remuneration of a reporter for Practice Court and Common Law Chambers, and Henry O'Brien, Esq., Barrister-at-Law, dan one of the conductors of this journal, has been appointed to fill the office.

LAW SOCIETY—TRINITY TERM, 1866.

CALLS TO THE BAR.

The following gentlemen were called to the bar of Upper Canada during the present Term:—Messrs. R. T. Livingstone, Toronto; Donald Guthrie, Guelph; W. Ault, Toronto; W. H. Sullivan, Kingston; F. M. Griffin, Brantford; John McCabe,———; Edward Furlong, Caledonia; W. E. Lees, Ottawa; ——— Gilbert, Belleville. Of the above, Messrs. Livingstone and Guthrie, passed such creditable written examinations that they were not called upon for the oral test. During the same Term, Hewitt Bernard, Esq, of Ottawa, was called to the bar under an act of last session.

ATTORNEYS ADMITTED.

R. T. Livingstone, Toronto; W. H. Sullivan, Kingston; J. W. Fletcher, Toronto; James Fisher, Oil-Springs; W. Ault, Toronto; T. Taiilon, Ottawa; — Faed, Toronto; W. E. Lees, Ottawa; Robert Mitchell, Guelph; J. C. Dalrymple, Brantford; T. A. Hall, Perth; John R. Arkell, Windsor; W. B. McMurrich, Toronto: R. H. R. Munro, Toronto; J. F. C. Halden, Toronto; and on Friday last, Edward Osler, Dundas.

The first seven were admitted without any oral examination.

The number of candidates for admission to the Law Society has much decreased of late years, and most of those who now present themselves are University men.

The Chancellor of Upper Canada returned during last month, and is again engaged in his arduous duties. We are glad to see him looking all the better for his holiday.

The Chief Justice of the Court of Common Pleas, and Mr. Justice Morrison, were unable, during Trinity ter n, owing to severe indisposition, to take their seats in their respective Courts.

JUDGMENTS —TRINITY TERM, 1866.

QUEEN'S BENCH.

Present:—Draper, C J : Hagarty, J.

Toronto. September 1, 1866.

Bell v. *Mills* —Judgment for plaintiff on demurrer to declaration

Johnson v. *Cowan.* — Rule absolute to enter nonsuit (leave to appeal granted).

Lee et al. v. *Morrow.*—Rule absolute to enter nonsuit.

Platt v. *Cummer.*—Rule nisi discharged.

Gates v. *Law* —Judgment for plaintiff on demurrer to the plea.

The Queen v. *Brady.*—Rule absolute for a new trial.

Graham v. *McArthur.*—Rule absolute for new trial.

ACTS OF LAST SESSION.

An Act to amend the ninety-eighth chapter of the Consolidated Statutes for Upper Canada.

[Assented to 15th August, 1866.]

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

1. The third section of the ninety-eighth chapter of the Consolidated Statutes for Upper Canada, intituled: *An Act to protect the inhabitants of Upper Canada, against lawless aggressions from the subjects of Foreign Countries at peace with Her Majesty*, is hereby repealed, and the following section shall be and is hereby substituted in lieu of the said section hereby repealed, and shall be taken and read as the third section of the said act:

"3. Every subject of Her Majesty and every citizen or subject of any foreign country who has at any time heretofore offended or may at any time hereafter offend against the provisions of this act, is and shall be held to be guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried before any Court of Oyer and Terminer and General Gaol Delivery, in and for any County in Upper Canada, in the same manner as if the offence had been committed in such County, and upon conviction shall suffer death as a felon."

2. In case any person shall be prosecuted and tried under the provisions of the next preceding section and found guilty, it shall and may be lawful for the Court before which such trial shall have taken place, to pass sentence of death upon such person, to take effect at such time as the Court may direct, notwithstanding the provisions of an act of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting New Trials and Appeals and Writs of Error in criminal cases in Upper Canada.*

An Act to regulate the means of egress from Public Buildings.

[Assented to 15th August, 1866.]

Whereas, the neglect of a proper mode of constructing the doors and gates of churches and of halls or buildings used for holding public meetings, is a source of great danger to life and limb, and it is desirable to provide a remedy: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. In all churches, theatres, halls or other buildings in this Province hereafter to be constructed or used for holding public meetings, or for places of public resort or amusement, all the doors shall be so hinged that they may open freely outwards, and all the gates of outer fences, if not so hinged, shall be kept open by proper fastenings during the time such buildings are publicly used to facilitate the egress of people, in case of an alarm from fire or other cause.

2. Congregations or others owning churches, and individuals, corporations and companies owning halls, theatres, or other buildings used for the purpose of holding public meetings, or places of public resort or amusement, shall, within twelve months from the passing of this act, be required to have the doors of such churches, theatres, halls or other buildings so hinged as to open freely outwards.

3. Individuals, companies and corporations owning or possessing public halls, churches or other buildings used for public meetings, who shall violate the provisions of this act, shall be liable to a fine not exceeding fifty dollars, recoverable on information before any two of Her Majesty's Justices of the Peace, or before the Mayor or Police Magistrate of any city or town; one moiety of such fine shall be paid to the party laying the information, and the other moiety to the municipality within which the case may arise, and parties so complained against shall be liable to a further fine of five dollars for every week succeeding that in which the complaint is laid, if the necessary changes are not made:

2. Congregations possessing corporate powers, and all trustees holding churches or buildings used for churches under the act, chapter sixty-nine, of the Consolidated Statutes for

Upper Canada, intituled: *An Act respecting the property of religious institutions in Upper Canada*, and incumbents and church-wardens holding churches, or buildings used for churches under the act of parliament of Upper Canada, chapter seventy-four, third Victoria, intituled: *An Act to make provision for the management of the temporalities of the United Church of England and Ireland in this Province, and for other purposes therein mentioned*, and the incumbents, church-wardens or trustees holding churches or buildings used for churches under the act chapter nineteen of the Consolidated Statutes for Lower Canada, intituled: *An Act respecting lands held by religious congregations*; and all others holding churches or buildings used for churches, under any act, shall be severally liable as trustees for such societies or congregations, to the provisions of the preceding section.

4. Municipal Corporations in Upper Canada shall have power to enact by-laws to regulate the size and number of doors in churches, theatres and halls, or other buildings used for places used for places of worship, public meetings, or places of amusement, and the street gates leading thereto, and also the size and structure of stairs and stair-railing in all such buildings, and the strength of beams and joists, and their supports.

5. Municipal Corporations in Lower Canada shall have the same power to enact by-laws as is hereby granted to the Municipal Corporations in Upper Canada—except in so far as relates to churches and other buildings used for places of worship, the construction of which is regulated by chapter eighteen of the Consolidated Statutes for Lower Canada; and the Commissioners mentioned in the said chapter shall have, for the said churches and places used for worship, the same power to enact by-laws as is hereby conferred on the Municipal Corporations, which said by-laws, when sanctioned by the ecclesiastical authorities mentioned in the said chapter, shall have full force and effect.

6. In cities, towns and incorporated villiges, it shall be the duty of the High Bailiff, Chief Constable, or Chief of Police, to enforce the provisions of this act, and such officers neglecting the performance of such duties shall be liable to a fine not exceeding fifty dollars, recoverable in the manner and before the Justice of the Peace, and payable to the parties mentioned in the third section of this act.

7. County, Township and Parish Municipalities may, by by-law, appoint an officer to enforce the provisions of this act.

8. This act shall not be construed to apply to convents or private chapels connected therewith.

An Act to amend an Act respecting the Superior Courts of Civil and Criminal Jurisdiction in Upper Canada.

[Assented to 15th August, 1866.]

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

1. The sixteenth section of the act of the Consolidated Statutes for Upper Canada, chaptered ten, and intituled: *An Act respecting the Superior Courts of Civil and Criminal Jurisdiction*, shall be and the same is hereby repealed, and the following section shall be substituted in lieu thereof:

"16 In case any Judge of either of the Courts of Queen's Bench or Common Pleas has continued in the office of Judge of one or more of the Superior Courts of Law and Equity in Upper Canada for fifteen years, or becomes afflicted with some permanent infirmity, disabling him from the due execution of his office, and in case such judge resigns his said office, Her Majesty may, by letters patent under the great seal of this Province, reciting such period of service or permanent infirmity, grant unto such judge an annuity equal to two-thirds of the salary annexed to the office of such judge, to commence immediately after the period of his resignation, and to continue thenceforth during his natural life."

2 The eighteenth section of the said act is hereby repealed, and the following substituted in lieu thereof:

"18. The terms of the said Courts of Queen's Bench and Common Pleas, shall annually be as follows:—Hilary Term shall begin on the first Monday in February, and shall end on the Saturday of the ensuing week; Easter Term shall begin on the third Monday in May, and shall end on the Saturday of the second week thereafter; Michaelmas Term shall begin on the third Monday in November and end on the Saturday of the second week thereafter; and Trinity Term shall be abolished."

3. The first section of chapter eleven of the Consolidated Statutes for Upper Canada is hereby repealed, and the following is substituted in lieu thereof:

"1. The Courts of Assize and *Nisi Prius*, and of Oyer and Terminer and General Gaol Delivery shall be held in every County and Union of Counties in Upper Canada, in each and every year in the vacation between Hilary and Easter Terms, and between that period of the vacation after the twenty-first day of August and, Michaelmas Term, and in addition to the said two Courts to be held for the County of the city of Toronto and the County of York, there shall be a third such Court in every year in each of the said two last mentioned Counties in the vacation between Michaelmas and Hilary Terms, and all such Courts shall be held, with or without commis-

sion, as to the Governor may seem best, and on such days as the Chief Justices and Judges of the Superior Courts of Common Law shall respectively name."

4. The Court of Queen's Bench and Common Pleas at their discretion, may hold sittings in Banc in time of vacation, by virtue of a rule or order of the Court, respectively to be made in or out of term, for the hearing of such special cases or rules for new trials as shall be named in a list to be attached to any such rule or order—and for giving of judgments in cases previously argued, and for disposing of such other business as the Court in its discretion shall see fit; Provided that no such sittings in Banc shall be appointed for or holden on any day between the first day of July and the twenty-first day of August in any year.

5. Notice of such rules or orders shall be given by affixing the same in some conspicuous place on the outside of the Court making the same, and in the Judges' Chambers and Practice Court, in Osgoode Hall, and in the office of the Clerk of the Crown and Pleas, of the same Court, six clear days, excluding Sunday, or any other legal holiday, before the day appointed, and such notice may be to the following effect:

COURT OF QUEEN'S BENCH OR COMMON PLEAS.

This Court will on the———day of——— hold sittings, and will proceed on that and the following days, in hearing and disposing of the cases mentioned in the subjoined list, and in giving judgment in cases previously argued, and in disposing of any other business as the Court shall in its discretion see fit. (*List to be subjoined.*)

(Signed) ——— ———
Clerk of the Crown and Pleas.

6. The twentieth section of chapter ten of the Consolidated Statutes for Upper Canada is hereby repealed.

7. All judgments to be pronounced, and all rules and orders to be made by virtue of this act, shall have the same effect, to all intents and purposes, as if they had been pronounced in term time.

8. This act shall come into operation upon the last day of Michaelmas Term next, and not before.

An Act to complete the separation of the County of Peel from the County of York.

[Assented to 15th August, 1866.]

Whereas the Provincial Municipal Council of the County of Peel have petitioned for the passing of an act to enable the Governor in Council to set apart the said County of Peel from the County of York whenever it may be deemed expedient to do so: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. Notwithstanding anything contained in the fifty-first section of the chapter fifty-four of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting the Municipal Institutions of Upper Canada*, it shall be lawful for the Governor in Council to issue his proclamation declaring that the separation of the County of Peel from the County of York shall take effect from a day to be named in the said proclamation, and such separation shall take place accordingly from such day, and have the same effect on and after such day, to all intents and purposes whatever, as if such proclamation had been issued and such separation had taken effect according to the terms of the said fifty-first section.

2. From and after the day on which such separation shall take place no local action shall be brought in either the said County of Peel, or the said County of York, except where the cause of action shall have arisen in that County of the said Counties in which the action is brought; provided always that a suggestion may be entered on the record to change the place of trial of such local action in the same manner as may now be done by law, and the practice of the Superior Courts of Common Law.

3. This act shall be deemed a public act.

CAP. XXXIX.

An Act respecting the hearing of causes in the Court of Chancery of Upper Canada.

[Assented to 15th August, 1866.]

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

1. Any sitting of the Court of Chancery for Upper Canada for the hearing of causes may be held by any one of Her Majesty's Counsel learned in the law, of the Upper Canada Bar, upon such Counsel being requested by the Chancellor or one of the Vice-Chancellors to attend for the purpose; and such Counsel, while holding such sittings, shall possess, exercise and enjoy all the powers and authorities of a judge of the said court.

2. The counsel may give his decision either during the sittings or afterwards, and in case any party is dissatisfied with the decision of such counsel, he shall be entitled to have the same reviewed by the said court in the same manner and within the same time as in the case of a decision by a judge of the said court; and the order made thereupon by the court shall be appealable to the Court of Error and Appeal in the same manner as other decrees and orders of the said Court of Chancery.

3. The said court shall have the power from time to time to make general orders for regulating the practice under this act, and to suspend, repeal, vary or revive such orders as to the said court may seem fit.

SELECTIONS

THE CASE OF GORDON.

The case of Gordon is likely to be a leading case on the subject of martial law, for which reason we commented upon it in an article in January. We then examined the question of the legality of the trial, with reference either to the authority of courts-martial under martial law, or to the arrest of the prisoner in a district *not* under martial law, or to the supposed insufficiency of the evidence. And we expressed our opinion (in opposition to a very positive opinion to the contrary), that courts-martial *had* authority under martial law; that the removal of the prisoner into the district under martial law was perfectly legal (upon the fundamental principle, that the trial of the crime is *local*), assuming that he had committed or been party to the commision of a crime in that district; and that the question whether he *had* been party to such a crime, was for the court-martial, provided there was *any* evidence on which *they* might honestly come to that conclusion. And, finally, we decried as absurd, the idea of trying Governor Eyre for *murder;* and declared, that, though, no doubt, it would be competent to any one, under the 43 Geo. 3, to *prefer* an indictment for murder against him, no judge who charged the grand jury would fail to tell them that they must not *find* the bill unless satisfied that the execution was the result of a wicked conspiracy between the governor, the general, and the court, to execute the prisoner under *colour and pretence* of martial law, not *really* believing him to be guilty, and not *really* in pursuance of a trial and sentence, but merely in pursuance of a murderous conspiracy. Upon which direction, of course, as there would not be a particle of evidence of anything of the kind, no jury would find the bill. These conclusions are now admitted by all rational persons. In an article of the 30th June we adverted to the Report of the Commissioners which contained nothing at variance with them. And the chairman of the Jamaica committee—formed mainly for the purpose of prosecuting Mr. Eyre—has avowed himself so satisfied of the absurdity of the idea, that he has not only declined to adopt it, but has publicly denounced it, and retired from the chairmanship of the committee. We must say, it is scandalous that such a committee should ever have been formed—acting, as they did, for the avowed purpose of promoting a criminal prosecution, and taking every possible means to poison the fountains of justice, and prevent the accused from having a fair trial. This may not have been *intended* by the committee (at all events, by its more respectable members), but it was the *effect* which the means they took was necessarily calculated to produce, and for which, therefore, they would have been criminally responsible. Among the means they have taken was the publication of inflamatory appeals, and even of a legal opinion, tending to shew that Mr. Eyre had been guilty of murder; and almost all our cotemporaries—even our *legal* cotemporaries—were so far turned away by partisan feelings, as to advocate that view. This was the very offence for which Sir Francis Burdett was severely punished. (*Rex* v. *Burdett*, 4 B. & Al. 95, 314). He had published a letter to the effect that the military, in what he called "the Manchester massacre," were guilty of murder, and for this he was fined and imprisoned, on the ground that it had the necessary *effect* of tending to prevent them from having a fair trial. This case is apposite to Gordon's case, in more points than one; for in that case, as in a previous case (*Rex* v. *Harvey and Chapman*, 2B. & Cr. 257), it was recognized as undoubted law, that if a man publishes matter *calculated* to produce a mischevious effect, it must be taken that he *intended* to produce that effect, and is responsible for it.

This brings us back to Gordon's case, with reference to the supposed liability of any one for his murder. We assume—for it has already been established in our former articles, and it is evidently assumed and implied in the Commissioner's Report—that the trial was *legal*; that, as we shewed in our article of the 30th June, would depend on the authority of courts-martial under martial law, which is recognised by the Commisioners, and on the jurisdiction of the court over the particular person and the particular charge, which we established in our article of January, and which is considered very elaborately in Mr. Finlason's "Treatise on Martial Law." But, assuming the legality of the trial, in the sense of the authority of the court, and their jurisdiction over the prisoner, it is said that the conviction was illegal, because it was not supported by the evidence. This in a legal point of view is perfectly absurd. Nothing is more common than for a judge in a court or criminal case to express his *dissent* from the verdict; nay, as Mr. Finlason observes, it is not uncommon for the judge on a criminal trial to tell the jury that, in his opinion, the evidence is not sufficient to sustain the charge, and yet for the jury to convict contrary to his opinion. The judge has no power to withdraw the case from the jury, if there is *any* evidence, however he may differ from them as to its weight and effect, for its weight and effect is for *them* to consider; and if there is any evidence for them to consider, then there is evidence which will legally warrant them in finding the prisoner guilty, notwithstanding that the judge does not deem it sufficient—nay, considers it wholly insufficient to sustain the verdict.

In a criminal case there is no mode of reviewing the judgment of the jury upon the facts; and even in a civil case, where there *is*, the Court will not set aside a verdict merely because the judge differs from the verdict, and deems the evidence was insufficient to sustain

it. We must go further, and say, that it was against the *weight* of evidence; and then it is a matter of discretion to grant a new trial even in a civil case; and it will not be granted if it appears that justice has been done; and the verdict cannot be set aside as matter of *right* and of *law*, if there was *any* evidence, although the verdict was against the weight of evidence. And, as already mentioned, in a criminal case, the verdict cannot be disturbed in such a case, if there was *any* evidence, although it was so much against the *weight* of evidence that the judge strongly dissented from it, and advised the jury to find the prisoner not guilty. It is manifest, therefore, that, on a trial by court-martial, the finding is legal if there is *any* evidence upon the charge.

Now, what was the charge against Gordon? Treason, and inciting to rebellion That was the substance of it. As to treason, we may dismiss it, because the statutes as to constructive treason only apply to the *realm*. The charge, then, in effect, was inciting to rebellion. That is, complicity with those who were engaged in the massacre or inciting to rebellion. *Not complicity in the massacre.* It was naturally but erroneously supposed, that to justify the execution, an offence capital at common law must have been sustained; that is, treason or murder. And as treason was out of the question, and to make a man guilty of murder, he must have been a party to it, that is, have caused and procured it, or helped to cause and procure it, it was assumed that it was necessary to shew that Gordon had *planned and intended the particular massacre;* of which there certainly was not sufficient evidence. This is what was meant by people who said his execution was murder, and so forth; and probably this is what the Commissioners meant when they said that the evidence, in their opinion, was wholly insufficient to sustain the "charge;" though they did not say (be it observed) that there was not sufficient evidence to warrant the *court-martial* in finding the prisoner guilty on some part of the charge. They evidently supposed it was necessary to prove that he designed and *intended* the particular massacre. But it was not so; for (as Mr. Finlason shews in his book), under martial law inciting to rebellion is a capital offence; for it is so by military law, as we have been shewn lately by the trials of soldiers for Fenianism in the army in Ireland. And neither at common law, nor by military law, is it at all necessary that the party should have *actually intended* the mischief which has resulted. It is enough (as *Burdett's case* shews) if his acts or words were *calculated* to produce the mischief which ensued; that is, it is enough if his words were *calculated* to incite to rebellion or insurrection. Now, that this was so in the case of Gordon is so much beyond a doubt, that it would be worse than idle—it would be a mere insult to our understandings—to pretend that it was not so. He did not dispute the proclamation on the "state of the island," in which he told the excitable negroes that their patience must be exhausted, and that they must now be up and doing. What would this be understood *by them* as meaning? And it was proved, that a few days before the massacre he had sent this seditious proclamation to the active ringleaders for circulation in the disturbed district. Now, these facts were *not disputed*; and they alone were sufficient to sustain the conviction under martial law. But this was only the weakest part of the case. A witness came and swore that he heard the prisoner say to the active ringleader, that "the blacks must have the land and the whites must die." This, again, of itself would be *legally* sufficient to sustain the charge. What *would it be understood by the blacks to mean?* That is the real question. And it is a question for the Court, if *they* were satisfied—coupling this with the other evidence—that the *natural effect* was to incite the blacks to rise, their finding was justified. But this was not all. There were *depositions* of two witnesses, that in a meeting in the disturbed district the prisoner told the blacks to do as they have done in Hayti—*i. e.* rise and massacre the whites. This evidence was not legally *necessary*, the strictly legal evidence being amply enough to sustain the finding as a matter of law. And if the finding had rested upon the *depositions alone*, then it might have been said that it was not *satisfactory:* though even then it is a mistake to suppose they were not legally admissible, for depositions are legally admissible in certain cases (and in others they are not objected to), and courts-martial under martial law are not bound by the strict rules of legal evidence. But the depositions were not *necessary*, and were only confirmatory of other evidence, which was legally admissable, and which was sufficient to sustain the finding, because shewing that the prisoner had, *in fact*, incited to the rebellion in the disturbed district; that is, that he had used language *calculated* to have that effect whether he *intended* it or not. That he *did* intend it, and that he intended the particular massacre, though not legally necessary to justify the finding, there was however, *some* evidence. It was proved that he said that "his people would be revenged upon the magistrates" who were murdered. It was proved that he he had called the negroes at the seat of the rebellion "his people." It was proved that the massacre was committed by his intimate political associates upon his political enemies; and it was proved that he spoke of it after the event without any reprobation. There was, therefore, evidence that he *intended* this particular massacre: and very strong evidence when it is considered how unlikely it was that his associates would have taken so serious a step as a deliberate insurrection without his privity. The contrary view was rested on a denial of *any conspiracy at all.* But the Commissioners report, upon over-

whelming evidence, that there *was* a conspiracy for the massacre; and it was a conspiracy by his intimate political associates. Could he have been ignorant of it? The natural inference would be that he was *not*. And by military law the mere concealment of such a danger would be a capital offence. The courts-martial in Ireland have shewn us that. We repeat, however, it was not necessary to shew that he was privy to the particular massacre. It was enough that he had used language calculated to incite to rebellion; and this was beyond a doubt. The sentence, therefore, was in every respect perfectly legal.

And even if it were not so, there would be great legal difficulty in making the governor criminally liable for the execution. For, as Mr. Finlason shews, in his book, the effect of martial law is to make the *general* in command the supreme authority in the district; and it was the general in command who directed the trial. All that the governor did was to send the prisoner into the district where the rebellion broke out; and where, beyond all doubt, *either* at common law *or* by martial law, the prisoner was triable. It was the *general* who considered that he was triable under martial law. Then he stated at the time in his report:—"After six hours search into the documents connected with the case of G. W. Gordon, *I found* that *I had sufficient evidence* to warrant my directing his trial. I prepared a draft charge and precis of evidence for the court. It assembled about 2 P. M. this day, and closed its proceedings after day light. The President having transmitted them, *I carefully perused them*. The sentence was death. I considered it my *duty fully to approve and confirm*. . . . . I inclose the whole of the proceedings of the court for *your* information, as you may desire to see what evidence led to the conviction of so great a traitor. I have not furnished any report of the court to his excellency the governor, because his excellency is now at Kingston. *I* apprehend all my report should be made through *you*, my immediate commanding officer. Hoping, as heretofore, to gain your approval."

This report was sent, *not* to the governor but, to the commander-in-chief of the colony, the general military superior and the supreme military authority on the island, who alone, by military law, could reconsider and review the sentence, and refuse to confirm it. By military law it is very questionable whether the governor could have disapproved and set aside the finding. Indeed, it is clear that he could not except by an extraordinary exercise of the prerogative. Previously it was a purely military matter. Accordingly the general did not send a report to him; and though the commander-in-chief sent it to him, it was only as a matter of courtesy, or to afford him an opportunity of exercising the prerogative. For he had previously approved of the sentence, and wrote to the War Office that he had approved of it; and all that can be said of Governor Eyre, therefore, was, that he did not think proper to interfere by the exercise of the prerogative to prevent the execution. It is perfectly ridiculous to call this murder; as every lawyer knows mere nonfeasance will not make a man a murderer. There must be an act and a *direct* act. The party to be tried must have directly committed or caused the act; and if other persons who had legal power to do it intervened and directed it, all that can be said is, that he did not *prevent* their doing it; it is a nonsensical abuse of terms to call that murder, no matter how unjustifiable the sentence was, unless there was a conspiracy to commit a murder under *colour* of martial law.

To shew this, however, several things must be shewn: that the prisoner was innocent; and that there was no pretence for supposing him guilty; and that the parties concerned did *not*, in fact, however wrongly, believe him to be so. But can any man in his senses suppose either of these things? Can any one suppose, for instance, that General Nelson and General O'Connor, when, after reading the proceedings, they approved and confirmed the sentence, did not *believe* there was evidence? Mr. Buxton and the *Saturday Review* see the absurdity of such a supposition. And if the *generals* considered there was sufficient evidence to sustain the sentence, why should it be supposed that the *governor* did not think so? Especially as it was a purely military matter; a military trial; for a military offence; under military law; with a military penalty to be inflicted under military authority. In such a case he would naturally yield to military judgment. And in point of law the execution was their act, not his. The idea of making him, or any one else, guilty of murder for it, is a downright absurdity. If, indeed, there had been a conspiracy among all the parties to execute an innocent man, under colour of martial law, then it would have been murder. But Mr. Buxton and the *Saturday Review* see the absurdity of such an idea, and scout it. Mr. Buxton, indeed, is under the impression that the Commissioners have reported the innocency of Gordon. That is a complete mistake. They have carefully avoided doing so. What they have said is, that, in their opinion, the evidence was insufficient to sustain the charge—that is, the *whole* charge, as they evidently understood it. Not that the evidence was insufficient to warrant the court in finding any part of the charge proved—that he incited to rebellion; still less, that he was innocent of such incitement. On the contrary, they go on to say that he did, in fact, incite to rebellion; that is, that he used language calculated to incite the blacks to rise, although they choose to say that they think he did not intend it. With great respect, we venture to say that the lawyers on the commission ought to have known that this was legally immaterial; and, no doubt, they did know it as to sedition; only they fancied that

it was necessary to convict Gordon of murder. They forgot that the trial was under martial law which makes incitement to sedition capital.

This would be the logical result of not fully realising the fundamental principle that martial law is the *application to non-military persons of military law.* That this is so is shewn by the authorities cited in Mr. Finlason's work, and that the Commissioners failed to grasp this, and, in fact, went through their enquiry on the very contrary view, is clear from the statement of Mr. Gurney, to which we referred last week, that courts-martial under martial law had no authority, "because the Mutiny Act did not apply." Of course it does not, for it only applies to military persons, and is only necessary in time of peace. But if rebellion is war, and the proclamation of martial law is the declaration of a state of war, and the application of military law to the whole population—that is, of military rule as it applies in time of war, by virtue of the prerogative, apart from Mutiny Acts—then the result would be, that non-military persons are liable to be tried for military offences; and, by military law, inciting to sedition is capital. Assuming this, then Gordon's execution was legal, no matter how innocent he was of *more* than mere incitement to sedition, and no matter what were his actual intentions. This was the view of Governor Eyre, and General Nelson, and the Commander-in-Chief, and Mr. Finlason, who elaborately examines the case, contends that it is the right view. Assuming the contrary, then, *whatever* Gordon's guilt may have been, there was no legal authority to try him, and his execution was legally a murder. And it must have been upon this view that a learned judge is said by Mr Bright to have told him that the execution of Gordon was a murder. But this is not the Commissioners' view, for the logical result would, of course, be, that *all* the trials were illegal, and *all* the executions legally murders; they say that they were, with few exceptions, unimpeachable.

It is obvious that the notion of Gordon's execution being unjustifiable has arisen entirely from erroneous notions as to the effect of martial law. No judge could have meant anything so absurd as that the legality of an execution depended on the actual guilt, or the degree of guilt, of the accused. It depends, it is obvious, on the legality of the *trial;* and *that* depends on the existence of a jurisdiction or authority to try, and the *substantial* fairness of the trial; against which the Commissioners say not a word; for what they say, in effect, is, that they do not concur in the propriety of the verdict, which is utterly immaterial, in a legal point of view, especially as it proceeded on a manifest error. To dream of making *murder* out of the case is pure nonsense.—*Jurist.*

THE CHARGE OF RAPE.

We are surprised that it has not occurred to the advocates of woman's rights to put forward the important advantages which the recognition of her claims would immediately extend to unprotected males. It is of comparatively little use to dwell upon the injustice of the theory that woman's highest mission is to bring children into the world and suckle them. It requires some intellect to be just, and an ordinary man may well be pardoned if he fails so completely to emancipate himself from the yoke of life-long custom and tradition as to see no absurdity in the notion that a woman should be qualified to make his will or cut off his leg. In these days men live and learn fast, and there is no knowing what the next generation may bring forth. But it is to be feared that, by his own contemporaries, Mr. Mill, when he lectures Parliament upon the injustice of the position we now assign to woman, will be regarded much as Sir Isaac Newton was regarded by his landlady—as a poor creature who can never hope to be anything better than a philosopher. But the case would be very different if Mr. Mill and his followers would dwell, not upon woman's rights, but man's wrongs—if they would urge the frightful dangers to reputation, personal freedom, and all that makes life worth having, which are incurred by the unprotected male simply and solely in consequence of the popular prejudice that woman is the weaker vessel, with peculiar and exceptional claims upon man's protection. Every man may not have an eye for abstract justice, but every man is fully alive to the risk he runs from the fact that, if a woman takes it into her head to charge him with an indecent assault, the chances are ten to one that he will be found guilty, no matter how strong may be the proofs of his innocence, or how weak the evidence against him. To be accused of such an offence is to be condemned. The chivalrous male juror feels that woman, as the weaker vessel, requires special protection; and his notion of specially protecting her is to accept, in the face of all evidence, whatever charges she may like to bring against her male oppressor. This chivalrous code has moreover the advantage—a very great advantage in the British tradesmen's eyes—of being maintained at another man's expense. Sydney Smith defined benevolence as the feeling which prompts A., when he sees B. in distress, to ask C. to help him. In like manner, the British juror shows his chivalrous admiration for weak and lovely woman by ruining another man on her behalf. This is the only intelligible explanation of the astounding verdicts which are given in cases of indecent assault and rape. Juries are indeed, by fits and starts, sufficiently assinine or bovine in cases of every description, but they are so consistently and habitually only when a woman is concerned. It is scarcely an exaggeration to say that any man's

reputation is at the mercy of any woman, and it is difficult to see what remedy can be obtained so long as the weaker-vessel theory maintains. But once establish woman's right to be treated as the equal of man, and it might perhaps cease to be considered unchivalrous to test her statements by the ordinary rules of evidence. Indeed we might then have half a dozen ladies in the jury-box as ready, in cases of improper conduct between the sexes, to convict the woman as male jurors are to convict the man. What unprotected male will not vote for female enfranchisement if it is to usher in such a golden age as this?

Quite recently there have been three astounding convictions for rape, in all of which public opinion pronounced flatly against the verdict of the jury. In the first, it was clear that an improper intimacy already existed between the plaintiff and the accused, and she had apparently brought the charge in order to screen herself from the consequences of his being discovered in her bedroom. The alleged assault took place without awakening children who were sleeping in the same room. In the second case, an improper intimacy had also existed between the parties, though the woman's motive for bringing the charge was not so clear. Her story, however, was even more extraordinary. According to her own account, she kept in her hand, throughout the assault, a jug which she had gone to fill. It was impossible to save her honour without breaking the jug or spilling its contents. The dilemma illustrated aptly enough the point of Pope's satirical fears as to

> Whether the nymph should break Diana's law,
> Or some frail China jug receive a flaw.

The jury's verdict pronounced the woman a heroine for sacrificing her honour and saving the jug. The third case has just occurred at Reading, and, if possible, involves a more absurd and monstrous miscarriage of justice than did either of the other two. The prosecutrix, a Miss Partridge, twenty-one years old, and represented as a young lady of "prepossessing appearance," advertises for a situation as governess or "lady-housekeeper." The prisoner, a shopkeeper named Toomer, answers her advertisement, stating that he has a daughter thirteen years old whom he wishes to be taught music, and that there are ladies lodging in his house whom Miss Partridge would have as companions. He requests that a photograph of the advertiser may be sent him, and the photograph proving satisfactory, an arrangement is concluded, and she comes to his house. She there finds neither daughter nor lady-lodgers, but only two female servants, one of whom shortly leaves. Everything seems to go on quietly enough for a fortnight or thereabouts, but Mr. Toomer then suddenly begins to make love, talk about marriage, and kiss her, "contrary to her wish." On the following night he pushes her into his bedroom, and "after a night-long struggle," so quietly carried on that it does not wake the servant in the next room, commits the offence with which he is charged. She does not, however, return to her own room, but next morning has her breakfast brought up to her in the prisoner's bed. He appears so "penitent" in the evening that, although she has been on the point of packing up her things to leave his house, and has even written part of a letter home, she not only consents to remain, but still continues to take her meals with the prisoner, and goes out for long walks with him, as amicably as if the little difference between them were only an excuse for a renewal of love. Two or three nights afterwards, her bedroom door being left open on account of the heat, another night-long struggle ensues with the same results, and conducted in the same noiseless fashion. Next day the prosecutrix charges the prisoner with rape, and last week the jury, after five hours' deliberation, brought in a verdict of "guilty;" whereupon the Judge, as if to create a sensation and draw public attention to the case, sentenced him to penal servitude for fifteen years.

We may inform our readers that we have carefully excluded from our version of this extraordinary story certain statements which told heavily against the prosecutrix, but which may possibly not be true, and which she herself would probably deny. The *Times*, for instance, in summarising the story, seems to accept as ascertained facts that the prosecutrix declared that she was ready to remain with Mr. Toomer if he gave her twenty pounds, and that she declined the servant's offer to share her bed. But, so far as we can make out, both these facts rest entirely on the assertion of Mr. Toomer's servant; and, although they are by no means in themselves improbable, nor out of keeping with the rest of the evidence, still it is only fair to remember that Mr. Toomer's servant had, as such, an interest in extenutaing the charge brought against him. But if we strictly confine ourselves to the facts admitted, or rather volunteered, by the prosecutrix herself, there is still evidence enough to refute ten times over the charge she brought. We have simply to take the three facts—that she stopped in Mr. Toomer's house after discovering that his story about his daughter and the lady-lodgers was a fabrication, and that she was to take her meals and spend the evening with him alone; that she remained with him, on friendly terms, after he had committed the first assault; and that, although she knew by experience his character and her own defenceless position, she deliberately exposed herself to another assault by leaving open her bedroom door. And we must here mention another most important point in the evidence—namely, that the testimony of the medical men was strongly in favour of the accused. That, in the face of these facts—waiving all other parts of the evidence—twelve men taken at random from the same portion of the community, and not specially selected from an idiot asylum, could find

Toomer guilty of rape, is astounding even to those who know best of what a British jury is capable. We earnestly hope that the Phrenological Society will keep its eye upon these twelve Britons, and take care that their heads are some day opened and examined. The examination could scarcely fail to throw valuable light upon the use of the British Palladium and upon our nineteenth century interpretation of the rules of evidence in their connection with the laws of chivalry. If a hundred years hence a lovely woman has ceased to be recognised as the weaker vessel, she will perhaps now and then look back with regret upon some of the advantages which the recognition now affords her, and feel that there is something to be set off even against the debt of gratitude she will owe Mr. Mill. If a man appeared in court with a charge so flimsy and so self-contradictory as that brought by Miss Partridge, he would stand some chance of being tried for perjury. But what can a male jury do when the prosecutrix is a young lady of "prepossessing exterior," and the prisoner is not merely a male, but actually a widower at that most unromantic period of life, middle age?

It is scarcely necessary to enter any formal protest against the verdict in this particular case. It is impossible to suppose that it will be allowed to take effect. But the moral of the story is anything but a pleasant one. If Mr. Toomer could be found guilty on such evidence, what unlucky male is safe? It may be indeed true, as the *Times* says, that the prisoner, by his immoral conduct, helped to get himself into the scrape, and has therefore "so much the less to complain of." But then, on the other hand, we must remember that a far more plausibly concocted charge could be got up against the most innocent man. Mr. Toomer's immorality may perhaps have influenced a half-educated jury, though really it had about as much to do with the specific charge as had the colour of his hair. But it can scarcely have told as much against him as the weak points in the evidence told in his favour, and such weak points as these the merest tyro in the art of lying could avoid. Miss Partridge would have made out a much better case if Mr. Toomer had been innocent of all improper overtures to her, and if, having no substratum of fact to go upon, she had been compelled to trust entirely to her imagination. She would never in that case have dreamed of asserting that, after the first assault, she remained quietly to eat her breakfast in the prisoner's bed, and, after continuing with him him on friendly terms for two or three days, give him an opportunity for renewing the assault by leaving her bedroom door open. These are the most damning facts against her, and the facts that will save the prisoner. Yet they would have never appeared in an absolutely imaginary charge, though the other facts, on which the jury found their verdict, must have been substantially the same. Miss Partridge would have had one "night-long struggle" instead of two, and would as soon as possible have laid information at the police-station. No one, indeed, could have heard this imaginary struggle, nor could the medical evidence have supported it. But, as we see from the actual verdict, these trifling objections would not have prevented a perfectly innocent man from being ruined, inasmuch as they did not affect the really essential features of the case—the sex and prepossessing exterior of the accuser, and the unromantic middle age of the accused. Mr. Toomer's immoral conduct, as the *Times* says, may thus have in one way got him into the scrape, but in another it has actually got him out of it. If he had been innocent, he would have been helpless. He is positively saved by the first improper assault, which Miss Partridge was either too dull or too honest to conceal. A highly consolatory inference this for innocent and moral men.

The worst part of the business is that serious as is the evil which this trial illustrates, and frightful as are the dangers to which innocent men are exposed, there really seems no remedy—unless, indeed, as we have suggested, it is possible to hurry on female enfranchisement, abolish the weaker-vessel theory, and put six women into the jury-box to protect male prisoners in cases of this kind. It is hopeless attempting to persuade a chivalrous British jury that lovely woman is sometimes sinning, and not always sinned against; and it would be perhaps too grave a constitutional change to arrange that, wherever she is concerned, the trial should be conducted solely by a judge selected especially for his want of gallantry, and not much under seventy. Where the accuser is young and of prepossessing exterior, it might possibly mitigate the miscarriage of justice to keep her thickly veiled or out of sight, unless indeed there are grounds for suspecting that there is any juror present possessed of imagination, in which case concealment would, of course, make matters worse. To insist on the prosecutrix appearing in an ugly dress would overshoot the mark, and, by making all charges on the part of women well-nigh impossible, would encourage connivance at crime. So that, pending the advent of female enfranchisement, we can really see no remedy, and can only hope, in the interest of the male creation, that the next charge of improper assault may be brought, not against a country shopkeeper, but against the Lord Chancellor, the Archbishop of Canterbury, or Mr. Mill.—*Saturday Review.*

INEVITABLE ACCIDENT.

A case has been recently decided in the Court of Common Pleas, which illustrates the rule of law applicable to cases where a person has been prevented from doing, by inevitable accident, that which he has undertaken to do. The material facts in *Appleby* v. *Meyers* (12

Jur., N. S., part 1, p. 500) appear to have been as follows:—The plaintiffs had entered into a contract to perform certain works on the defendant's premises, and had been engaged in carying it out; but before the completion an accidental fire broke out on the defendant's premises, which entirely destroyed what the plaintiffs had erected thereon. The premises were occupied by the defendant, and entirely under his control, the plaintiffs having access thereto only for the purpose of performing their contract. The question was, whether the plaintiffs were entitled to recover the whole, or any portion, of the contract price. The Court took time to consider their judgment, which was delivered by Smith, J. It was laid down, that the whole of the contract price could not be recovered. It was stated in the course of the judgment, that when a man contracts to do a thing, he is bound to do it, or make compensation, notwithstanding he is prevented by inevitable accident; and the defendant was held liable on an implied promise to provide and keep up the premises in a state fit for the plaintiffs to work thereon. The case of *Taylor* v. *Caldwell* (32 L. J., Q. B., 164) was mentioned and distinguished. In this case, there had been a contract, that the defendants should allow the plaintiff's to give four concerts on four different days at the Surrey Gardens and Music Hall; before any one of the concerts were given, the music hall was burnt down. The plaintiffs having brought an action to recover damages for the defendants not allowing them to have the use of the music hall, the judges of the Court of Queen's Bench held that it could not be maintained; and that by a fire which occurred through the default of neither party, both parties were excused from liability to perform the terms of the contract. Allusion was made in the judgment to the class of contracts in which a person binds himself to do something which requires to be performed by him in person, such as promises to marry, or to serve for a certain time; and it was stated that it had been very early determined, that if the performance of a contract is personal, the executors are not liable. A passage from Williams on Executors was cited with approval, to the effect, that if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and by the intervention of the contractor's death has become impossible to be performed. The above were instances where an implied condition exists of the continuance of a man's life; but the judges of Queen's Bench considered that there were others where the same implication was made as to the continued existence of a thing, and hence drew the conclusion, that the defendants were not liable to be sued for the failure to allow to the plaintiffs the use of the music hall on the agreed nights.

It will be useful to compare the decisions given in the two above-mentioned cases with what has been thought to be well ascertained law in the case of a lease. In Woodfall's Landlord and Tenant, 354, ed. 1863, it is said, that where a lessee covenants generally to pay rent, he is bound to pay it, though the house be burnt down: and in *The Brecknock Company* v. *Pritchard* (6 T. R., 750), it is laid down by one of the counsel, that the rule is, that when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. This doctrine is stated by Lord Kenyon, C. J., to be correct; but the former portion of it seems hardly consistent with the old rule of law, as to the liability of a person on whose premises a fire had occurred without any default on his part, for damage occasioned to another person by the spreading of the fire. In Roll, Ab., B. 2, it is said, "If a fire light suddenly in my house, I know nothing of it, and burn my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me;" in such a case the law imposed on a person a duty (*sic utere tuo ut alienum non lædas*), which an accident disabled him from performing; but nevertheless he was held liable. The law is now altered by the 6 Ann, c. 31, and 14 Geo. 3, c. 7, s. 86. (See Gale on Easments, 239). The latter part of the doctrine, of which Lord Kenyon, C. J., approved, does not seem to agree with *Appleby* v. *Meyers* and *Taylor* v. *Caldwell*; for if it were correct, it would seem to be a necessary conclusion, that in the former case the plaintiffs would have been bound to do again the works destroyed by the fire, and complete the contract before they could recover anything; and that in the latter case the defendants would be liable, as they were bound unconditionally to allow the plaintiffs the use of the music hall.

It is of frequent occurrence to insert in a lease a clause exempting the tenant from payment of rent if the house be burnt down. (See Davidson's Precedents in Conveyancing, vol. 5, pp. 181, 455, note, ed. 1861, and Prideaux's Predcedents in Conveyancing vol. 2, pp. 7, 39, ed. 1866.) It appears to have been at one time thought that equity would relieve the lessee if sued at law for the rent agreed to be paid for premises burnt down during the lesee's occupation. In *Baker* v. *Holtzapffell* (4 Taunt. 45) the plaintiff had obtained a verdict for rent claimed for premises which had been consumed by fire. The action was for use and occupation, and it was contended, on motion to set aside the verdict, that since the buildings were not capable of being occupied, the plaintiff must fail. The Court refused to grant a rule, on the ground that the land was still in existence on which the defendant might rebuild, and that the landlord, if he entered

for that purpose, would be a trespasser, and that there was no offer on the defendant's part to deliver up possession. In *Holtzopffell* v. *Baker* (18 Ves. 115) it was held by Lord Eldon, L. C. that the lessee had no remedy in equity.

Again: in *The Brecknock Company* v. *Pritchard* the liability of a person who has contracted to keep a bridge in repair came into question. The declaration alleged that the defendants undertook to keep in complete repair a bridge for seven years, but had failed to perform their contract. The plea alleged that the bridge had been washed away by the act of God, that is, by a great unusual and extraordinary flood of water, such as the bridge could not be reasonably expected to resist. This was held bad. But the principle of this case falls far short of the extent which it is necessary to go in order to support *Appleby* v. *Myers*. It seems reasonable enough to hold, that the defendant's contract was, in effect, one insuring that the bridge should be in repair during the whole of the time specified; but *Appleby* v. *Myers* presented many difficulties, and, as the Court said, was a case as to which no decision directly in point could be cited.—*Jurist.*

LONG VACATION.

It is perfectly well understood that the closing of the Chancery offices does not take place solely for the benefit of the officials connected with them, and that the profession are quite as much pleased by being limited to a certain time within which they must complete any work connected with the Accountant-General's office, or submit to have it deferred over the Vacation. We say that this compulsion is a boon to many, because much work is got over, particularly in the Taxing Master's offices, which might, but for the closing of the offices, be delayed indefinitely.

When, therefore, a correspondent of the *Times* suggests that it would not, "under the circumstances of the exceptional state of the money market be any great hardship if the officials were called upon to defer their holiday for two or three weeks, in order to release many thousands of pounds which will otherwise be locked up during the Long Vacation," he displays the audacity of ignorance for which the *Times* itself is so famed. He assumes, in the first place, that the offices are closed to give the officials a holiday, whereas it is well-known that the clerks in the Accountant-General's office remain working for a considerable period with closed doors in order to balance the account with the Bank. He next assumes that there are many waiting to get money out of court whom the pressure of the business of the courts prevents from getting their petitions presented or heard; and, moreover, he assumes that if about three weeks were given them, these lagging ones would come in and be in time to transact their business. None of these assumptions appear to be warranted by the facts. In order to balance the Accountant-General's book is is found necessary to colse the offices for public business, and the time fixed this year for their closing is the same as usual. As regards the pressure of business, we have inquired from reliable sources and find it to be no greater than is usual at this time of year; indeed, we have heard it generally said that the "money business" is unusually light; and in respect to want of time, we venture to assert that there will be few indeed (if any) who, with the notice they have had, will have been prevented from getting their work through before the Vacation, merely by reason of the closing of the offices. Why it should make any difference to the "hardship" of giving up three weeks of a vacation that money is at 10 per cent. we leave to others to discover. The emergency, if any, can be overcome by special application made to the judge, and we have always believed, and still believe, that the closing of the offices, like the closing of the transfer-books at the Bank, gives a periodical opportunity of winding-up certain classes of business which would otherwise be left to accumulate in endless arrears.—*Solicitors' Journal.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

Newman v. Niagara District Mutual Fire Assurance Company.

Compulsory reference at N. P.—Making order a rule of court—Certificate by arbitrator.

Action upon a policy of insurance on goods. *Pleas.*—Denying the policy—setting up that the goods were not destroyed—that the plaintiff gave no notice of the loss as required—misrepresentation as to value of the goods and mode of heating the premises—increase of risk by alteration. After the examination of one witness the Judge at *Nisi Prius* ordered a compulsory reference. The award, dated 30th April, was in favor of the plaintiff. The evidence and proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendant to move against his award if so advised.

A rule *nisi* was granted in the Practice Court to set aside the verdict and award, and for a new trial or reference back, and was moved absolute in full court, though not on the face of it returnable there. The main objection was that the arbitrator had found due notice and account of the loss given, whereas it was disproved by the plaintiff's own evidence.

Held. 1. That before moving, the order of reference should have been made a rule of court.

2. That the objection, being to the arbitrator's finding on the evidence, was untenable, unless misconduct could be inferred.

3. *Semble*, that the compulsory reference was authorized; but *held*, that the defendants, having attended at the arbitration without protest, were precluded from raising this objection.

4. *Semble*, also, that the certificate could not be looked at, as it was written after the award.

Remarks as to the practice of arguing rules in full court moved in Practice Court.

[Q. B., E. T., 1866.]

The first count in the declaration was on a policy of insurance, dated 30th November, 1863, whereby the defendants agreed to insure the

plaintiff in the sum of $2,000 on his stock of dry goods, groceries, hardware, crockery, wines, liquors, ready-made clothing, boots and shoes, contained in a rough-cast frame building in the village of Elora, until the 30th of November, 1866, subject to conditions endorsed on the policy. Averment, that the said goods, &c, were destroyed by fire, whereby the plaintiff suffered loss to the amount of $4,000, yet the defendants have no paid. Common money counts were added.

Pleas.—1. *Non est factum.* 2. The said goods were not destroyed by fire. 3. Setting out a condition, that the plaintiff, on suffering loss by fire, should forthwith give notice, and within thirty days deliver a particular account, &c.: that the plaintiff did not forthwith give notice, and within thirty days after his loss deliver in a particular account of such loss or damage, signed by his own hand, and verified by his oath or affirmation, and by his books of account or other proper vouchers. 4. That the policy was obtained by the fraud and misrepresentation of the plaintiff, in representing that his general stock of dry goods, &c., were worth $6,000, whereas in truth they were worth only $4,000, and in making and causing to be made statements to the defendants as to the number of stoves kept upon the premises and the partitions through which they passed, and how they were protected, and that the plaintiff would not deviate therefrom without first giving notice to the defendants' Secretary, and obtaining the defendants' consent. Averment, that the plaintiff did wilfully deviate, and did make false statements, and concealed the fact that the building was heated by a hot air apparatus, and concealed the risk arising therefrom, whereby the policy became void. 5. That after the making of the policy the plaintiff materially altered the premises mentioned in the application, and in which the goods, &c., were kept, so as to vary and increase the risk, by erecting thereon a stove and apparatus for heating the premises with hot air. These five pleas were pleaded to the first count.

6. To the common counts, never indebted. Issue.

The trial took place at Guelph, in March, 1866, before *Richards*, C. J. After the plaintiff had examined one witness, the learned Chief Justice referred the whole case to the Judge of the County Court of the County of Wellington, under the 160th section of C. L. P. Act, Consol. Stat. U. C, ch. 22.

James Miller obtained a rule in the Practice Court, calling on the plaintiff to shew cause why the verdict and award should not be set aside and a new trial granted, or why the case should not be referred back to the arbitrator, if the court should be of opinion that it is a cause which can be referred by compulsory reference, on the following grounds: 1. That the arbitrator, as appears by his certificate and the award, held "that the notice of loss by fire had been given by plaintiff to the defendants, and had within thirty days after said loss delivered in a particular account of such loss or damage, signed by the plaintiff's own hand, and verified by his oath or affirmation, and by his books of account or other proper vouchers—whereas it was established by the plaintiff's own evidence that he had not done so, as required by the condition of the policy."

This rule was drawn up on reading the award made herein, the affidavit attached thereto, and the certificate of the arbitrator, and was moved absolute in the full court, though not on the face of it returnable therein.

The affidavit stated that this cause was at the last Guelph assizes referred to the award of the Judge of the Court of the County of Wellington, against the will of the counsel for the plaintiff and defendants: that the annexed papers, marked A1 and A2, were award and certificate of the said judge herein.

The award annexed to this affidavit bore date the 30th of April, 1866. Its execution was not otherwise proved than by this affidavit. It recited that by an order made at the sittings of *Nisi Prius* held at Guelph on the 22nd of March, before the Chief Justice of the Common Pleas, it was ordered that the jury should find a verdict for the plaintiff for $1,961.10 damages, subject to a reference to the said arbitrator, the award to be binding, with power to increase or reduce the verdict, or order a verdict for the defendants, with power to enlarge the time for making the award, costs of the cause and of the arbitration to abide the event, the award to be made on or before the first day of the then next term, the arbitrator to have the same power as a Judge at *Nisi Prius*. The award contained a finding upon all the issues, and ordered that the verdict entered for the plaintiff should stand on the issues on the first count for the sum of $1,697, and that a verdict be entered for the defendants on the issue on the second count.

Annexed to this award was a statement of the evidence and proceedings had before the arbitrator, with the exhibits produced; and it concluded, "I certify the same and my conclusions thereupon, to enable the defendants to move against my award if so advised."

S. Richards, Q. C., shewed cause. He objected to the sufficiency of the materials on which the rule appeared to have been granted, and to the reception of the certificate, as being a document made or signed by the arbitrator after the award was made; citing *Legge* v. *Young*, 16 C. B. 626; Russell on Awards, 470–1, 298, 626. *Holgate* v *Killick*, 7 H. & N. 418; *The London Dock Co.*, and *The Trustees of Shadwell*, 32 L. J. Q. B. 30. He also argued on the questions raised by the rule.

James Miller, contra, cited *Kent* v. *Elstob*, 3 East 18; *Jones* v. *Corry*, 5 Bing. N. C. 187; *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189; *In re Hall and Hinds*, 2 M. & G. 847; *Caswell* v. *Grou_cutt*, 31 L. J. Ex. 361; *McDonald* v. *McDonald* 7 U. C. L. J. 297; Russell on Awards, 295, 669.

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

The first question that arises is, are we properly in possession of this case? It is not shewn that the order of *Nisi Prius* has been made a rule of court. The 163rd sec. Consol. Stat. U. C. ch. 22, enacts that the proceedings upon *any such arbitration* shall, unless otherwise directed by this act or by the submission or document authorizing the reference, be conducted in like manner and be subject to the same rules and enactments as to the power of the arbitrator and of the court, the

attendance of witnesses, the production of documents, enforcing or setting aside the award, or otherwise, as upon a reference made by consent under a rule of one of the superior courts of common law or the order of a Judge thereof. The preceding sections, beginning with section 158, shew that a compulsory reference is included in the words "any such arbitration." It is true that the order of *Nisi Prius* which is endorsed on the record before us contains no power to make the reference a rule of court; but *Millington* v. *Claridge*, 3 C B 609, decides that, this being a proceeding in a cause, there can be no doubt as to the power of the court to make the order a rule of court. In Russell on Awards, 559, 2nd ed., numerous authorities are cited in support of the position, that before proceeding to enforce the award by summary process the submission must be made a rule of court. It appears to us to make no difference whether the object be to enforce or to impeach the award, and the common practice undoubtedly is to make the submission or order of *Nisi Prius* a rule of court before moving to enforce or set aside the award.

The terms of this rule appear also designed to raise a question as to the power to make the compulsory reference. We are clearly of opinion that that question is not open for discussion on this rule. And here we may observe, that this rule granted in the Practice Court is not on the face of it made returnable here, though it was argued without objection on that ground. We notice this because, although it is in the discretion of the Judge presiding in the Practice Court so to direct, it would, we think, be a most inconvenient practice to allow parties to argue here rules obtained in that court upon some understanding between themselves; and further, because, although in substance the rule is directed against the award, yet in terms it asks to set aside the verdict and for a new trial.

The rule, limited by the grounds on which it was asked for and granted, seeks to overturn the award because the finding of the arbitrator is contrary to the evidence as shewn in the certificate annexed to the award. Such, reduced to its lowest terms, is the true character of the objection, and assuming the authority to refer, at which the rule does not strike, the objection is untenable unless misconduct is to be inferred. We do not think the defendants could be heard to question the reference after appearing before the arbitration and taking part in the entire proceedings. Two cases—*Ringland* v. *Downdes*, 10 Jur. N S. 850, and *Davies* v. *Price*, 34 L. J. Q. B. 8, and 11 L. T. N. S. 203—show that a party may appear under protest before an arbitrator, and afterwards raise the objection of the want of legal authority; but we hear nothing of any protest in this case; the defendants seem to have been content, though the reference was made against their will, to take their chance of a decision in their favor.

In this latter view, at all events, we think the rule should be discharged, for the application is in truth an attempted appeal against the arbitrator's decision of a matter of fact.

The case of *Angell* v. *Folgate*, 8 N. & N. 396, and the authorities therein cited, may be referred to with advantage on the question of this being a case in which a Judge could order a compulsory reference. My impression is strong against the objection hinted at, but not really raised for decision by the rule.

I am also strongly impressed in favor of the plaintiff's case by the consideration that the award appears to have been made on the 30th of April, 1866, while the statement or certificate annexed thereto bears date the 11th of May following. *Holgate* v. *Killick* is a clear authority, among several others to the same effect, that the court will not look at a letter or document written after the completion of the award. Apart from objections of a character more affecting the form than the substance, though such as if found to exist in fact must have prevailed in law, we think the plaintiff has established a meritorious case to recover. We think the rule must be discharged.

Rule discharged.

Connell v. Boulton.

Covenant against encumbrances—Measure of Damages.

In an action on a covenant that the defendant had done no act to encumber, contained in a conveyance of land by the defendant to the plaintiff, for a consideration of £150.

Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase money and interest, and the mortgage included other lands sufficient in value to satisfy it.

[Q. B., E. T., 1866.]

Declaration on a covenant contained in an indenture dated the 24th of September, 1860, whereby the defendant conveyed to the plaintiff, in consideration of £150, certain lands in the town of Cobourg, and covenanted with the plaintiff that he had not done any act or thing whereby the said lands were or might be impeached, charged, affected, or encumbered in title, estate, or otherwise. Breach, that before making the indenture, *i.e.*, on the 30th of December, 1843, defendant had conveyed the said lands, with other lands, to one Corrigal in fee, by way of mortgage, to secure £600, which mortgage was at the time of the commencement of this suit in force and unsatisfied.

Plea.—Payment of one shilling into court in satisfaction. Replication.—Sum insufficient.

The trial took place in October, 1865, at Cobourg, before *Draper*, C. J.

It was admitted that the plaintiff entered into possession of the land mentioned in the declaration under the indenture of bargain and sale therein also mentioned, and had continued in possession ever since, and had made improvements thereon to the extent of £400: that the consideration money in the deed was £150, and the interest from the date of the deed was £46 10s., making principal and interest $786: that the defendant executed the outstanding mortgage in the declaration mentioned at the time alleged therein, and that the same was outstanding, in full force and unsatisfied: that the amount due and unpaid upon the mortgage was £450: that the mortgage covered other land besides that of the plaintiff, which other land was of the full value of the mortgage money and interest.

It was agreed that a verdict be entered for the plaintiff for $786; and leave to the plaintiff to move to increase the verdict to such sum as the court should think proper, and to the defendant to move to reduce the verdict to such sum as the

court should think proper, or to enter a verdict for the defendant.

In Michaelmas term *Nanton* obtained a rule to reduce the verdict to one shilling, or to such sum as the court should see fit, or to enter a verdict for the defendant on the plea of payment into court.

In the same term *J. D. Armour* obtained a cross rule to increase the verdict to £450.

In this term both rules were argued

J. D. Armour for the plaintiff cited *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Gibson* v. *Boulton*, 3 U. C. C. P. 407; *Carlisle* v. *Orde*, 7 U. C. C. P. 456; *Raymond* v. *Coopar*, 8 U. C. C. P. 388; *Kennedy* v. *Solomon*, 14 U.C. Q B. 623; *McDonell* v. *Thompson*, 16 U. C. Q. B. 154; *Stuart* v. *Mackison*, 23 U. C. Q. B. 135; *Randall* v. *Raper*, 1 E B. & E. 84; *Vane* v. *Lord Barnard*, Gilb. Eq Rep 7; Mayne on Damages, 101; Dart. V. & P. 507, 3rd ed.; Sug. V. & P. 610, 14th ed.

J H. Cameron, Q C., for the defendants, cited *Kennedy* v. *Solomon*, 14 U.C. Q. B. 623; *Graham* v. *Baker*, 10 U. C. C. P. 426; *Sikes* v. *Wild*, 4 B. & S. 421; Mayne on Damages, 89.

Draper. C. J.—It appears to me that *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, governs this case. Sir William Follett, in argument for the defendant in that case, put the question in the most favorable light for his client. But Lord Tenderten remarked, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value at law." In this case there are other lands on which the defendant's mortgage is a charge, but the plaintiff's land is nevertheless charged with the whole sum due on the mortgage. I think the plaintiff's rule to increase the verdict must be made absolute. This will most probably drive the defendant into equity, but in a court of law I do not see my way to another conclusion.

In my opinion the rule to increase the verdict to £450 should be made absolute, the other rule discharged.

Hagarty, J.—There is a dearth of authority in our books as to the damages on covenants for title.

Mr. Mayne gives it as his opinion that there is no difference of principle between a covenant against encumbrances and a covenant to pay off encumbrances, and that if so the law is settled by *Lethbridge* v. *Mytton*.

If the point were unaffected by authority, it would not be easy to understand why the plaintiff here, who has bought a property with a covenant that his vendor had done no act to encumber, should not recover such damages for a breach of that covenant as would put him in the same position as if his vendor had truly performed his part of the contract. We have no power to apportion the money over the various properties affected; the only complete relief we can give is to award the full amount to pay off the encumbrance. The parties would then have to adjust their equities elsewhere.

Lethbridge v. *Mytton*, would, we may assume, have been decided in the same way, if the encumbrance which the defendant covenanted to pay off had extended over other properties than those included in the settlement.

It is of course to be noticed that the mortgage money here considerably exceeds the purchase money and interest. It has been usually held that in the absence of fraud, the latter amount was the measure of damages for breach of covenant of seizen or right to convey. The well-know case of *McKinnon* v. *Burrowes*, 3 O. S. 593, discusses the point at large. An analogy is there sought to be established with the sale of chattels. It is put somewhat as the case of a consideration wholly failing, and the purchaser recovers back his purchase money and interest.

In Mayne, p. 95 *et seq.*, the question is discussed. "The conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in effect pass nothing at all." He cites a Massachusetts case, in which it was said, "No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant: he has lost only the consideration paid for it. This he is entitled to recover back, with interest to this time."

The other case is also put, and an old case of *Gray* v. *Briscoe* (Noy 142) is cited. "B. covenants that he has seized of Blackacre in fee simple, when in truth it was copyhold land in fee, according to the custom. By the court The covenant is broken. And the jury shall give damages in their consciences, according to that rate, that the country values fee simple land more than copyhold land."

In the case before us the plaintiff at all events acquired the equity of redemption in the estate, with right to pay off the encumbrance. The evidence shews that he has largely improved the property, trebling its value since he acquired it. He contracted for an estate free from encumbrance, and defendant contracted that he had not encumbered. Had he covenanted to pay off the existing mortgage he would, on the authorities, be liable to damages for the whole amount thereof. I am unable to recognize any substantial distinction between the cases. American authority seems opposed to the English doctrine. Mr. Sedgwick, in his work on Damages, questions the correctness of *Lethbridge* v. *Mytton*.

It is said that on a reference as to title in equity, an outstanding mortgage is treated not as a matter of title but as of conveyancing. I presume that on a contract of sale in terms similar to those of the covenant before us, the vendor would be forced to relieve the property of the encumbrance by payment or otherwise. After conveyance executed a court of equity would probably compel the specific performance of a covenant to pay off an encumbrance by an appointed time. Where, as here, it is merely a covenant that the vendor has done no act to encumber, the only remedy is by action for damages, and I cannot see why such remedy should not be complete, and not merely illusory, as it would be if defendant's argument prevailed. As *Parke*, J., says, in *Lethbridge* v. *Mytton*: "At law the trustees were entitled to have the estate unencumbered at the end of a year from the marriage. How could that be enforced unless they could recover the whole amount of the encumbrances in an action on the covenant."

Morrison, J., concurred.

Rule absolute to increase verdict.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, *Esq., Barrister-at-Law.*)

IN MATTER OF ROBERT RUSSELL WADDELL, AN INSOLVENT.

Insolvent Act of 1864, *sec.* 9, *sub-secs.* 6, 10, *and sec.* 11, *sub-sec.* 1—*Appeal from county judge—Application for discharge of insolvent—Notices to creditors.*

The provisions of sec. 11, of the above act, with reference to notices, do not apply to the case of an insolvent who has procured a consent from his creditors to his discharge, or has procured the execution by the requisite number of his creditors of a deed of composition and discharge, and who is applying to the judge for a confirmation of such discharge.

Sec 9, sub secs. 6 and 10, point out all that is to be done on the part of the insolvent, to enable him to bring his application before the judge.

[Chambers July, 4, 16, 1866.]

On 23rd June last the insolvent presented a petition to the county judge for his discharge under the Act. Notice of his intention to apply in the form given by the statute was published in the *Canada Gazette*, the first insertion in that paper being on 21st April and the last on 16th June Notices of the intention to apply were not sent to the creditors of the insolvent.

Burton, Q. C., appeared for an opposing creditor, and objected that the publication of the notice was not sufficient. It was not published for two months as required by sub-sec. 6 of sec. 9, and notices should have been sent to the creditors as provided by sec. 11, *sub-sec. 1, and both these sub-sections* must be read together.

Sadleir, for the insolvent, *contra*.

Sub-sections 2, 3, and 4, of sec. 1, of Act of 1864, are repealed by Act of 1865, second session. This provides that where an assignment is made to an official assignee, no notices are required to be sent by insolvent to his creditors, by post or otherwise; form A in old Act is done away with, and form A in new Act is only where an assignment is not made to an official assignee. Where the assignment is to an official assignee, the first notice is given by assignee for the purpose of calling on creditors to prove claims. See then section 11 of old Act—To whom is insolvent to give notice of his intention to apply for discharge? The end of sub-section 1, section 11, showed "that notices thereof must be addressed to all creditors within the Province, &c., at the time of the insertion of the first advertisement," that is, the assignee's advertisement.

The following judgment was, after consideration given by the learned judge of the court below,

Logie, Co. J.—As to the first point sub-sec. 6 sec. 9, provides that notice shall be given by advertisement in the *Canada Gazette* for two months, and the first point raised is whether the full period of two months must elapse between the first and last insertions in the *Gazette*, or whether the time of making application to the Judge being more than two months from the day of the first insertion in the *Gazette* publication in all the issues of the paper during the intervening time would be sufficient although the time between the first and last insertions should happen to be less than two months. I was under the impression that the case of *Coe* v. *Pickering*, 24 U. C., Q. B., 439, settled that point, but on looking at the case, I find it does not; and I have not been able to find any case in which it has been determined. I have, on careful consideration, come to the conclusion that the insertion of the advertisement for two months means an insertion in each issue of the paper published during the two months between the first insertion and the day of presenting the petition; and therefore, as in this case, the day of meeting is more than two months from the date of the first insertion, and the notice has appeared in each issue during the period, the publication in the *Gazette* is sufficient.

With regard to the other point, I am of opinion that notices should have been sent to the creditors of the insolvent as provided by sec. 11. I think that sec. 11, sub-sec. 1, must be read along with sec. 9, sub-sec. 6, in order to ascertain the intention of the Legistature. Sec 11, sub-sec. 1, contains the general provision of the Insolvent Act for the giving of notices. It provides that notices of meetings of creditors and all other notices required to be given by advertisement without special designation of the nature of such notice shall be given by publication for two weeks, &c. And in any case, the assignee or person giving such notice shall also address notices, &c., to the creditors. The words in the last part of this section, "and in any case," &c., are very comprehensive, and unless controlled or limited by the other part of the section, or by anything in sub-sec. 6, of sec. 9, would *unquestionably include the case of an insolvent* giving notice of intention to apply for his discharge. It is contended by Mr. Sadlier for the insolvent, that it is limited by the words "without special designation of the nature of such meeting" to cases where a meeting is called without the object of the meeting being stated in the notice, but that where the object is stated in the notice the requirements of sec. 11 do not extend to all notices required to be given; and therefore where there is a special provision for advertising notice of application as in sub-sec. 6, of sec. 9, the provisions of sec. 11 do not apply to it. I think, however, that the portion of sec. 11 requiring notice to be given to creditors applies to applications for discharge under sub-sec. 6 of sec. 9, and my reasons for so thinking are as follows: Sub-sec. 6 provides that the insolvent may give "notice &c. of his intention to apply &c.;" and notice shall be given by advertisement, &c.; if the latter part of the clause had been ommitted, there would be no question, I think, as to the notice required; the general provisions of sec. 11, would apply. Does the last part of the clause then limit these provisions? I think not; it provides, generally, that notice shall be given, and that notice, meaning the notice referred to, shall be advertised for a longer period than sec. 11 requires; the effect in my opinion of sub-sec. 6, is merely to extend the period of advertising from two weeks to two months, in other respects the requirements of sec. 11 as to notice to creditors must be complied with. I am also of opinion that the words in sec. 11 "without special designation of the nature of such notice," do not limit the words, "and all other notices herein required to be given," to cases where the object of the meeting or notice is not expressed in the notice. In the

case of a voluntary assignment, under sec. 2, a meeting must be called, of which notices must be sent to the creditors, though the special object of the meeting is stated; sub-sec. 2 of that section assumes that notice is sent to creditors under the general provisions of the Act, and requires a list of creditors to be sent with it. The last part of sec. 11 requiring notices to be sent to creditors, applies in my opinion, to every case where notice is required to be given; and as the notices have not been given in this case, I cannot entertain the insolvent's petition for his discharge."

From this judgment, the insolvent (at the suggestion of the learned Judge himself,) appealed by petition entitled in the Court of Queen's Bench, to the presiding Judge in Chambers under sec. 7 of the Insolvent Act of 1864.

The petition was as follows:—

"The petition of Robert Russell Waddell, of &c., sheweth,

1. That your petition on the 27th April, 1865, made an assignment under the Insolvent Act of 1864, and surrendered all his estate, both real and personal to John Murray, of the city of Hamilton, an official assignee.

2. That the said John Murray has since died, and William Forest Findlay, of &c., has been appointed and acts in his place, &c.

3. All proceedings in said matter of insolvency of your petition have been carried on in the County Court of the County of Wentworth.

4. That more than one year had elapsed from the date of your petitioner's said assignment, and his application by petition to the judge of the said County Court of the County of Wentworth for an order allowing and confirming your petitioner's discharge, under the Insolvent Act of 1864 (a copy of this petition was annexed).

5. Your petitioner, on the 23rd June, 1866, by petition, setting forth that your petitioner having duly assigned and surrendered, and in all things conformed himself to the statutes, rules, and orders relating to bankruptcy, and having been duly examined under oath, touching his estate and effects, made his application to Alex. Logie, Esq., judge of the said County of Wentworth, for an order allowing and confirming his discharge under said Act.

6. That his honor, the said judge, refused your petitioner's said application, on the grounds set forth and declared in his said judgment given therein (a copy of which was annexed)

7. Your petitioner being dissatisfied with the determination and decision of the said judge of the County Court of Wentworth, gave due notice of his intention to appeal therefrom to this honorable court, or to the presiding judge in chambers.

8. That your petitioner applied to the presiding judge in chambers on the 11th July, 1866, for leave to appeal from the decision of the judge of the County Court of Wentworth, and by an order made in chambers, bearing date the 11th July, 1866, by his lordship the hon Mr. Chief Justice Draper, it was ordered that your petitioner should be allowed to appeal from the decision of the judge, dated July 4, 1866, upon giving the required securities, and otherwise complying with the provisions in that behalf contained in the Insolvent Act of 1864.

9. Your petitioner hath given the security required under the said Act, as approved of by the said judge of the County Court of Wentworth, and otherwise complied with the provisions in that behalf, as directed by the said order of his lordship, Mr. Chief Justice Draper.

Your petitioner therefore prays:

1. That the said judgment or decision of Alex. Logie, Esq., judge, &c., may be revised by this honorable court, or the presiding judge in chambers to whom this petition may be presented.

2. That your petitioner may have such further and other ordered relief as the circumstances of the case may require

3. That the respondent, Lewis R. Corby, the creditor of your petitioner, opposing his discharge, may be ordered to pay the costs of this appeal.

And your petitioner, &c.

This petition was verified by an affidavit of the insolvent.

Sadleir, for the insolvent, the appellant.

S. Richards, Q.C., for the opposing creditor.

No cases were cited on the argument.

Draper, C. J.—The question raised on this appeal is in what manner is the notice to be given by an insolvent who has procured a consent from his creditors to his discharge, or has procured the execution by the requisite number of his creditors of a deed of composition and discharge within the meaning of the act to apply to the Judge for a confirmation of such discharge.

The objection on which such an application has been decided adversely to this insolvent is, that no notices were addressed to all his creditors and to the representatives of foreign creditors within this Province, nor were any mailed to them, postage paid, according to the 11th sec., sub-sec. 1 of the Insolvent Act of 1864.

The 6th sub-sec. of sec. 9, points out how the insolvent is to proceed to obtain a confirmation of his discharge, either under a consent or a deed of composition and discharge. It requires, 1st. Filing in the proper office the consent or the deed, 2nd. Giving notice of such filing and of the insolvent's intention to apply on a day named in such notice for a confirmation thereof by the Judge, "and a notice shall be given by advertisement in the *Canada Gazette* for two months, and also for the same period if the application is to be made in Upper Canada, in one newspaper * * * * in or nearest the place of residence of the insolvent."

The 11th sec. is to the following effect:—Notice of meetings of creditors and all other notices herein required to be given by advertisement, without special designation of the nature of such notice, shall be so given by publication thereof for two weeks in the *Canada Gazette;* also, in Upper Canada, in one newspaper, in English, published at or nearest to the place where the proceedings are being carried on. * * * * And in any case the assignee or person giving such notice, shall also address notices thereof to all creditors and to all representatives of foreign creditors within the Province, and shall mail the same with the postage thereon paid at the time of the insertion of the first advertisement

The application in this case was under the 10th sub-sec of sec. 9, by which the insolvent is required to give notice of his application in the manner provided for by sub-sec. 6, above set out, *i e*, "in the manner hereinbefore provided, for notice of application for confirmation of discharge"

The first observation which suggests itself, is, that the 6th sub-sec. contains a complete direction as to the notice of the day on which the application for a confirmation of the discharge will be made. The words are precise, and it makes no reference to any other part of the Act as is done in sub-sec 2 of sec. 2, as to each notice of meeting sent by post "as hereinafter provided," evidently alluding to the 11th sec. which fixes the length of time for advertising as well as directs the postal notice.

The 10th sub-sec. of sec. 9 refers to the 6th sub-sec. as to the mode of giving notice, as if all was to be found expressed there.

The 11th sec. professes to regulate "notices of meetings of creditors and all other notices herein required to be given by advertisement without special designation of the nature of such notice." The notice in question is very clearly a notice required to be given by advertisement, and yet it cannot, in one respect, be governed by sec. 11, which names two weeks as the period of insertion in the *Gazette* and newspaper, while the 6th sub-sec. names two months for the same purpose. The form of notice directed to be used by sub-sec. 10, (Q) designates the object of the application to the Judge to be for a discharge under the Act. Waiving for the moment, the question how to construe the words "without special designation of the nature of such notice," it is obvious that the provisions of the 11th sec. both as to time and to the local newspaper are inconsistent with the 6th sub-sec. of sec. 9, the former absolutely, and the latter possibly, for it may not always happen that the place where the proceedings are being carried on is also the place of residence of the insolvent. But the words on which the opposing creditor relies are "in any case, the assignee or person giving such notice" shall also address notices to all creditors, &c., and to mail them, postage paid; the contention is, that this applies to the notice required by sub-secs. 6 and 10 of sec. 9.

I am not sure that I rightly understand what effect or meaning the learned Judge in the Insolvent Court, put upon the words "without special designation of the nature of such notice." Mr. Richards argued very strenuously that they would be satisfied by holding them to apply to the period during which the advertisement is to be continued. I confess this appears to me a forced construction, not in accordance with the guidance to interpretation furnished in the 13th sub-sec. of sec. 11, which, in reference to "every petition, application, motion, contestation, or other pleading under this Act," says the parties may use plain and concise language "to the interpretation of which the rules of construction, applicable to such language in the ordinary transactions of life shall apply." I think the meaning of these words is without special statement of the matters to which such notice relates; thus, the notice by the sheriff of a writ of attachment is couched in general terms.

On the other hand, it is impossible not to admit that there are notices which do contain such special statement, which appear to come within the latter part of sec. 11, and require postal transmission in addition to the advertisement.

The only instance in which I have observed that the Legislature have specially referred to postal notice in addition to advertisement (except sec. 11), is in sub-sec. 2 of sec. 2, and there the advertisement is to state the object of the meeting to be called; but I do not find in this, any argument which leads to the conclusion that postal notice is prescribed as to cases within the 6th and 9th sub-sec. of sec. 9

The 6th sub-sec. applies to the case of an insolvent who has either procured a consent to his discharge, (See sub-sec. 3 of sec. 9), or the execution of a deed of composition and discharge, (see sub-secs. 1, 2, of sec. 9); although such deed of composition and discharge may be made before proceedings upon assignment or for compulsory liquidation. I entertain no doubt that in the great majority of cases, it will be either pending or after such proceedings among other reasons for these suggested by Mr. Edgar in a note on this section of his useful edition of this Statute, and in all these cases the creditors have had notice as required by the Act of previous meetings and proceedings, and the deed itself must have been executed by a fixed proportion of the creditors, a majority in number of those whose debts amount to, or exceed $100, and who represent three-fourths in value of the insolvent liabilities, and the deed so executed binds the remainder of the creditors. In this instance it appears to me, not unreasonable to conclude that the Legislature considered advertising for two months sufficient without postal notice. A similar conclusion is equally suggested in the case of a consent in writing of the creditors as provided for in sub-sec. 3 of the same section. Nor does this conclusion appear to me less clear when the application is under sub-sec. 10, where the application for a discharge is not until after the expiration of one year from the date of an assignment, which must have been advertised, or from the issue of a writ of attachment also advertised, and under each of which other proceedings requiring advertisement and postal notice will have taken place, or the insolvent will not be in a position to ask for a discharge from his liabilities.

On the whole, after some hesitation, arising mainly from my respect for the well known care and discrimination of the learned Judge in the court below, I am compelled to differ from his conclusion, and am of opinion the 11th sec. does not apply to the present case, but that the 6th and the 10th sub-sec. of sec. 9 point out all that was to be done on the insolvent's part to enable him to bring his application before the Judge.

The appeal must therefore be allowed, and the application further heard. Assuming that I have power over the costs of this appeal, I do not think it a fit case to give them.

IN THE MATTER OF A SUIT IN THE COUNTY COURT OF THE COUNTY OF WENTWORTH *between* T. G. FURNIVALL AND BERNARD SAUNDERS.

County Court—Jurisdiction—Amount ascertained by act of parties.

The defendant was book-keeper for the plaintiff, and as such debited himself with cash received which more than paid his salary, and for which excess a verdict was, upon action brought, given against him. He thereupon applied for a prohibition.

Held, that the amount had been ascertained by the act of the parties.

[Chambers, July 5, 1866.]

Hector Cameron obtained a summons calling upon the judge of the County Court of the County of Wentworth and the defendant, to shew cause why a writ of prohibition should not issue to restrain the further prosecution in the said court of this suit, on the ground that the said court had no jurisdiction, inasmuch as the amount sued for exceeded the jurisdiction of the court and is not ascertained by the act of the parties or the signature of the defendant, and on grounds disclosed in affidavits filed.

Mr. Cameron filed his own affidavit, and a copy of the notes of the learned judge on the trial of the case in the court below, from which it appeared, that the defendant entered into an agreement with the plaintiff, which agreement was not produced in Chambers, though admitted by counsel, and was dated in the spring of 1861, and that the defendant was to serve plaintiff as his book-keeper, among other things, at a salary of $1000 for the following year. That without any further agreement, the defendant remained with the plaintiff till some time in August, 1863, when he left. The defendant had charged in his own account, in the plaintiff's ledger, all monies which he took from the plaintiff's business, and had credited himself, in February, 1862, $1000, and in February, 1863, $1000, as his salary. He had charged against himself cash, at many times, which amounted to $4589.85. Just before he left, he credited himself with $589 85, as trade expenses, for which there was no authority or entries to warrant; but when his salary was credited to him, up to the time he left, the balance against him, on his own showing, in plaintiff's books, was $304 06, as cash received by him from the plaintiff:

The case was tried at the sittings of the County Court at Hamilton, and a verdict rendered for the plaintiff for $356.56 damages.

The counsel for the defendant contended at the trial that there was no account stated in the books in defendant's hand-writing showing any balance, and that the entries made by defendant were not acts of the parties within the meaning of the statute, so as to give the court jurisdiction when the amount claimed is over $200. The defence set up was that the plaintiff and defendant were in fact partners in the business, but this the jury negatived, and found for the plaintiff the amount as shown by the plaintiff's books, adding interest.

Curran shewed cause, and filed several affidavits to the effect that the defendant took out a rule *nisi* to set aside the verdict one of the grounds being the alleged want of jurisdiction, but that he did not appear in support of the same, and it was thereupon discharged; and that the defendant then gave notice of appeal from the judgment of the county judge, and entered into and perfected the bond in appeal; that the sum in dispute was also in question in the Court of Chancery, on a bill filed by the defendant against the plaintiff, and he contended that the amount had been ascertained by the act of the parties, and that therefore the County Court had jurisdiction.

JOHN WILSON, J.—The County Courts have jurisdiction in *suits relating to debt, covenant*, and contract, to $400, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant.

Now the simple question is,—Has this amount been *ascertained by the act of the parties*? The business of the plaintiff required books; the duty of the defendant was to make all proper and necessary entries in these books, and as between the plaintiff and himself, to make true entries of the cash he took from plaintiff in his books. The account in the plaintiff's books is to ascertain what the defendant is from time to time taking on account from his employer. The act of the plaintiff is to furnish the book for the purpose of these entries. The act of the defendant is the making entries of the amount he takes; the amount due from one to the other is ascertained by the production of the account. In the very nature of things it admitted of mistakes, and it admitted of entries not warranted; but when it was gone over, and mistakes or improper entries corrected, the amount was ascertained by the act of the parties; by the one, in making the charges against himself; in the other, by accepting these charges. Here the defendant was entitled to take credit for his salary from the beginning of the third year until the time he left in August. If he had done this properly, the balance due the plaintiff would have been ascertained as that which he now claims; but the defendant made an unwarranted entry of trade expenses to balance his account, which he had no right to do, unless indeed he had been a partner, which both admit was the substantial defence, but which the jury found against the defendant.

The reasoning in the case of *Wallbridge* v. *Brown*, 18 U. C. Q. B. 158, applies here. The written agreement between these parties shows what the defendant was entitled to take from the plaintiff. It shows that the duty of the defendant, directly and by implication, was not to take more than his ordinary salary; but he took more, and by his own act made the entries against himself; but his overdrawing he covered by an unauthorised entry, which the plaintiff properly rejected, and so the amount of the defendant's indebtedness was well ascertained by the act of the parties. I think there is no ground for awarding this prohibition.

Summons discharged.*

HAROLD v. STEWART.

Costs—Taxation—County or Division Court scale.

Where a verdict is recovered in one of the Superior Courts for an amount exceeding $60, and a certificate for full costs refused, the master has still power to enquire whether a Division Court had jurisdiction, and to tax County Court costs.

In this case the action was for use and occupation, the plaintiff recovered $100, and the master taxed County Court

* The Court of Queen's Bench during the ensuing term granted a rule *nisi* to rescind the order in this case.—EDS. L. J.

costs The learned judge who tried the case would have certified for such costs if he had had authority to do so, and he therefore refused to interfere.

[Chambers, July 12, 1866.]

The plaintiff recovered a verdict for $100 in an action for use and occupation. At the trial, a certificate to the effect that the cause was properly brought in the Superior Court was asked for, but refused by the learned Chief Justice of Upper Canada, for the reasons given in the following memorandum:—

"I do not see any sufficient grounds to justify me in giving a certificate for costs. The verdict is within the County Court jurisdiction, and these courts have jurisdiction to try such an action. After carefully reading my notes, I cannot say that the title to land was brought into question. It was not in truth disputed. The question was simply as to the premises actually used and occupied by the defendant, by the permission of the plaintiff upon defendant's request."

The master taxed the costs upon the County Court scale, notwithstanding the objection of the defendant that only Division Court costs were taxable, whereupon a summons was taken out, calling on the plaintiff to shew cause why the master should not revise the taxation of costs, by taxing the plaintiff's costs on the Division Court scale, on the ground that the cause was within the jurisdiction of the Division Court.

Harman shewed cause and filed his own affidavit to the effect:—

That the action was brought to recover the amount due from the defendant to the plaintiff, for the use and occupation by the defendant of certain lands of the plaintiff, Mary Anne Harold, wife of the said plaintiff, Thomas G. Harold.

That a considerable amount of previous litigation had taken place between the same parties, to establish the right of the plaintiffs to the lands, for the use and occupation of which, by the defendant, this action was brought.

That at the trial of this cause, one of the principal witnesses was the deputy sheriff of the County of Halton, who was rigidly cross-examined as to his having given the plaintiff possession, under the writ of possession issued after a previous action of ejectment of the said lands.

That an exemplification of the judgment in the said action of ejectment was put in at the trial on the part of the defendant.

That the amount sought to be recovered by the plaintiffs was variously sworn to by the witnesses, at a much larger sum than was awarded as their verdict by the jury.

That the said amount sought to be recovered by the said plaintiffs was in no way to be considered a liquidated amount, or an amount *or balance claimed*, in any way struck or settled, between or by the acts of the parties, so as to bring it within the scope and meaning of the Division Court Act.

That in the copy of the affidavit of disbursements, made by the defendant, (and served upon deponent, with notice of taxation of defendant's costs, to be made at the same place and time as was appointed for the taxation of the plaintiff's costs, in order that any difference of costs to be allowed on taxation might be then ascertained or allowed,) the defendant alluded and swore to the professional evidence to be given by one of her witnesses, as a land surveyor; and also to a plan and survey which was necessary on the trial of the said cause, and was used at the trial.

That the learned chief justice, while declining to grant a certificate for full costs, used the expression that the verdict rendered was "within the County Court jurisdiction."

That a bill of costs was served and notice of taxation given to tax the same on the County Court scale, on which scale the said costs were taxed, and that at the same time the difference of Superior Court costs were taxed and allowed to the defendant, amounting to upwards of ten pounds, according to the statute in such case made and provided.

Mr. Harman cited *Cleaver* v. *Hargrave*, 2 Dowl. 689; *Sellman* v. *Boom*, 8 M. & W. 552; *Woodham* v. *Newman*, 7 C. B. 666; Arch. Pr. 11 Ed. 518; Patterson's Pr. 500.

C. S. Patterson supported the summons.

Draper, C. J.—The Common Law Procedure Act (s. 328) provides, that in case a suit of the proper competency of a County Court be brought in the Q. B. or C.P., or in case a suit of the proper competency of a Division Court be brought in either of these Courts, or in a County Court, the defendant shall be liable to County Court costs or to Division Court costs only, as the case may be, unless the judge who presides at the trial certify in court immediately after the verdict has been recorded, that it is a fit cause to be withdrawn from the County Court or Division Court, as the case may be, and brought in the Superior Court or a County Court, making provision, if the judge does not so certify, for the indemnification of the defendant.

This action having been brought in the Queen's Bench, I refused to certify under the above section. It had been previously held by that court in *Cameron* v. *Campbell*, 11 U. C. Q. B. 159, that where a cause had been improperly brought in the Queen's Bench, and a verdict rendered, for an amount within the Division Court jurisdiction, the judge who tried it had no power to order County Court costs, the suit not having been commenced there. I had granted the certificate, in that case, holding a different view; but finding the opinions of the chief justice and my brother Burns against me, I acquiesced in their decision.

In that case the judgment proceeded on the foundation that the Court could not, on anything that appeared, say that the plaintiffs had any claim against the defendant beyond a money demand of an ordinary nature, not exceeding $100. If I had had authority in this case to have certified for County Court costs, I should have done so, first, because I felt no doubt, that on the evidence, as well as on the cause of action, the case was of the proper competence of the County Court; and next, because, if the case had been instituted in the Division Court, the evidence was such as to support a claim beyond $100, and therefore beyond the jurisdiction of the Division Court—in the words of the Act, not of the proper competence of the Division Court.

I presume that it was shown to the master, as it is now shown on affidavits before me, that the amount sought to be recovered in this suit was in no way to be considered a liquidated amount, or an amount or balance claimed, or in any way

struck or settled, between or by the acts of the parties. Now the jurisdiction of the Division Court is two-fold; it extends—(1st) to all personal actions where the debt or damages claimed do not exceed $40—(2nd) to all claims and demands of debt account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100

If I am at liberty to refer on this application to my notes at the trial, I find that they confirm the statement of fact contained in the affidavit above set forth.

I think that the master must, in such a case as this, be held to have power to enquire whether the Division Court had jurisdiction.

The absence of a certificate on the part of the judge who tried the case, shows only that the cause was not properly instituted in the Superior Court. The amount of the verdict shows conclusively that the case is not within the first branch of the jurisdiction of the Division Court; and whether it is within the second, must be a matter to be ascertained, in order to determine if the plaintiff could have maintained his claim within that branch of jurisdiction; I think, therefore, the master was not precluded from such an enquiry, and that there is no reason established before me to warrant me in saying he has decided improperly. I am far from having exhausted all that in my opinion might be urged against holding that by bringing an action in a case like the present, the plaintiff, if not entitled to a certificate that the cause was properly withdrawn from the County Court, is inevitably reduced to Division Court costs.

I discharge the summons, but without costs, as I believe the case is of the first impression.*

Summons discharged.

Lewis et al. v. Manning.

Pleading—How far equitable pleas and replications governed by ordinary common law rules of pleading—Striking out—Costs.

Held 1. That the right given to suitors to plead or reply equitable matters of defence or reply, does not give to suitors the right to set at nought the well understood common law rules of pleading.

Held 2. That although an equitable replication might be a good equitable answer in equity, if pleaded by way of answer to a bill framed as the plea to which it is replied, it does not follow that it is a good replication on equitable grounds in a court of law.

Held 3. That the equitable replication in this cause was clearly multifarious, and so was struck out with costs; but to save another application, leave was given to plaintiff six days after the service of the order to reply *de novo*.

[Chambers, August 27, 1866.]

Robert A. Harrison obtained a summons, calling on the plaintiffs to shew cause why the replication of the plaintiffs in this cause should not be struck out and removed off the files of the court with costs, on the ground that it was framed contrary to the rules of pleading, in not being either simply in denial or in confession and avoidance; and also, in being double, multifarious, and containing several alleged grounds of answer to the plea; and also, containing irrelevant and immaterial matters, and matters of mere evidence, and was so framed as to embarrass and delay the fair trial of the action, and on grounds disclosed in affidavits and papers filed.

The declaration was on a promissory note by the plaintiffs, as the holders, against the defendant, as endorser. The note, which was dated 7th April, 1865, and for the sum of $1450 97, was made by one William Clarke, payable to the order of defendant, and by him alleged to be endorsed to the plaintiffs.

The defendant for a defence on equitable grounds pleaded—that before the making or endorsement of the promissory note in the declaration mentioned, William Clark, the maker of the said note, was indebted to the firm of Bryce, McMurrich & Co., of which one Samuel Gunn was then a partner, as also to the plaintiffs and the defendant, and to divers other persons, in large sums of money which he was unable pay in full, and thereupon it was proposed by said Clark, through said Gunn, to his creditors, and assented to by all such creditors, that they would receive a compensation of six shillings and three pence in the pound on the amount of their respective claims against said Clark, provided the same were secured by promissory notes, endorsed by the defendant, and that defendant agreed to endorse such notes, on condition that his claim against the said William Clark should not be abated, provided all the other creditors of the said William Clark would come into said arrangement and accept the said composition in satisfying and discharging their respective claims; that the defendant relying upon the said arrangement being carried out in good faith, and at the request of the said Samuel Gunn, who acted as well on behalf of the said firm of Bryce, McMurrich & Co., as of the plaintiffs, and certain other creditors of said Clark thereupon endorsed divers promissory notes, made by said William Clark, to the amount of six shillings and three pence in the pound, on the claims of the creditors of said Clark (exclusive of the defendant), and amongst others, the promissory note in the declaration mentioned, and delivered all such notes to the said Samuel Gunn, to be held and safely kept by him in trust, for and on behalf of the defendant, until all the creditors of the said Clark, except the defendant, should have executed and delivered to said Gunn proper and sufficient releases of their respective claims against the said Clark, or have entered into a valid and binding agreement to execute such releases upon receiving the promissory notes so endorsed for the said composition upon their respective claims, whereupon he should deliver such promissory notes to the creditors so respectively entitled to the same; but in case of the refusal of any of such creditors to execute such release, or bind himself so to do as aforesaid, then that the said several endorsements by the defendant should be null and void, and all the said promissory notes should be delivered back to the defendant to be cancelled; that the said several promissory notes, including the note in the declaration mentioned, were so delivered to the said Samuel Gunn, and were received and held by him upon the trust for the purpose and upon the terms aforesaid, and upon no other terms and consideration whatsoever (of all which premises the plaintiffs, at the time of the delivery of the said promissory note, declared on to them by the said

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*The Court of Queen's Bench during Trinity Term refused a rule *nisi* to rescind the order in this case.—Eds. L. J.

Samuel Gunn, as hereinafter mentioned, had full notice and knowledge); that after the said Samuel Gunn had so obtained possession of said notes as aforesaid, and before the delivery of the promissory note declared on to the plaintiffs, certain persons composing the firm of Merrick Brothers, of the City of Toronto, being creditors of the said William Clark, as well as certain others of such creditors, and for a composition on whose respective claims (amongst others) promissory notes so endorsed had been delivered to the said Samuel Gunn, on the terms aforesaid, absolutely refused and still refuse to accept the said composition, or to release or agree to release the said William Clark from their respe tive claims on receiving such notes, whereupon the said Samuel Gunn should have redelivered all the said several notes so endorsed to the defendant, according to the condition and terms on which he held the same as aforesaid; but the said William Gunn, in fraud of the defendant, and without his consent, and contrary to the said terms and purpose on which he held the same as aforesaid, delivered the promissory note in the declaration mentioned, together with certain other of said notes to the plaintiffs, as such composition on their said claims against the said Clark; they, the plaintiffs, at the time of the delivery of the said notes to them as aforesaid, and when they first received the same, well knowing the conditions on which the defendant had so endorsed the said notes, and the terms and conditions on which the said Gunn held possession of the same as aforesaid; and that the said William Clark is now wholly insolvent, and his estate, which has since been put into compulsory liquidation in the insolvent court at Toronto, at the suit of the said Merrick Brothers, for the full amount of their said claim, is wholly insufficient to pay six shillings and three pence in the pound, on the amount of all the debts due by him at the time of such arrangement for composition.

To this the plaintiffs for replication on equitable grounds replied:

That at the request of the defendant they agreed to accept six shillings and three pence in the pound, in satisfaction of their claim against the said Clark, and for which they held the promissory notes or acceptances of the said Clark, upon receiving the security of the endorsement of the defendant, and that they did not agree to the same under any such arrangement, or on the condition alleged in the said plea, and that they received from the said Gunn, who acted as the agent of the defendant, and not as the agent of or on behalf of the plaintiffs, the said notes, endorsed by the defendant for the said composition, and thereupon gave up to the defendant, who has ever since retained the same, the promissory notes or acceptances held by them as aforesaid, and released the said Clark therefrom, and the consideration for the said endorsement was the giving up of the said promissory notes and acceptances and the release of the claims of the plaintiffs against the said Clark, and the placing of the defendant in a position to proceed to enforce and collect the whole amount of his own claim from the said Clark, without the interference of the plaintiffs, and without their having or retaining in themselves any power to take any proceedings against the said Clark, or his estate, except upon and for the amount of the said composition notes, and the defendant having so induced and procured the plaintiffs to give up and release their said claim, and so to deprive themselves of the power to proceed against the said Clark, or his estate, arranged with the said Clark for the payment of the whole amount of his, the defendant's said claim, by certain instalments agreed upon between them, some of which instalments have been paid to and received and retained by the defendant, and some of which have not yet become due; and the defendant, after the said composition notes were delivered to the plaintiffs, and after said Merrick Brothers and other creditors had refused to accept the said composition, or to release, or agree to release the said Clark, as the defendant well knew, caused the note which first fell due to be paid to the plaintiffs at maturity, out of the estate of the said Clark, and when the second of the said notes became due, the plaintiffs sued the defendant therefor, and the defendant did not plead or allege any of the matters in the said plea contained, and the plaintiffs recovered judgement for the said second note, and the defendant paid the same; and the defendant by his said conduct, and also by letters written to the plaintiffs, and otherwise, has constantly affirmed his liability to the plaintiffs upon his said endorsement and has prevented the plaintiffs from taking any proceedings against the said Clark, or his estate, even if the plaintiffs, after giving up their securities and releasing their claim as aforesaid, could have taken any such proceedings.

Defendant, on the day the replication was served, notified plaintiffs that if not withdrawn, an application would be made to a judge to strike it out, with costs, on the grounds already mentioned.

C. S. Patterson showed cause. He contended that an equitable plea is in the nature of a bill in equity for a perpetual injunction, and that whatever would be a good answer to such a bill, if filed in Chancery, would, in a court of law, regardless of the ordinary rules of pleading, be a good equitable replication. He also argued, that the facts disclosed in the replication moved against displaced the plea, and that all the facts therein stated were essential to make out a good answer to such a plea, and ought therefore to be allowed. He cited *Mines Royal Societies* v. *Magnay*, 10 Exch 489; *Woodhouse* v. *Farebrother*, 5 E. & B. 277; *Wood* v. *Copper Miners Co.*, 17 C. B. 561; *Clerk* v. *Laurie*, 1 H. & N. 452; *Wakely* v. *Froggatt*, 2 H. & C. 669; *Flight* v. *Gray*, 3 C. B N S. 320; *Perez* v. *Oleaga*, 11 Exch. 506; *Drain* v. *Harvey*, 17 C B. 257; *Vorley* v. *Barnett*, 1 C. B. N. S. 225; *Sloper* v. *Cottrell*, 6 E. & B. 497; *Davis* v. *Marshall*, 7 Jur. N S. 1247; *Whitehouse* v. *Roots*, 20 U. C. Q. B. 65.

Robert A. Harrison contra, argued, that the object of written pleadings at law is to eliminate an issue or issues for trial; that pleadings double or multifarious were formerly bad on special demurrer, that the only remedy now is, to move to strike them out; that the right given to suitors to plead matters of equitable defence, or displace same by matters of equitable answer, does not give to suitors the right to set at nought all well understood rules of pleading in courts of law;

that the plea in question tenders a single issue, viz, note given on a condition precedent not performed; that the replication at the commencement of it completely met this by a traverse, and afterwards proceeded to set up three distinct matters of confession and avoidance; that some of the matters contained in the replication were neither traverses nor matters of confession and avoidance, but statements of evidence immaterial to the proper issue, and calculated to prejudice the defence; that if the replication were allowed to remain in its present form, plaintiff would have to ask leave to file at least four rejoinders to it, and that the result would be endless pleading, with little prospect of material issues. He cited Con. Stat. U. C. ch 22, s. 119.

Draper, C. J.—I think this replication clearly multifarious, and that this objection arises from unnecessarily pleading evidence, from which legal conclusions are deducible, instead of pleading the ground of defence resulting from the facts which such evidence would establish.

I do not accede to the plaintiff's proposition, that if his equitable replication would be a good pleading in equity, if pleaded by way of answer to a bill framed, as the plea is framed, it is therefore a good replication on equitable grounds in a court of law.

I know of no case going that length, and am not prepared to establish the precedent.

I think therefore the replication must be struck out with costs.

I give costs, because I think it an experiment as to how far the common law rules of pleading can be set at nought.

To save another application, I give the plaintiff six days after the service of the order to reply *de novo*. Order accordingly.

CHANCERY CHAMBERS.

(Reported by Richard Graham, Esq., *Barrister-at-Law.)*

Mitchell v. Martin.

County Court—Equity side—Jurisdiction—Removal.

Sec. 57 of the County Courts Act does not authorise the removal of a case from the County Courts to the Court of Chancery, where such removal is desired on account of the existence of a subsequent mortgage upon the premises exceeding the jurisdiction of the Court of Chancery.

[Chambers, June, 12, 1866.]

In this case a suit was commenced in the County Court, for the foreclosure of a mortgage, the amount due thereon being within the jurisdiction of the County Court. Upon proceeding with the suit, it was discovered that there was a second mortgage upon the premises for an amount far exceeding the jurisdiction of the County Court. On these facts,

A. Hoskin moved, under sec. 57 of the County Courts Act, to remove the cause to the Court of Chancery, contending, that the existence of the subsequent claim rendered the case a proper one to be withdrawn from the County Court to be disposed of by the Court of Chancery.

Mowat V. C.—This is not a proper case for removal. Sec. 57 only applies to cases where the claim itself upon which the suit is founded, is one which is fit and proper to be transferred, If the plaintiff wishes to make the subsequent mortgagee a party, he must file a new bill in this court.

GENERAL CORRESPONDENCE.

Insolvent Act of 1864—*Defects in, and suggested amendments*—Thorne *v.* Torrance—*Notices to Creditors.*

To the Editors of the U. C. Law Journal.

Sirs,—The cases of *Thorne* v. *Torrance*, and *Ross* v. *Brown*, recently decided by the Court of Common Pleas, have, I think, taken the profession by surprise, and go far to unsettle the notion which most lawyers entertained of the effect and operation of the Insolvent law.

The facts were, that John and Charles Parsons being at the time in insolvent circumstances, made an assignment which was not in accordance with the Insolvent Act, and so an act of insolvency within that Act, but good at Common Law, and under the provisions of the Indigent Debtors' Act.

Shortly after the assignment, a *fi. fa.* was issued against the assignors, and placed in the sheriff's hands, and within a few days thereafter a writ of attachment was issued under the Insolvent Act of 1864.

Few lawyers would be found to dispute the position that the assignment in question being in itself an act of insolvency, and followed up in due course by insolvency proceedings, would be invalid against the assignee in insolvency, and if authority were wanting on what would seem so clear a question, the case of *Wilson* v. *Cramp*, recently decided by V. C. Mowat disposes of it, but in the cases referred to, the Court of Common Pleas have decided that the effect of the insolvency proceedings is not only to render the assignment invalid as against the assignee in insolvency, but to let in the claim of the execution creditors. Several English cases are cited as apparently supporting this view; let us see whether on a careful review of them, they do support it. It is submitted with great deference that they are not authorities for the judgments just pronounced, and in view of the serious responsibilities entailed upon sheriffs and others in acting upon them, it is to be hoped that no time will be lost in bringing the question before the Court of Appeal.

It is difficult to understand the reasoning of the Chief Justice of the Common Pleas in the following extract from his judgment:—

"If we were not to hold assignments of this kind void, the Insolvency Act would be of little practical advantage; it makes the giving of such an assignment an act of insolvency on which the debtor's estate can be put into compulsory liquidation, but if he, by assigning all his effects to a trustee to satisfy his debts, were to have his estate administered in a manner not provided for by the act, he would not have any estate to be liquidated under the act. This could, hardly be the intention of the Legislature."

Does the Chief Justice consider that it would be of much practical advantage towards making an equal distribution of an insolvent's

estate if execution creditors could be thus privileged, or that *such was the intention of the Legislature?* What he urges is, a strong reason for holding the assignment void as against the assignee in insolvency; and that is all that was decided in *Wilson* v *Cramp*, and if the effect of its being so avoided is to let in the execution, it is an unfortunate slip which will have to be remedied by the Legislature.

The Chief Justice founds his judgment if I understand his reasoning correctly, chiefly on the ground that our Insolvent Laws, differing in this respect from the Bankruptcy Laws of England, do not vest the property in the assignee by relation back to the act of Bankruptcy, but merely provide that the estate and effects of the insolvent *as existing at the date* of the issue of the writ of attachment shall vest in the assignee in the same manner, and to the same extent as if a voluntary assignment had *at that date* been executed in his favor.

For the purpose of the argument, I pass over the question of whether the first assignment was, or was not valid under the Indigent Debtors' Act, but assuming it to be good under that act, but invalidated under the Insolvent Act, is the effect of such avoiding to let in the intermediate execution?

The cases of *Graham* v. *Wetherly*, and *Graham* v. *Lewis*, 7 Q. B. 491, are referred to as the cases, the principles of the decision of which must dispose of this case.

The facts of those cases shortly were, that one Bennett placed a *fi. fa.* in the sheriff's hands against Seddons on a judgment obtained upon a warrant of attorney under which a seizure was made.

Whilst the sheriff was so in possession, another plaintiff, Wetherly, obtained a judgment in an adverse action, and placed a writ in the sheriff's hands; whilst the goods were unsold, a *fiat* in bankruptcy issued against Seddons, the goods were afterwards sold for an amount more than enough to cover Wetherly's writ but not sufficient to pay off Bennett's.

As between Bennett and Wetherly there was no question that Bennett was entitled to priority; but under the Bankrupt Act of Geo. IV., Bennett's judgment was fraudulent and void as against the assignee in bankruptcy; the question then arose, what would be the effect as to Wetherly's writ, and they held, that the moment the *fiat* in Bankruptcy issued, the sheriff was bound to treat the first writ as void. The moment he so treated it, the writ of the second execution creditor which had attached provisionally, became in effect the first writ.

By placing the assignments, argues the Chief Justice, in the place of Bennett's writ, we have a very clear analogy in principle to apply to the case before us, and a strong authority in favor of the defendants.

The fallacy of this reasoning appears to me to be this: in the English case the goods were bound by both writs—Bennett's first, unless something occurred to displace that priority—and subject thereto by Wetherly's. If, therefore, Bennett's writ was displaced or rendered void, the goods remained still the goods of the bankrupt, subject however to any existing lien, and subject to such lien vested in the assignee. In the case, however, under discussion, the execution never attached; the goods were never bound by it, and the very moment the assignment became void, that same moment did they vest in the assignee. The title of the first assignee was good against all the world except the assignee in insolvency, and inasmuch as the execution never could legally attach, there ceases to my mind, to be any analogy between the two cases.

Whilst on the subject of insolvency, it may not be amiss to make some reference to the Act of 1864, and its amendment, with a view to invite some discussion through your columns on the subject; and, first, as to the wording of the acts which could scarcely have been more ambiguously framed, had uncertainty been the special aim of its framers. No two lawyers can be found to agree upon many of its provisions, and a vast labour has been thrown upon our already overworked judges in the hearing of appeals, which, after all, can scarcely be as satisfactory as if there had been a Chief Judge in insolvency to whom appeals might have been made with powers to him in cases of intricacy and importance to state a case for the opinion of one or other of the full courts. If a first-class man were selected for this position he might also be a judge of the Court of Error and Appeal—a court which, as at present constituted, can scarcely be said to be satisfactory either to the profession or the country.

A case recently came by way of appeal before the Chief Justice of Upper Canada which illustrates the difficulty of putting a construction upon the acts in question, and the decision in which does not seem to be very clearly upheld by some of the clauses to which the learned judge refers.

The question was whether an insolvent applying for his discharge was bound to mail notices to creditors under section 11—the section referring to, and regulating proceedure generally—or whether the advertisement for two months under sub-section 6 of section 9 was sufficient. The learned judge in insolvency held that it was necessary to send notices by mail; that the true construction of section 11 was, that in cases where notices were required to be given by advertisement, two weeks notice in the *Official Gazette*, and in one newspaper, would in all cases be sufficient unless the act *specially designated the nature of the notice*, in which cases the advertisement instead of being for two weeks, and in a paper nearest to the place where the proceedings are being carried on would be for the period and in the mode so designated; but

that in *all* cases the person giving the notice, whether for two weeks or for the period, and in the manner so designated, was to send notices by mail.

One of the time-honoured fictions of our law is, that every one is presumed to know it; and another, that a notice in the *Official Gazette* is notice to all the world. Our Legislature in framing the Insolvent Act appear to have considered that, however much to be venerated for its antiquity, such a mode of giving notice was of little practical utility; and that it would be well, therefore, that creditors should have *actual notice;* and it is submitted with great deference to the opinion of the learned Chief Justice who reversed the decision of the judge below, that it was intended, under the Insolvent Act, that creditors should in all cases receive actual notice in addition to the two weeks publication; and that in certain cases the publication should be for a longer period.

The Chief Justice appears to have fallen into an error in supposing that sub-section 2 of section 2 *requires* notice to be sent. That section assumes that the notices referred to in section 11 are required, but further provides that they shall be accompanied with a list of creditors.

But if the construction placed upon the 11th section by the Chief Justice be the correct, one, it follows: that although that section professes to *regulate procedure generally*, the Legislature have strangely omitted to make any regulation whatever in the cases to which the words in question apply. The Chief Justice thinks the meaning of those words to be "without a special statement of the matter to which such notice relates." Then section 11—not applying to such cases—for what period, and in what manner are such notices to be advertised? for one week, and in one paper? at whose discretion is it to be varied? by the assignee or insolvent, or by application to the judge? Manifestly it was intended to secure uniformity in procedure by the clause in question. This would be attained by placing this construction upon it which was adopted by the judge below and which makes the whole act consistent. Such construction moreover secures to the creditors, what, in my humble judgment, the Legislature intended they should have, viz., actual notice of the proceedings which were being taken to wipe out their claims.

Yours, &c., A Barrister.

[The matters above referred are well worthy of discussion. The name and standing of our correspondent lend additional weight to the views he puts forward. *Thorne* v. *Torrance* no doubt has taken many by surprise, and, it is hoped, will be reversed in appeal. The case referred to by our correspondent in the latter part of his letter is doubtless that of *In re Waddell*, which our readers will find reported in full in a former page of the present number.—Eds. L. J.]

Death of plaintiff after fi. fa. land issued, but before executed—Revivor.

To the Editors of the U. C. Law Journal.

Gentlemen,—Your opinion on the following question would oblige the undersigned, and, no doubt, many others, being of general interest.

Where the plaintiff in a case dies after a *fi. fa.* lands is issued against the defendant, but before it is executed, is it necessary to revive the judgment? The Common Law Procedure Act provides for the death of a plaintiff before judgment, and between interlocutory and final judgment, but not after execution issues.

The case of *Ellis* v. *Griffith*, 16 M. & W. 106, decides that a *ca. sa.* issued in the lifetime of a judgment creditor may be enforced after his death.

But there appears to be a distinction between executions against goods or the person and an execution against lands—in the former case, the judgment not requiring to be revived (*Clerk* v. *Withers*, 6 Mod. 290; *Harrison* v. *Bowden*, 1 Sid. 29): in the latter, it must be revived; see *Cleve* v. *Veer*, Cro Car. 459, where a writ of extent upon a statute staple was held to have abated under similar circumstances, the Court saying that that was the case of lands which the sheriff had no authority to extend.

But I see no valid reason for the distinction, and the Court of Exchequer in the decision referred to, where all the cases are cited, does not seem expressly to recognise it.

Yours obediently,

A Law Student.

Guelph, August 16th, 1866.

[We think the rule laid down in *Ellis* v. *Griffith* is as much applicable to an execution against goods or lands as to one against the body, and that rule we take to be against the necessity for revivor in the case of the death of plaintiff after execution issued, but before execution executed, (see 1 Chit. Archd. 9 Ed. 169, and *Todd* v. *Wright*, 16 L. J. Q. B. 311). *Cleve* v. *Veer*, when closely examined, is not an authority to the contrary.—Eds. L. J.]

Sheriffs—Mileage.

To the Editors of the U. C. Law Journal.

Gentlemen,—You will greatly oblige by answering the following question in the next issue of the *Law Journal:*—

Has a sheriff a right to charge mileage on a writ of summons where the defendant is living, and is served within half a mile of the Sheriff's Office in the County Town?

Yours respectfully,

J. F. L.

Sarnia, August 17th, 1866.

[We never heard of such a charge being made, and think it unwarranted.—Eds. L. J.]

FALL ASSIZES, 1864.

EASTERN CIRCUIT—The Hon. the Chief Justice of Upper Canada.

Kingston.....	Monday.....	1st October.
Brockville	Tuesday	9th October.
Perth.....	Monday.....	15th October.
Ottawa	Friday.....	19th October.
L'Orignal.....	Friday.....	26th October.
Cornwall	Monday.....	29th October.

MIDLAND CIRCUIT—The Hon. Mr. Justice Morrison.

Belleville	Monday.....	1st October.
Picton	Tuesday.....	9th October.
Whitby	Monday.. ...	15th October.
Cobourg	Monday.....	22nd October.
Napanee	Tuesday	30th October.
Peterborough..	Tuesday	6th November.
Lindsay.....	Tuesday	13th November.

HOME CIRCUIT—The Hon. the Chief Justice of the Common Pleas.

Milton.....	Monday.....	1st October.
Welland	Thursday	4th October.
St. Catherines..	Monday... ..	8th October.
Owen Sound...	Wednesday....	17th October.
Barrie.....	Tuesday	23rd October.
Hamilton.....	Monday.....	29th October.

OXFORD CIRCUIT—The Hon. Mr. Justice A. Wilson.

Cayuga	Monday.....	1st October.
Simcoe.....	Thursday	4th October.
Berlin.....	Monday.....	8th October.
Stratford.....	Thursday	11th October.
Guelph.....	Monday.....	15th October.
Brantford	Monday.....	22nd October.
Woodstock	Monday.....	29th October.

WESTERN CIRCUIT—The Hon. Mr. Justice Hagarty.

Goderich.....	Monday	1st October.
Sarnia.....	Wednesday....	10th October.
Sandwich.....	Monday.....	15th October.
Chatham	Monday.....	22nd October.
St. Thomas....	Monday.....	29th October.
London.	Thursday	1st November.

YORK & PEEL & CITY OF TORONTO—The Hon. Mr. Justice John Wilson.

City of Toronto.	Monday.....	1st October.
York and Peel...	Monday.....	8th October.

CHANCERY FALL CIRCUITS.

THE HON. V. C. MOWAT.

Toronto	Thursday,	13th September.

THE HON. THE CHANCELLOR.

Barrie	Monday,	10th September.
Owen Sound	Thursday,	13th "
Peterboro'	Tuesday,	18th "
Lindsay	Thursday,	20th "
Sarnia	Tuesday,	25th "
Sandwich.....	Thursday,	27th "
Chatham	Saturday,	29th "
London.....	Wednesday,	3rd October.
Stratford	Monday,	8th "
Goderich	Tuesday,	10th "
Woodstock	Monday,	15th "
Simcoe	Friday,	19th "

THE HON. V. C. MOWAT.

Belleville	Tuesday,	16th October.
Cornwall	Friday,	19th "
Brockville	Friday,	26th "
Ottawa	Monday,	29th "
Kingston	Friday,	2nd November.
St. Catherines.....	Wednesday,	7th "
Hamilton	Friday,	9th "
Brantford.....	Tuesday,	20th "
Guelph.....	Thursday,	22nd "
Cobourg	Wednesday,	28th "
Whitby	Tuesday,	4th December.

APPOINTMENTS TO OFFICE.

COUNTY COURT JUDGES.

JOHN DEACON, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court in and for the County of Renfrew. (Gazetted Aug. 25, 1866.)

EDWARD HORTON, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court in and for the County of Elgin. (Gazetted Aug. 18, 1866.)

POLICE MAGISTRATE.

LAWRENCE LAURASON, Esquire, to be Police Magistrate for the City of London. (Gazetted Aug. 18, 1866.)

SHERIFF.

JAMES MORRIS, Esquire, to be Sheriff in and for the County of Renfrew. (Gazetted Aug. 25, 1866.)

COUNTY CROWN ATTORNEY.

WILLIAM DUCK, of Osgoode Hall, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney in and for the County of Renfrew. (Gazetted Aug. 25, 1866.)

CLERK OF COUNTY COURT.

ARCHIBALD THOMSON, Esquire. to be Clerk of the County Court in and for the County of Renfrew. (Gazetted Aug. 25, 1866.)

REGISTRAR.

ANDREW IRVINE, Esquire. to be Registrar of the County of Renfrew, in the room of James Morris. Esquire. appointed Sheriff of said County. (Gazetted Aug. 25, 1866.)

NOTARIES PUBLIC.

EDWARD ROBINSON, of the town of Chatham, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.

FRANK EVANS, of Orillia, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.

ARCHIBALD LEITCH MACLELLAN, of Belleville, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.

WILLIAM BEALL, of Columbus, Esquire, to be a Notary Public for Upper Canada. (Gazetted Aug. 4, 1866).

HENRY O'BRIEN, of the city of Toronto, Esquire, Barrister-at-Law. to be a Notary Public for Upper Canada.

THOMAS O'BRIEN, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted Aug. 11, 1866.)

FRANCIS TYRRELL, of Morrisburgh, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted Aug. 18, 1866.)

CORONERS.

ALEXANDER BELL, of the village of Lakefield, Esq., M.D., to be an Associate Coroner for the County of Peterboro'.

JAMES COWAN, of the township of Minto, Esquire, M.D., to be an Associate Coroner for the County of Wellington.

WILLIAM JOSEPH R. HOLMES, of Ainleyville, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted Aug. 4, 1866.)

JAMES STEPHENSON, of Iroquois, Esquire, M.D., to be an Associate Coroner for the United Counties of Stormont, Dundas and Glengarry.

DANIEL BROWN McCOOL, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce.

CHARLES JAMES STEWART ASKIN, of Chatham, Esquire, M.D., to be an Associate Coroner for the County of Kent. (Gazetted Aug. 11, 1866.)

THOMAS FREER, ALBERT H. DOWSELL, CHARLES YOUNG, JOHN D. CLENDINNEN, GEORGE SURTEES, JOHN CHANNONHOUSE, JOHN JUDGE, EDWARD McKENZIE, JOHN G. CRANSTON, and DAVID EVANS, to be Coroners in and for the County of Renfrew. (Gazetted Aug. 25, 1866.)