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DIARY FOR MAY.

1. Tuesday........ Last d. for not to Counties of apport of Gram School moneys.
5. Saturday....... Articles, &c., to be left with Sec. Law Soc. Chancery Hearing [Term ends.
6. SUNDAY ...... *4th Sunday after Easter.*
13. SUNDAY...... *5th Sunday after Easter. Rogation Sunday.*
16. Wednesday ... Last day for service of Writ in County Court.
17. Thursday .... *Ascension Day.*
20. SUNDAY ..... *Sunday after Ascension Day.*
21. Monday .... EASTER TERM begins.
25. Friday .... Paper Day, Q. B.
26. Saturday....... Paper Day, C. P. Last day for declar. County Court.
27. SUNDAY....... *Whit-Sunday.*
28. Monday......... Paper Day, Q. B.
29. Tuesday .... Paper Day, C. P.
30. Wednesday ... Paper Day, Q. B.
31. Thursday...... Paper Day, C P. Last day for Court of Revision finally to revise Ass't Rolls, and for Co. Councils to revise T'p Rolls.

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

MAY, 1860.

NOTICE TO SUBSCRIBERS.

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

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

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

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

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

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

TAXATION OF ATTORNEYS BILLS.

It is at present the policy of the law to regulate as far as possible the remuneration to be allowed Attorneys and Solicitors for work done by them as such.

This policy, though having many advocates, is not without some opponents. Many there are who contend that neither the Court nor any other power should dictate to an Attorney what he is to charge for his services more than to the tradesman what he is to charge for his wares, or to the laborer for his labor.

Without discussing the wisdom of the existing policy, we propose to examine in what manner and to what extent it is carried intopractice.

An Attorney or Solicitor is an officer of the Court, and as such amenable to the Court for everything which he does in the practice of his profession, whether it be the receipt of money or the issue of a writ, a charge made or a suit conducted.

From this it is argued that the Courts have independently of any statute power to refer an Attorney's bill for taxation (*Sayers* v. *Walond*, 1 Sim. & St. 97; *Williams* v. *Odell*, 4 Price 279, *Wilson* v. *Gutteridge*, 4 D. & R., 736.

This position is sustained to some extent, though not conclusively, by the case of *Watson* v. *Poston*, 1 Dowl. P C. 556, but in the case of *Dagley* v. *Kentish*, 2 B. & Ad. 411, Lord Tenterden doubted its correctness. And in *Weymouth* v. *Knight*, 3 Scott, 764, Chief Justice Tindal referring to *Dagley* v. *Kentish*, said, "The result of the conference of the Judges on that case was that they almost unanimously concluded that the Courts had no authority independently of the Statute to direct the taxation of Attorneys bills unless under special circumstances, as when an Attorney has been guilty of fraud."

The authority of more recent cases, and the practice of the Courts is certainly in favor of the doctrine advanced by Chief Justice Tindal (*Slater* v. *Brookes*, 9 Dowl. P. C. 349. *See ex parte Cardross*, 5 M. & W. 545).

It is not now usual for the Courts to refer a bill to taxation, otherwise than under some one or other of the Statutory provisions giving express authority so to do. In each case where the right is disputed the contest is whether the services charged for are such as can be referred under the Statute, not whether the Court has power independently of the Statute to make the particular reference.

Until recently the Statute under which references were made was 2 Geo. II. cap. 23, s. 23, passed in 1729, which provided as follows:—

"1. That no Attorney or Solicitor should commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at Law or in Equity until the expiration of one month or more after such Attorney or Solicitor should have delivered unto the party or parties to be charged therewith, or left for him, her or them at his, her or their dwelling-house or last place of abode, a bill of such fees, charges and disbursements, written in a common legible hand and in the English tongue, (except law terms and names of writs,) and in words at length (except times and sums), which should be subscribed with the proper hand-writing of such Attorney and Solicitor.

"2. That upon the application of the party or parties chargeable by such bill, or of any other person in that

behalf authorized, unto the Lord High Chancellor, &c., or unto any of the Courts, &c., or unto a Judge of any of the Courts, &c., in which the business contained in such bill, or the greatest part thereof in amount or value was transacted, and upon the submission of the said party or parties, &c., to pay the whole sum that upon taxation of the said bill should appear to be due to the said Attorney or Solicitor respectively, it should be lawful for the said Lord High Chancellor, Court, Judge, &c., to refer the bill and the Attorney or Solicitor's demand thereupon (although no action or suit should be depending in such Court touching the same) to be taxed and settled by the proper officer of such Court without any money being brought into the Court for that purpose.

"3. That if the Attorney or Solicitor, or party or parties chargeable by such bill having due notice, should refuse or neglect to attend the taxation the officer might proceed to tax the bill *ex parte*, pending which reference and taxation no action should be commenced or prosecuted touching the demand.

"4. That upon the taxation and settlement of such bill and demand the party or parties should forthwith pay to the Attorney or Solicitor, &c., the whole sum that should be found to be or remain due thereon, which payment should be a full discharge of the said bill and demand, and in default thereof should be liable to an attachment or process of contempt or other proceeding at the election of the Attorney or Solicitor.

"5. That if upon the taxation and settlement it should be found that the Attorney or Solicitor was overpaid, then the Attorney or Solicitor should forthwith refund all such monies as the taxing officer should certify to have been overpaid, and in default that the Attorney or Solicitor should in like manner be liable to an attachment or process of contempt.

"6. That the costs of such taxations should be awarded according to the event of the taxation of the bill, that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the Attorney or Solicitor should pay the costs of the taxation, and if not less the Court in its discretion should charge the Attorney or client in regard to the reasonableness and unreasonableness of such bills."

Without discussing the various provisions of this Statute we may remark, that as compared with subsequent Statutes the following appear to be some of its distinguishing characteristics. The power to tax was after delivery of bill. The time for the application was according to the intention of the Act, within a month after delivery. The applicant was required to be the party chargeable. It applied only to business transacted in some one or other of the Courts. The application was required to be made to the Court in which the business contained in such bill, or the greatest part thereof in amount or value was transacted.

In Upper Canada the power to refer a bill to taxation until the passing of the Stat. 16 Vic., cap. 175, appears to have been derived entirely from the Eng. Stat. 2 Geo. II. cap. 23, s. 23. (*In re* Jones 3 U. C. L. J. 167.)

The 16 Vic., cap. 175, was in some respects an extension of the provisions of the old Act.

It expressly allowed an application after the expiration of one month from delivery with such directions and subject to such conditions as the Court or Judge making such reference should decide proper, but provided that no such reference should be made after a verdict obtained or writ of enquiry executed in any action for the recovery of the the demand or after the expiration of twelve months from the delivery of the bill, except under special circumstances to be proved to the satisfaction of the Court or Judge.

The reference was permitted to the proper officer of the Court in which any of the business charged was done. It empowered the officer to whom the reference was made to request the proper officer of any other Court to assist in taxing and settling any part of the bill. If more than a sixth were disallowed the Attorney was required to pay the costs of taxation. If less, the party chargeable. In the former Act on this latter point the Court had a discretion.

The Courts also were empowered in cases when authorized to refer a bill when delivered, if no bill were delivered to order the delivery of the same, and to make an order for the delivery up of deeds, documents, and papers in the possession, custody, or power of the Attorney (s. 20), provided for a reference upon the application of a party liable to pay though not the party chargeable (s. 21), and also for the delivery of a bill to a party liable though not chargeable (s. 22).

It also in express terms declared that the payment of any such bill should in no case preclude the Court or Judge from referring the bill, if the special circumstances of the case in the opinion of the Court or Judge appeared to require the same; upon such terms and conditions, and subject to such directions as to such Court or Judge should seem right, provided the application were made within twelve months after payment (s. 23).

Such was the law until the passing of the Consolidated Act of Upper Canada, cap. 35. The whole law on the subject is now contained in eighteen sections of that Act, numbering from s. 27 to s. 44 inclusive. They are substantially a re-enactment of the old Statute of 2 Geo. II. c. 23, s. 23, and 16 Vic. c. 175, s. 20, 21 and 22.

Our 16 Vic. cap. 175 appears to have been based upon the Eng. Stat. 6 & 7 Vic. c. 73, s. 37, 38 and 39, which repealed and re-enacted the Eng. Stat. 2 Geo. II. cap. 23

s. 23, and so our present Act and the Eng. Stat. 6 & 7 Vic. cap. 73 are substantially the same.

It is enacted by our present Statute as follows:

"1. That no suit at Law or Equity shall be brought for the recovery of *fees*, *charges* or *disbursements* for business done by any Attorney or Solicitor *as such* until one month after delivery of bill, &c. (as before), (s. 27).

"2. That upon the application of the party *chargeable* by such bill within such month any of the Superior Courts of Law or Equity, or any Judge thereof, &c., without any money being brought into Court, may refer the bill, &c., to be taxed by the proper officer of any of the Courts in which any of the business charged for in such bill was done (s. 28).

"3. That in case no application be made *within* the month, then the Court or Judge, upon the application of either party, may order a reference with such directions and conditions as he may deem proper, and may upon such terms as may be thought just restrain any suit for such demand pending the reference (s. 29).

"4. That no such reference shall be directed, &c, after a verdict obtained or writ of enquiry executed, *or* after twelve months from the time such bill was delivered, &c., *except under special circumstances* to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made (s. 30).

"5. That in case either party having due notice refuses or neglects to attend the taxation, the officer, &c., may tax the bill *ex parte* (s. 31).

"6. That in case the reference is made upon the application of either party, and the party chargeable with the bill attends the taxation, the costs of the reference shall be paid according to the event of the taxation, except that if a sixth part be taxed off the costs *shall* be paid by the party by whom or on whose behalf such bill was delivered, and if *less* than a sixth part be taxed off thereby the party chargeable with such bill, *if he applied for or attended the taxation* (s. 31).

"7. That every order of reference shall direct the officer, &c., to tax the costs of the reference and to certify what upon the reference he finds to be due to or from either party, &c. (s. 32.)

"8. That such officer may certify specially any circumstances relating to such bill or taxation, and the Court or Judge may thereupon make such order as may be deemed right respecting the payment of the costs of the taxation (s. 33).

"9. That in case such reference be made when the same not authorized, except under special circumstances as hereinbefore provided, the Court or Judge in making the same may give any special directions relative to the costs of the reference (s. 34.)

"10. That where no bill has been delivered, &c., and where such bill if delivered, &c., might have been referred as aforesaid, any such Court or Judge may order the delivery of a bill and may also order the delivery up of deeds or papers, &c. (s. 35).

"11. That in proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, &c. (s. 36).

"12. That any Judge, &c., on proof to his satisfaction that there is probable cause for believing that the party chargeable, &c., is about to quit Upper Canada, may authorize an Attorney, &c., to commence an action for the recovery of his fees, &c., although one month has not expired since the delivery of his bill, &c. (s. 37).

"13. That when any person not being chargeable as the principal party is liable to pay or as paid any bill, &c., the party so paying, &c., may make the like application for a reference, &c., as the party chargeable therewith might himself have made, &c. (s. 38).

"14. That in case such an application is made when under the provisions hereinafter contained, a reference is not authorized except under special circumstances the Court, &c., may take into consideration any additional special circumstances applicable to the person making it, &c. (s. 39).

"15. That for the purpose of any such reference, &c. such Court or Judge, &c., may order the Attorney, &c., to deliver to the party making the application a copy of the bill *upon payment of the costs of the copy* (s. 40).

"16. That no bill previously taxed shall be again referred, unless under special circumstances the Court or Judge, &c., thinks fit to direct a retaxation (s. 41).

"17. That payment of any such bill shall in no case preclude the Court or Judge, &c., from referring such bill for taxation if the application be made within twelve months after payment, and if the special circumstances of the case in the opinion of such Court or Judge appear to require the same, upon the terms and subject to the directions which to the Court or Judge seem meet (s. 42).

"18. That in all cases in which a bill is referred, &c., the officer, &c., may request the proper officer of any other Court to assist him in taxing any part of such bill, &c. (s. 43).

"19. That all applications made to refer any bill, &c., or for the delivery of a bill, &c., shall be made 'In the matter of such Attorney or Solicitor,' &c." (s. 44).

If space permitted we might make many observations in explanation of the above statutory provisions, but at present must briefly confine our remarks to two points. 1. Cases within the Act. 2. Effect of the Act upon special agreements.

First. In the old Act 2 Geo. II. c. 23, s 23, the expression was, "Fees, Charges or Disbursements *at Law or in Equity*," and was construed as extending only to fees, &c., connected with proceedings in Courts either at Law or Equity (*Hillier* v. *James Barnes*, 41, *Burton* v. *Chatterton*, 3 B. & Ald. 486, *Williams* v. *Odell*, 4 Price 279, *ex parte Dann*, 9 Ves. 547). But if the bill delivered contained *any* taxable item the *whole* became taxable (*Winter* v. *Payne*, 6 T. R. 645, *Smith* v. *Taylor*, 7 Bing. 259).

The present Act extends not only to "Fees, Charges or Disbursements," but to "*business done by any Attorney or Solicitor as such*," and therefore the Act is not now limited to business transacted in Court, but extends to any other business connected with the profession of an Attorney or Solicitor, which as an Attorney or Solicitor he is employed to do (*Smith* v. *Dimes*, 4 Ex. 32). When the bill is for conveyancing and business not done in Court the Taxing Officer must ascertain the remuneration as well as he can according to the contract between the parties express or implied (*In re Eccles et al*, 5 U. C. L. J. 279, *Ib.* 6 U. C. L. J. 59).

Second. The jurisdiction as to taxation extends only to the ascertainment by the ordinary rules of practice of the *quantum* payable by the one party to the other. It does not authorize the Court or Judge to determine whether a special agreement exists, or to interfere with a special agreement superseding the discretion of the Court (*In re Smith*, 4 Beav. 309, *Alexander* v. *Anderden*, 6 Beav. 405, *In re Byrch*, 8 Beav. 124. *In re Rhodes*, *Ib.* 224. *In re Thompson*, *Ib.* 237. *In re Eyre*, 10 Beav. 569). The validity of such an agreement can in Equity only be determined in a suit and not by petition (*In re Whitcombe*, 8 Beav. 145). And where the amount of a bill of costs was included in a settled account between a Solicitor and client, and retained by the Solicitor out of money in his his hands, it was held that the Court had not jurisdiction upon petition to open the account and enter taxation, and that it could only be done by bill (*In re Catlin*, 8 Beav. 121. *See* also *ex parte* Buss. 2 Phillips, 562). But the Courts of Common Law will not in general give full effect to agreements between Attorney and client for payment at a specified rate for business done (*Drax* v. *Scroope*, 2 B. & Ad. 581. *Evans* v. *Taylor*, 2 Dowl. P. C. 349. *Tanner* v. *Lea*, 4 M. & G. 617), though there is nothing to prevent an Attorney bargaining with his client for less than the established rate of fees (per Bullock, C. B., in *Smith* v. *Dimes*, ubi. sup.).

ATTORNEY'S BILL.

The case of *Read, Leith & Read* v. *Cotton & Manning*, reported in this number, will be read with interest in connexion with the foregoing.

MUNICIPAL LAW.

Our thanks are due to W. Duck, Esq., of the city of Ottawa, for the report of the case of *Regina ex rel. Horne and Sparks*, reported in other columns.

The judgment will be read with much interest by those who may be concerned in contesting a municipal election. The point decided is a new one, and the judgment is the more valuable upon this account.

It is provided by the Municipal Act (Consol. Stats. U.C. p. 551), that a relator with a view to question a municipal election shall make application "within six weeks after the election, *or* one month after the acceptance of office by the person elected." The doubt arises on the latter branch of the provision. What is an "acceptance of office," such as intended? Taking the declaration of office is undoubtedly an acceptance. Then what *other* act will constitute an acceptance?

It seems, according to the ruling of Judge Armstrong, that a speech by the elected to the electors, immediately after the termination of the election, announcing an acceptance of office, to bind a relator, must be clearly proved, and possibly made in his presence or with his knowledge.

The proper construction of this clause of the statute becomes a matter of much concern, when we mention that if the time allowed for moving be allowed to expire without a motion, the right of the elected to hold his seat cannot be tried by information in the nature of a *quo warranto*, or in any other direct manner. (*Reg. ex rel. White and Roach*, 18 U.C., Q.B. 226.)

DEATH OF BARON WATSON.

This eminent Judge, like the late Mr. Justice Talfourd, expired while holding a Court of Assize. On 13th March last, while holding the Assizes for the County of Montgomery he was seized with an apoplectic fit, and in less than an hour from the first attack breathed his last, aged 63. The names of Mr. Wilde, Q. C., Mr. Montague Chambers, and Mr. Lush, are mentioned in connexion with the vacant seat.

LAW AND EQUITY.

The Lord Chancellor, who for so many years presided over the Court of Queen's Bench, and who, owing to his large experience and extensive learning, is, perhaps, of all living men the best fitted to bring about a fusion of the systems of Law and Equity, has introduced a bill, which, if it become law, will in a great measure attain that end.

During the recent Durham Assizes in England, a Roman Catholic Clergyman (Rev. Father Kelly) refused to reveal a statement made to him by a prisoner in confession. Mr. Justice Hill, the presiding Judge, committed the priest to custody for contempt.

THIRD REPORT OF THE ENGLISH COMMON LAW COMMISSIONERS.

The following is the third and concluding report of this Commission :—

We, your Majesty's Commissioners, appointed to inquire into the Process, Practice, and System of Pleading in the Superior Courts of Law at Westminster, the manner of conducting suits and other proceedings in such Courts, and on the circuits, and the costs, charges, and expenses incidental thereto, the practice at the judge's chambers, and the duties of the several officers, clerks, and other persons of and connected with such Courts, circuits, and judge's chambers, humbly certify to your Majesty that we have further proceeded to consider the matters thus committed to our investigation, and we submit to your Majesty this our Third and Final Report.

In the year 1850, your Majesty was pleased to direct us and our late lamented colleague Sir John Jervis, to inquire into and report upon the Process, Practice and System of Pleading in the Superior Courts of Common Law at Westminster. At that time much dissatisfaction prevailed amongst the practitioners and suitors. It was complained, and with justice, that the proceedings in actions, though undefended, of which the great majority of cases consists, were unnecessarily tedious and costly. It was also a subject of deep and just dissatisfaction, that the time of the Courts was frequently occupied, and expense and delay occasioned, by frivolous arguments and discussions upon points merely of a technical form, altogether irrelevant to the merits. Justice was frequently defeated in trials at Nisi Prius, in consequence of variances between the Pleadings and the Evidence ; or of objections to the stamps upon documents; or from want of authority to adjourn the trial when an unforseen difficulty arose; or from other circumstances which occasionally, after very great trouble and expense had been incurred, rendered the trial wholly fruitless, and left the real question in controversy between the parties undecided. To these and other causes or complaint we have referred in our former Reports.

Our first Report was presented in the year 1851. We discussed therein all the ordinary proceedings in an action, and made suggestions for their improvement by abolishing all unnecessary steps, by removing the possibility of a defeat of justice by mere technical objections, and by putting an end to the fictions which, as in outlawry and ejectment, had incumbered the law. We further recommended the payment of the officers of the Superior Courts by salaries instead of fees, and the abolition, or at least revision, of the various charges upon the suitors in respect of the proceedings in those Courts.

In consequence of that Report, the Common Law Procedure Act of 1852, and the Nisi Prius Officers Act (15 & 16 Vic. ch. 73,) were enacted, and these Acts were followed by two sets of Rules made by the Judges in Hilary Term, 1853.

In our Second Report (1853), we proceeded to deal with the following important subjects:—Trial by Jury, the instances in which it might be dispensed with, and the mode in which the constitution of Juries might be improved; the trial at Nisi Prius and its incidents, and the improvements necessary in that part of our Procedure for perfecting the administration of justice; the law of evidence, and the further alterations required to complete the course of improvement which modern legislation has introduced into this branch of the law ; the expediency of an appellate jurisdiction in cases of New Trial, and of special cases stated by consent of parties. These, together with several other subjects of minor importance, fully considered and discussed in our Report, related to the existing Procedure of the Common Law Courts in actions at Law.

In the second branch of our Second Report we considered the necessity of enlarging and expanding the Procedure of these Courts, so as not only to invest them with powers previously exercised by Courts of Equity alone, by way of assistance to the Courts of Common Law in the progress of an action called auxiliary Equity, but also to enable them to exercise the powers of Courts of Equity, for the protection of legal, as distinguished from equitable rights, and for the enforcing of legal obligations.

We strongly urged that these powers should be conferred on the Courts of Common Law, on the ground that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction ; and that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess in all matters within their jurisdiction the power to give all the redress necessary to protect and vindicate common law rights, and to prevent wrongs, whether existing or likely to happen unless prevented.

This Report was followed by the Common Law Procedure Act of 1854. By this Act the legislature gave effect, in substance, to all our recommendations contained in that Report relating to the existing Procedure in an action at law, with the exception of our recommendation as to the constitution of juries; this subject being reserved, as it was understood, for consideration at a future period when the law relating to this matter was to be generally revised. Effect also was given to our recommendations as to conferring on the Courts of Common Law the powers previously exercised by the Courts of Equity alone, as auxiliary to the Courts of law. But the Legislature abstained from enlarging the powers of the latter Courts, so as to enable them to protect common law rights from threatened invasion, or to enforce the specific performance of common law obligations.

The experience of the several years which have elapsed since the new system of Procedure, with such great and varied improvements, has been in operation, enables us to express a confident opinion as to its working. We have delayed making this Report in order to have the advantage of this experience, before we submitted to your Majesty our final views on the important subjects upon which your Majesty was pleased to command our services.

As regards the amendments and alterations in the Procedure in actions at law, we are happy to be able to report, that they have rendered the Procedure simple, economical, and speedy, and have had the effect of limiting the costs to the expenses of the necessary and essential steps in a cause.

The extent of the reform effected will be exemplified by the fact that in nine months of the years 1852-3 (the first, during which the new system was partially introduced), as compared with the same period in the preceding year, by the abolition of proceedings of a formal character, all involving considerable expense, reported by us to be unnecessary, and thereupon abrogated, the Rules granted by the three Courts, were during that time reduced in number from 38,000 to 3,081, and this notwithstanding an increase in the number of Writs issued.

The technicalities which brought so much discredit on our jurisprudence have now disappeared ; and the Courts, owing to the improved system of Pleading and Procedure, and the large additional power of amendment, are occupied in adjudicating upon the substantial merits of the cases in litigation, while from the operation of the same causes, it very rarely oc-

curs in trials at Nisi Prius that the real question in controversy is not decided by the jury.

Nevertheless, there are still a few suggestions which we think it necessary to make as to this branch of the subject, partly as to matters omitted in our former Reports, and partly as to improvements which the practical working of the existing system has shown to be desirable.

First, as to the joinder of parties to actions. It not unfrequently happens that the right to sue arises in such a manner that it is doubtful in whom it is vested. In such cases, great hardship and difficulty are imposed upon the suitor by the rule, which requires that an action shall be brought in the name only of the person in whom the right is legally vested. The effect of that rule is, that a mistake as to the proper person to sue involves an expensive defeat, by a judgment whereby the right is pronounced to exist, but to be vested in a person not a party to the action, but who may in fact be a trustee for or otherwise in the same interest with the Plaintiff, and who would have consented, had the law allowed it, to be joined as a party.

The existing rule, however, theoretically correct, is unnecessary in practice, as is proved by the exception in the case of ejectment; whilst in the other cases to which we have referred it has a mischievous effect. It is not likely that parties will be joined as Plaintiffs who have no interest in the matter; and we think that Plaintiffs may safely be intrusted with the right to bring their actions in the name of the persons in whom the legal right may be supposed to exist, leaving it to the Court to give judgment in favour of the persons or person who may be found to be entitled. With a discretion as to costs, and the provision as to set-off recommended in our First Report, this suggestion can work nothing but good, and we recommend its adoption.

The action of Replevin was one of the subjects left for our consideration; but we have been in part anticipated by the provision of the 19 & 20 Vic. ch. 108, ss. 63 to 68, upon which we have no improvements to suggest.

A doubt has been suggested whether that statute is not confined to replevin of goods distrained for rent or damage feasant. To prevent any question, it ought by enactment, to be extended to all cases of replevin.

Besides this, there is an alteration in the Procedure of Replevin which would be especially beneficial in the case of distress for damage feasant. At present a tender, after impounding, of the rent or damage, is too late; and it is said that the distrainee's only course is to replevy, to let the jury find the rent or damage, and then to pay it. This is obviously most objectionable, as it involves the expense of trial at the cost of the distrainee, if the distrainor is obstinate or malicious, to ascertain a sum, the amount of which may not be doubtful, or which and much more the distrainee would pay rather than be at the expense of a trial. The remedy for this is to permit a plaintiff, in answer to an avowry, to pay money into court in satisfaction of the matter avowed for, and we recommend that this should be allowed. It would be necessary to alter the bonds of each party accordingly. If the distrainee paid in enough, and the action went on, then his case should be like that of a defendant now in ordinary actions, and the case of the defendant like that of the plaintiff in such an action, with similar results *mutatis mutandis*, if too little was paid in.

The Actions of Dower, Writ of right of Dower and Quare impedit are at present commenced by writ issued out of Chancery. This causes delay and expense, besides giving rise to needless questions of form. They are the only actions so commenced, and there is no reason why the proceedings therein should differ in respect from those in other actions. We think they ought to be commenced by writ issuing out of the Court of Common Pleas, that being the Court which at present has alone jurisdiction in this action between subject and subject, in the same manner as a writ of summons in an ordinary action; that all process therein should be tested either in or out of term, and returnable after execution; and that the proceedings therein should be assimilated, as nearly as may be, to those in personal actions.

In Actions on Bonds the Defendant ought, in our opinion, to be allowed to pay money into court; and also in Detinue by leave of the Court or Judge.

An amendment has been suggested by our experience of the working of our Common Law Procedure Act 1854, in relation to the Attachment of Debts. It is, that the Judge should have a discretion to refuse to interfere in cases where the costs of the Proceedings will, in his opinion, bear so large a proportion to the amount to be recovered as to make the remedy practically worthless or vexatious.

There is a further provision which it is desirable to add to this part of the law. It occasionally happens that the garnishee appears, admits the debt, is willing to pay it, but has a *bona fide* doubt whether the execution debtor is really entitled to it, and whether some other person is not. Now it is obvious that garnishees ought not to be compelled to pay without being protected against that other person, and that the latter ought not to have his rights decided on without an opportunity of being heard on them. To prevent these inconveniences, the proper remedy is that the garnishee, on being served with the order, should be at liberty to take out a summons, in the nature of an interpleader summons, calling on any person to whom he suggests the debt is really due to appear. Proceedings might then take place as on interpleader summonses, and the creditor or person called on be barred according to the result.

Doubts also exist as to whether a Judge can exercise a discretionary power in cases where the garnishee appears and admits the debt in point of law, and where the judgment debtor has in strictness a legal right to maintain an action against the garnishee, but under the circumstances, it would in the opinion of the Judge, be inequitable for him to do so. For instance, where the garnishee has a cross claim against the judgment debtor for an amount exceeding the judgment debtor's claim, but which is not yet due. In such case it may well be that the judgment debtor himself would not think of enforcing payment of the debt due to him from the garnishee, whilst his assignees in bankruptcy or insolvency could not do so. To meet such cases the Judge should have power to make such orders as shall, in his opinion, effect complete justice between all the parties.

With respect to the subject of Costs, it appears to us that the two objects to be attained are, that the right to costs should be clearly defined, and that the amount to be awarded should be uniform in all the Courts.

The statutes which give to the parties a right to costs are in a very confused and unsatisfactory state. Not only have the separate enactments of the older statutes given rise to a variety of decisions, but subsequent statutes have in some instances modified, and in others partially repealed, former enactments, so that it is extremely difficult to ascertain what the real state of the law is on this subject.

We are of opinion that these statutes should be revised and consolidated. All that we think it necessary to say upon this branch of the subject is, that the leading principles which now regulate the right to costs should be retained. The party succeeding in the suit should have the general costs of the cause, the party succeeding on issues, either of law or fact, although he be not entitled to the general costs of the cause, should have the costs of those issues, or of those parts of the cause on which he succeeds; and the restraints now imposed on frivolous actions, by depriving the party of costs, should be preserved, and better defined than they are at present.

Under this head we think that it ought to be enacted, that whenever a Plaintiff in any action recovers less than £5

damages, it should be in the discretion of the Judge to allow or disallow his Costs.

The amount to be awarded for costs is now settled by the Masters of the Courts on Taxation, subject to revision by the Court, or a Judge. The allowance is regulated by the usage and practice of the Courts, excepting where the scale of costs has been fixed by rule of Court or Statute. These scales have recently been revised by the Judges, and there is no arrear in the Masters' Offices, where we believe the business is satisfactorily conducted.

We think it right to avail ourselves of this opportunity to invite renewed attention to our former observations respecting the constitution of juries; More especially we would urge the consideration of that part of our recommendations which relates to securing the attendance on common juries of the class of persons who now serve exclusively on special juries, with a view to the improvement of the former by the admixture of persons of higher education and intelligence. We are strongly persuaded that a very great improvement would by this means be effected in the constitution of juries; and as we do not propose to do away with the right of parties to resort to a special jury, or to deprive special jurors, when serving as such, of the additional remuneration which they are in the habit of receiving, we can see no ground why the liability of such persons to serve on common juries, which already exists in law, though it is not required in practice, should not be enforced.

We proceed to the second part of the subject, namely, the powers hitherto exercised by Courts of Equity alone, which we have proposed should be conferred upon Courts of Common Law. The experience of the five years which have elapsed since the passing of the Act of 1854, has strongly confirmed the views which we sought to enforce in our last Report; and we cannot but regret the partial manner in which our recommendations were carried into effect by the Legislature. Upon this subject, in addition to what we formerly urged, we beg to submit for consideration the following observations:—

Besides the exclusive jurisdiction which the Court of Chancery has from time to time acquired over subjects which either never were within the scope of the Common Law, or have ceased to be so from desuetude or express enactment, that Court has also exercised in various instances powers over subjects within the jurisdiction of the Common Law Courts, either in aid of these Courts, as by discovery, or by way of prevention of a threatened injury, as by injunction against a wrong or against an apprehended unjust litigation, or by way of specific performance, or by way of restraint of the proceedings of the Common Law Courts, where the prosecution of actions, and even the execution of judgments, have been stayed by injunction, upon the ground that there was something in the proceedings contrary to the law as administered in the Court of Chancery, technically called Equity. We desire to call attention to the points in which the two jurisdictions at present thus interefere, and are dependant one upon the other.

With that part of the Chancery jurisdiction which deals with subjects not within the cognisance of the Common Law Courts, it is no part of our duty to deal, because it does not interfere with the jurisdiction or procedure of the Common Law Courts as at present constituted. It is with that part of the Chancery jurisdiction which undertakes to aid the proceedings of Common Law Courts, or to furnish a better remedy or to control and restrain their proceedings, that we are concerned, because, in our opinion, the relation of the Courts to one another is, in respect of such jurisdiction, anomalous and absurd.

The auxiliary power of the Court of Chancery to compel discovery in aid of an action or defence in a Common Law Court has already by the Common Law Procedure Act of 1854, been conferred upon the Courts of Common Law. No practical difficulty has been experienced in the exercise of this jurisdiction. In cases where discovery must previously have been sought in the Court of Chancery, it has since the Act of 1854, been speedily obtained at Judges Chambers at a comparatively trifling expense.

That part of the jurisdiction of the Court of Chancery which relates to protection against threatened and impending injury deals, to a great extent, with subjects which are within the general jurisdiction of the Courts of Common Law. It is founded upon the principle of giving a more complete remedy by restraining the commission of injuries, in respect of which the Courts of Common Law can only award damages. We proceed to consider this subject, with reference to the various remedies in their order.

First, as to the power of restraining, by injunction, threatened and impeding injuries. Upon this subject we have already, in our Second Report, stated at large the opinion of the former Common Law Commissioners and our own. Suffice it now to say, that, for the reasons there stated, Courts of Common Law ought equally to have power to protect legal rights from violation, and to give damages for actual injury. It often happens that both compensation in damages and protection are required in order to afford justice; and, in such cases, where immediate protection is necessary, no complete remedy can at present be obtained, except by resorting to the Court of Chancery. This arises from the circumstance that there is no provision for issuing an injunction from a Common Law Court in case of threatened injury. It is necessary, as the law at present stands, to wait until a wrongful act has actually been commenced, so that an action for damages may be maintained, before application can be made for an injunction to a Court of Common Law, whereas the danger of such an injury is enough to found the jurisdiction of the Court of Chancery. This seems unreasonable, when it is considered that the right threatened to be violated exists at the Common Law, and that, in case of actual injury, redress is given in a Common Law Court and not in the Court of Chancery (unless it be incidently under the Act 21 & 22 Vict. c. 27), and that after the wrong has actually commenced an injunction may be obtained in a Common Law Court against its repetition or continuance, or the committal of an injury of a like kind; and yet that, in case of threatened and impending injury to a similar right, is is necessary to resort to the Court of Chancery. This defect in the jurisdiction of the Common Law Courts, which is the more striking when it is considered that the Court of Chancery often declines to interfere until after the right has been established at Law, ought, we think, at once to be remedied. The reasons for doing so are shortly as follows:—The rights, in respect of which the remedy proposed is to be given, are recognised in Courts of Common Law, which are instituted for the purpose of protecting and vindicating them: The complete enjoyment of such rights can only be obtained through the means of injunction, by which the violation of them is prohibited and prevented: Damages in many cases afford but imperfect redress; In practice, the resort for protection by injunction to a court different from that in which the right, if in dispute, is and ordinary must be tried and established, necessitates two suits instead of one: Lastly, to give the power to the Common Law Courts in all cases of Common Law rights will be to restore an ancient jurisdiction in an improved and more efficient form.

The procedure for this purpose may be at once simple and effective, namely, by application to the Court or a Judge for an injunction. If the case be such that the recovery of damages would be an inadequate or inconvenient remedy, the injunction may be ordered to issue forthwith *ex parte*, subject of course to an application to the opposite party to dissolve it .It should be in the discretion of the Court or Judge, whether the injunction should issue in the first instance, or whether only a rule or summons to shew cause should be granted.

Upon mention to quash the injunction, or on the hearing of

the rule or summons to issue it, the Court or Judge ought to have power either to decide the matter summarily, or to direct direct an action, or issue, or a special case, and to impose such terms as to keeping an account or otherwise, and to make such order as to the costs of the proceedings, as may be just.

This power ought to be conferred in all cases of Common Law rights in which an injunction might be obtained in the Court of Chancery.

In an action involving the question of injunction, brought or continued under the direction of the Court or Judge, it should not be necessary to claim an injunction in the Declaration, unless directed by the Judge; and in such an action not so brought, the party injured ought to be at liberty, as at present, to claim an injunction, if he think proper. The provisions of the 82nd section of the Common Law Procedure Act of 1854 ought to be modified, so as to be applicable to the new writ.

The power of issuing injunctions by the Common Law Courts is at present confined to actions in which some breach of contract or duty is complained of, and cannot be exercised for the protection of property the right to which is in litigation. It cannot, for instance, be exercised in the action of ejectment, even to prevent irreparable waste; nor in case of detinue, to prevent the defendant from making away with the goods, which may be specifically recovered. This defect in the jurisdiction should be supplied by extending the power of issuing injunctions so as to prevent injury to or the making away with property, in actions in which the title thereto is in dispute.

Another measure of protection at present afforded by the Court of Chancery consists in ordering the delivering up of documents, which, upon the face of them, appear sufficient to give the holder a right of action at Common Law, but which by reason of circumstances which might be set up as a defence if an action were brought, ought not to be made available. In such a case, the danger that by lapse of time evidence of the defence may be lost, and so the instrument may be unjustly enforced, is considered as constituting a right in the party apparently charged by the instrument, unless disabled by some act of his own, to have it given up and cancelled, and so to have the claim set at rest. This power may well be given to the Courts of Common Law in respect of Common Law claims and defences, And in cases in which only a part of the amount appearing to be due on the instrument is in fact due, an offer to pay such part, and a payment of the amount into court to abide such order as the Court may make, ought to be considered equivalent to actual payment, before proceedings. This may be done either by action or by summary application to the Court, as may be thought most advisable.

Under the same head of protection against anticipated injury may be classed the proceedings in Interpleader, which we now proceed to consider.

The principle of interpleader is this: That a person having, without any fault on his part, the possession of property in which he claims no interest, and which is claimed by two or more adverse parties whose alleged titles have a common origin is entitled to be protected from the necessity of litigating the question of property in which he has no concern, upon giving up the subject matter in dispute to be dealt with under the direction of the Court, which then determines the question in a proceeding between the adverse claimants. Before the Statute 1 & 2 Wil. 4, c. 58, the remedy existed in the Common Law Courts in one form of proceeding only, namely, the action of detinue. One of the last instances, if not the last, in which it was resorted to was in the case of *Land* v. *Lord North*, 4 Douglass, 226. The statute referred to, however, gave jurisdiction to Common Law Courts, in cases of action brought by one of the claimants against the holder of the property. It also gave a new power to relieve sheriffs against the necessity of litigating adverse claims made to goods taken under execution. In this latter case the Court of Chancery before the statute declined to exercise jurisdiction, for the alleged reason, that if the sheriff had made a wrongful seizure he ought not to be relieved; while if he had made a rightful one, there was no occasion for interfering. And it may be doubted whether that Court will assume jurisdiction since the statute (see *Tufton* v. *Harding*, 21 Dec. 1859, before Vice-Chancellor Kindersley). The jurisdiction conferred upon the Common Law Courts in such cases has proved highly beneficial. In some particulars, however, it requires extension and amendment.

With respect to both kinds of interpleader proceedings, difficulties have arisen where the claim is at present capable of being enforced in the Court of Chancery only, and is called equitable. In respect to such claims, Courts of Common Law have at present no jurisdiction, and the consequence has been that great inconvenience has arisen in the execution of the Interpleader Act. To enable the Courts to do complete justice in such cases, their jurisdiction ought to be extended to all claims, whether legal or equitable, where an action has been *brought in respect of a Common Law claim* within the former branch of the statute, or there has been a seizure in execution within the latter. In case of Interpleader for relief of sheriffs, jurisdiction ought to be given to the Common Law Courts, even though the claim or claims be all equitable. The proceedings upon such claim may be in the same form as those in the case of a conditional defence upon equitable grounds, which will be mentioned in a subsequent part of this Report.

In interpleader after action brought by one of the claimants, an amendment is also advisable. The course of decision upon the construction of this branch of the statute has usually followed that of the decisions in Chancery, which amongst other exceptions to this jurisdiction, appear to have established that relief will not be given when the titles of the claimants have not a common origin, but are adverse to and independent of one another. This exception of which the alleged reason is not very obvious, has no place in interpleader proceedings for the relief of sheriffs; and we see no good reason for its existence in any case of interpleader in the Common Law Courts. To take the common case of a wharfinger or warehouseman seeking relief against adverse claimants, the applicant has, generally speaking, no information as to the nature of their alleged titles; and yet it is clearly just, that, whatever may be, he ought not to be at the expense and risk of determining who is in the right, in a contest in which he has no interest whatsoever, except it be to hand over the property in dispute to the rightful owner. We recommend that interpleader should be allowed to all persons not falling within the class at present estopped from interpleading, whether the adverse claims have a common origin or not.

Interpleader for the relief of sheriffs admits of further improvement. It often happens that where a sheriff has seized goods in execution, a claim is made to them under a bill of sale to secure an amount much less than the value of the goods, and the goods, if sold, would be sufficient to satisfy both the execution and the bill of sale creditor. In such cases great difficulty arises. The property of the goods is entirely out of the debtor and in the bill of sale creditor. The former has a right to the goods upon paying off the bill of sale, and that right ought to be available to the execution creditor. The bill of sale creditor has a right to the possession of the goods for the purpose only of satisfying his debt, and he ought not, provided his own debt is first satisfied, to be allowed to stand in the way of the execution creditor by objecting to a sale by the sheriff. There are other similar cases in which the claimant is entitled to the goods only to secure a debt. The judge ought to have power in all cases where the right of the claimant is only by way of security for a debt, to direct a sale, and the application of the proceeds, in case of a surplus, to satisfy the execution, upon such terms as to payment of the secured debt or not, and otherwise, as the judge may think fit.

The jurisdiction in interpleader cases ought also to be extended in the following particular. It occasionally happens that the execution creditor and the claimant agree to leave the matter to the decision of the judge before whom the summons is heard, without requiring an issue. When points of law only are involved, this course saves expense and delay. Even where questions of fact are involved, now that the parties and their witnesses can be summoned and examined before the judge it not unfrequently happens that the judge, by consent, disposes of the case. Sometimes, however, even in cases of small amount, one of the parties insists upon the trial of an issue at a greater expense to both parties than the amount in dispute. In cases of this kind, it is obviously for the advantage of all that the judge should have the power of deciding summarily and so preventing needless expense. We think this power should be given to the judge, to be exercised if he thinks proper.

We would further recommend that in all cases where the question is one of law, the facts not being disputed, the judge should be at liberty to decide the question without an issue, and, if necessary, to direct a special case for the opinion of the Court.

We pass on to the remedy of specific performance for enforcing the actual fulfilment of contracts, the breach of which cannot be compensated by mere damages. On this subject we have already, in our Second Report, expressed our opinion that it ought to be added to the powers of the Common Law Courts, at least in all cases in which a breach of the contract can now be redressed in those Courts by an action for damages; and we pointed out the form of proceeding in which such remedy could be administered. We will not repeat what we then stated to be our opinion upon this subject, but we think it right to say that that opinion remains unaltered.

We next proceed to consider the interference of the Court of Chancery, upon equitable grounds, with the proceedings in Common Law Courts, as a subject to which particular attention ought to be directed. Notwithstanding recent legislation, the law is still imperfect in not admitting, by way of defence to a Common Law action, matter which is now ground only for application to the Court of Chancery to restrain the proceedings by injunction.

In all actions at Common Law whatever is ground for a perpetual injunction ought to be and is received as a defence, where the relief in Chancery would be unconditional; and in cases where such relief in the Court of Chancery would be conditional, the Courts of Common Law ought to have power to give, in a summary way, the same relief against actions pending therein. The first part of this recommendation has obtained the force of law by the 83rd and following sections of the Common Law Procedure Act of 1854, but subject to a condition, namely, "provided that such a plea shall begin with the words, *for defence on equitable grounds*; or words to the like effect." Considerable difference of opinion exists amongst us as to the propriety of requiring that a plea should be thus headed, but as we are not agreed upon this matter, we do not think it expedient to enter further upon it.

The second part of the recommendation now under consideration has not been acted upon, and the consequence has been, that in many cases pleas founded upon matter which would, in the Court of Chancery, be ground for conditional relief, have necessarily been rejected by the Common Law Courts, although they involved no difficulty which could not have been readily overcome by their ordinary procedure. The consequence is, that in such cases the defendant must either resort to the Court of Chancery, or submit to the judgment of the Court of Law, though he is ready and willing to perform the conditions upon which, according to the rule of the Court of Chancery, he ought to be relieved from the effect of such judgment.

Difficulties have been apprehended in raising such defences, because of the rigidity of the existing forms of pleading and judgment in the Courts of Common Law, and from its having been supposed that no appeal could be made to lie against a decision founded upon a summary application. In truth, however, no such difficulty exists. An instance of a conditional equitable defence given effect to by the proceedings in a Common Law Court, is presented by the proceedings in an action upon a mortgage to stay the action, and for a reconveyance upon payment of the debt and costs. The power of giving relief upon summary application by rule or summons may be coupled with a right to the unsuccessful party to appeal, by leave of the Court, within a limited time upon giving security. The appeal might be in the form of a special case stating the facts necessary to raise the question, as in appeals upon new trial motions, under the Common Law Procedure Act of 1854. This power of appeal, coupled with a discretionary power to direct issues or enquiries, and as to costs of the action and application, will enable the Common Law Courts in the great majority of cases to dispose of such defences finally; whilst in cases in which any unforseen difficulty may arise, though we do not anticipate any, a provision similar to the 86th section of the Common Law Procedure Act of 1854 will enable the court or judge to reject the defence, "in case it cannot be dealt with by a court of law so as to do justice between the parties, upon such terms as to costs and otherwise as to such court or judge may seen reasonable."

In these cases, the summons or rule would be in the nature of a bill for relief; if a form of procedure analogous to a plea is preferred, there is no reason why it should not be adopted. In that case the judgment must be altered, and be made the same as the combined effect of a Common Law Judgment and a decree on a bill for relief from it. On such a Judgment Error or Appeal may lie as on other Judgments.

The Action of Ejectment is not included in our recommendations under this head, because the course of legislation on the subject of land has tended to maintain and strengthen the distinction between legal and equitable estates, and we cannot hope, under the form of an improvement in procedure to change the system thus sanctioned.

There is, however, in addition to the case mentioned in our Second Report of an outstanding trust term, a class of cases in which we think the Courts of Common Law might, with advantage, be authorised to receive defences, at present available only by proceedings in Chancery; we mean cases of relief against forfeitures.

It often happens that contracts provide for a pecuniary penalty of large amount, in case of non-payment of a smaller sum, or non-performance of one or more stipulated acts, the omission of which occasions damage of less amount than the penalty. In such cases, at the Common Law, it was formerly competent for the stipulating party, in case of breach of the contract to demand and recover the whole amount of the penalty, without regard to the actual amount of damage sustained. In the Court of Chancery, however, unless it appeared that the amount represented the agreed damages for a breach of contract, technically called "liquidated damages," the sum stipulated to be paid was considered merely a security for the actual damages sustained, and where these admitted of calculation, that Court relieved against the penalty upon compensation being made for such damage. This jurisdiction has been given to Courts of Common Law, and the conflict between the two Courts put an end to by the Statutes 4 Ann, c. 16, s. 11, and 8 & 9 Wil. 3, c 11, s. 8. No more than the actual damage sustained can now be recovered, and the interference of the Court of Chancery is no longer necessary.

Upon the same footing stands the jurisdiction of the Court of Chancery to relieve against forfeiture of leases for non-payment of rent, and, in certain cases since the statute of 22 & 23 Vic. c. 35, against breaches of covenants to insure.

This jurisdiction has in case of non-payment of rent been partially conferred upon Courts of Common Law by statutes 4 Geo. 2, c. 28, ss. 2, 3, 4, and the Common Law Procedure Act, 1852, ss. 210, 211, 212. We think that the jurisdiction of the Courts of Common Law should be extended in this direction, and that in every case of ejectment brought for a forfeiture, these Courts should have, upon rule or summons, power to relieve in all cases in which relief can now be obtained by Bill in Chancery.

The legislation upon this subject will thus be rendered consistent.

Another enactment is, however, necessary to give full effect to the reception of such defences by Courts of Common Law. It is that a defendant shall not be permitted to proceed in the Court of Chancery for relief which he may obtain by plea or otherwise in the Court in which the action is pending; unless after such defence has been rejected by the Court of Common Law expressly upon the ground that "it cannot be dealt with there so as to do justice between the parties." The course of decision upon this subject may be traced in the cases of *Prothero* v. *Phelps*, before the Lords Justices, 22nd December, 1855; *Wild* v. *Hillas*, before Vice-Chancellor Kindersley, 3rd December, 1858; *Kingsford* v *Swinford*, before the same judge, 31st January, 1859; and *Gompertz* v. *Pooley*, before the same judge, 9th February 1859. These cases seem to establish that in the present state of the Law, it is competent for a defendant, after allowing the action to proceed to its termination without availing himself of such a defence, to file a bill in Chancery founded upon the same matter, and after a second investigation of the case, to nullify the judgment. This may be prevented without introducing any novelty in principle, simply by requiring the defendant, upon the first opportunity, to put forward all he intends to rely upon in answer to the action.

The alleged jurisdiction in the Court of Chancery to entertain bills, technically called Bills for a New Trial, to restrain execution upon a verdict and judgment, after the time for moving for a new trial in the Common Law Courts has elapsed, ought also to be abolished, as tending to revive and continue a litigation already brought to a close in a court of competent jurisdiction. Courts of law have abundant authority to deal with cases of fraud upon the Court and abuse of their proceedings. In other cases it is considered that the time allowed to prepare for trial, and to move for a new trial, gives the defeated litigant as much opportunity to bring forward the matter upon which he relies, as is consistent with a speedy and efficient administration of justice. The protraction of litigation to a length bearing a large proportion to the ordinary period of life is all but equivalent to a denial of redress, and it operates with almost equal disadvantage to both the litigants. The cases in which such a jurisdiction may be applicable were always rare, and they have become more unlikely than ever to occur, since the parties to a suit may be examined for or against themselves. Bills for a new trial have, for the reasons stated, fallen into disrepute and desuetude; but as the jurisdiction is stated to exist, and is an anomally in our jurisprudence, we think it ought to be abolished by express enactment.

We have thus recommended that many powers exercised by the Court of Chancery should be given to the Common Law Courts, and in doing so we have selected those only which seemed to us likely to be exercised there with advantage. It has not been our object to extend, for the mere sake of extending, the field in which the Courts have Common jurisdiction, by giving to the Common Law Courts powers which may be exercised with equal benefit in the Court of Chancery, but simply to prevent the necessity for a resort by either party to both Courts for the purpose of obtaining complete justice where the Court of Chancery at present, in the case of Common Law rights, gives, on the one hand, aid by way of discovery, or a more complete remedy, as by injunction and specific performance, or, on the other hand, restrains the proceedings in Common Law Courts because of the existence of an equitable defence. Indeed it is obvious, that our recommendations, instead of having a tendency to extend the common field of jurisdiction, suggest a contrary and more effectual mode of putting an end to the contest between Courts of Common Law and Chancery by so distributing their jurisdiction as to render their interference with one another impossible. It is our intention and wish, that the result of what is proposed should be ingrafted upon and become part of the Common Law, and the distinction between Common Law and Chancery Law should be so far abolished. If, in addition to this, the Court of Chancery is prohibited from interfering in cases where Common Law rights are thus rendered capable of complete vindication in the Courts of Common Law, and in which, therefore, its interfernce will have become useless, the greater part, if not the whole, of the field of conflict will be done away with by confining the operation of the Courts respectively to subject matters peculiar to each. Thoroughly to effect this it it is necessary to confer upon Common Law Courts power to give, in respect of rights there recognized, all the protection and redress which at present can be obtained in any jurisdiction; and it is upon this principle that we have acted in our suggestions. If they be carried into effect, there will no longer be the spectacle of jurisdiction imperfect in themselves and clashing with one another, but each Court will be armed in itself with exclusive jurisdiction over the subject matter within its cognizance with full power to give all the protection and redress which the law at present affords by means of a plurality of suits. The conflict of jurisdiction will be done away with, because the occasion for it will no longer exist.

We have only to add, that we have given our best attention to the question whether it is necessary to adopt the Procedure of the Court of Chancery in cases where it is proposed to borrow from its remedies; and we have arrived at the conclusien, strengthened by an experience of the working of the Common Law Procedure Act of 1854, that the desired object can be attained as effectually, and with less expense, by means of the ordinary proceedings of the Common Law Courts.

We have thus finished our task; and we submit this, our Final Report, to your Majesty's Royal consideration.

A. E. Cockburn. (L.S)
Samuel Martin. (L.S)
Jas. S. Willes. (L.S)
G. Bramwell. (L.S)
W. H. Walton (L.S)

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

BY JOHN MORRIS, ESQ.

(*Continued from our last.*)

SECOND LECTURE.

Our next subject is the practice of the Instance Court. In connection with this I might be allowed just to refer to the *locality* of the Court and its offices. The Court has for many years past held its sittings in Doctors' Commons; and its offices (*i. e.* the Registrar's and Marshal's offices) are in the immediate neighbourhood. The Court appears, however, to have had notice to quit the hall in which it holds its sittings. Although an Act of last session empowered Government to purchase the site of the College property in Doctors' Commons, terms have not yet been come to with the Doctors, who are, I suppose, and naturally enough, looking out for the best bidder.

I am tempted, here, just to refer to a sitting of the Court about two centuries ago, before its migration to the Commons,

as appearing by an entry in "Pepys' Diary"‡ (Pepys himself was Secretary to the Admiralty in the reigns of Charles II. and James II); the entry is as follows:—"To St. Margaret's Hill, in Southwark,§ where the judge of the Admiralty came and the rest of the doctors of the civil law, and some other commissioners, whose commission of oyer and terminer was read, and then the charge given by Dr. Exton, which methought was somewhat dull, though he would seem to intend it to be very rhetorical, saying that justice had two wings, one of which spread itself over the land, and the other over the water, which was this Admiralty Court. That being done, and the jury called, they broke up, and to dinner to a tavern hard by, where a great dinner, and I with them; but I perceive that this Court is yet in its infancy; as to its rising again, their design and consultation was—I could overhear them—how to proceed with the most solemnity and spend time, there being only two businesses to do, which of themselves could not spend much time. In the afternoon to the court again, where," &c.

All of you who are familiar with the Courts in Doctors' Commons, especially the Ecclesiastical Courts, will remember the quiet, and, if I might so term it, "cosy" mode in which the proceedings were conducted. The proctors were each known to the judge, and were addressed by him, from time to time, by name. No chance for an interloper! Your humble servant happened, some few years since, to be attending the Perogative Court on the hearing of an important will cause, and, having been engaged in getting up the case, he ventured from time to time to convey to the advocates such suggestions as occurred to him, little imagining that he was thereby committing an offence. The old judge bore with the intrusion patiently for a time; but at length he stopped the arguments of counsel, and informed the intruder that it was not allowable, in that court, to make communications to the advocates, except through the proctor. How all this has been rudely shocked by recent legislation is familiar to us all. The Admiralty was the last of our closed courts. I will not ask you to rejoice with me at its having been thrown open; but I do ask you to join with me in the expression of hope, that we shall do our best to prove ourselves worthy of our new privileges.

Pardon this digression from the subject immediately before us—viz. the practice of the Instance Court.

When I first designed these lectures the practice of the Court was my greatest difficulty. Excepting an old book written in Latin, "Clarke's Praxis," there was no treatise on the subject. In America, where, with its large mercantile marine, the Admiralty jurisdiction has received great attention, there are several treatises on the practice, and I am happy to find that we shall not long remain without proper guides in the practice of our own court, two treatises having been already announced, one by Mr. Pritchard, of Doctors' Commons (already favourably known to the profession by his "Admiralty Digest"), aided by his brother Dr. Pritchard; and the other by Mr. Coote, of Doctors' Commons.

With such aid as I could command, I had sketched out some remarks on the practice of the Court, accompanied by suggestions for its improvement, but I gladly cancelled what I had written on receiving, through the courtesy of the registrar, Mr. Rothery (who, I am happy to say, has honoured us with his attendance at both the lectures), an early copy of the new rules, which have only just been issued, and come into operation on the 1st of January next. These rules effect a complete revolution in the procedure of the Court; I commend them to your attentive consideration. They appear to me simple, concise, and practical. For all ordinary purposes, you will, I think, find them a sufficient guide; although it is true the 3rd rule provides that the old practice, previously in operation, shall continue in force, save in so far as it may be inconsistent with the new rules. Those only who have some acquaintance with the old procedure will be able to appreciate fully the great improvements which have been effected in the court by the present judge, of which these new rules are the crowning act.

The principal officers of the court, besides the judge, are the registrar and the marshal. The registrar combines the duties of a registrar and master in Chancery, and something beyond. He attends the court on the hearing of all Admiralty causes—he also attends the Court of Appeal on the hearing of all Admiralty appeal causes—and to him, either alone, or assisted by one or two merchants, all references are made. The registry is open all the year round; and all warrants of arrest are issued by the registrar upon his being satisfied of the sufficiency of the affidavit. Other duties of a special character devolve upon him, but which, as they do not affect the ordinary procedure of the Court, I pass over. The marshal executes the process of the court, and his office is altogether somewhat analogous to that of sheriff at common law. He attends the sittings of the Court, and carries before the judge a silver oar, as the emblem of the maritime jurisdiction of the Court.

There are two modes of procedure—1. *In rem*: 2 *In personam*. The former is the most usual, and we will consider it first.

The first step in a suit *in rem*, after the formal entry of the action, is to arrest the ship, "her tackle, apparel, and furniture"—words which include the whole extent of her owner's interest. The arrest may extend to the freight, if the value of the ship, &c. (allowing for prior claims), is not sufficient to satisfy the plaintiff's demand. In some cases, as in bottomry, where the cargo is liable (which it is not in ordinary cases), the arrest may extend to that also.

The affidavit to ground the warrant need not be made by the plaintiff himself. It is sufficient if it be made by some one on his behalf, and in the latter case the facts may be deposed to on information and belief. The affidavit may be sworn before a commissioner for administering oaths in Chancery.

As the warrant issues on the registrar being satisfied of the sufficiency of the affidavit, the whole proceeding may be accomplished in a few hours.

The warrant is executed by affixing it temporarily to the main mast (and in case it extends to the freight, then also on one of the principal bales of the cargo), and leaving thereon affixed a true copy; and a party is, of course, left in possession. Any one disturbing the party in possession will be liable to an attachment. Dr. Lushington said, pointedly, in a case in which the party in possession was forcibly ejected, that he would not only attach the party who did it, but he added, "If I can bring within reach of the law any persons, who have assisted in executing the dispossession, or have advised it or aided it in any way, I will attach them all."*

When the ship has been arrested, the course of proceeding differs according to whether any party interested appears or not.

If not, the cause formerly proceeded, as it was termed, *in pœnam*, whereby a decree could only be obtained after a certain number of court days, at each of which a formal default had to be entered if there was no appearance. Then, after the right number of defaults, the cause was heard as an undefended one; and the plaintiff, if he made out his case, obtained the first decree, analogous to the *primum decretum* of the civil law, but no sale could take place under the decree, except on what was called an allegation of perishable condition, and for that another order had to be obtained. The plaintiff had no absolute title to the ship, or its proceeds if sold, until the expiration of a year and a day from the date of the first decree, within which time any claimants might come in.

This procedure, founded on the model of the civil law, and well enough suited to a time when there were not any such public means of intelligence as we now possess through the

‡ Vol. i. p. 398, 6th edit. § At the Old Marshalsea.

* *The Bure* 10 Jur., 1123.

medium of newspapers, has been wisely abolished by the new rules, which provide that after the expiration of twelve days from the filing of a warrant, if no appearance has been entered a notice of sale may be advertised in two or more public journals, and if no claimant then appears, the plaintiff may move for an order for sale, and if the judge is satisfied that the claim is well founded, he may order the property to be appraised and sold, and the proceeds to be paid into the registry. Within six days from the time when the proceeds have been paid into the registry, the plaintiff is to file his proofs in the registry, and have the cause placed on the list for hearing, and it will be heard as an undefended one. The proceedings necessarily differ in causes of possession, in which a sale is not sought, indeed cannot, as we have already seen, be had. See rules 24, 25, & 26. A claimant may come in at any time before the decree; but the 38th rule properly provides, that "a party who shall not enter an appearance, until after the expiration of six days from the service of the warrant or citation, shall pay all costs that may have been occasioned by his default."

Under the old practice, the plaintiff could in no case obtain payment of money out of the registry, which had been paid in under a decree *in pœnam*, until the expiration of the year and a day, before referred to, except on bail. This was a very proper precaution in some cases, but it was wholly unnecessary in the great majority of cases; and accordingly, by rule 129, it is now provided that in future "bail for latent demands shall not, unless the judge shall otherwise order, be required on the payment of money out of the registry." In *The Saracen*, 10 Jur. 396; s. c. on appeal, 11 Jur. 253; the nature of the bail-bond, under the old practice, was fully discussed. Whether the bail for latent demands under the new rules will follow the form of bail bond under the old practice I do not know. I should think not, as the precise effect of the old bail-bond seems to have been a matter of doubt; but if the old form should be adhered to, then the case of *The Saracen* is well worth your perusal. See also *The Tecumseh*, 13 Jur. 68.

Instead, however, of alloting the decree to pass by default, any of the persons interested in the ship, as the master, owner, &c., may appear and defend. There are two modes of appearance—viz, under protest, or absolutely. If under protest, the sufficiency of the protest has first to be decided: the cause is heard thereon, and if the protest be overruled, the defendant must then appear absolutely. An appearance under protest is only resorted to when it is intended to dispute the jurisdiction of the Court on the subject matter, and this is done because an absolute appearance is held to amount to a waiver of any defect as to jurisdiction.

After appearance, bail may be given—*i. e.* the bond of the defendant and two sureties, and if sufficient, the ship is released, and suffered to proceed to sea; the security thus substituted for the ship is enforceable by attachment. It is not in the option of the suitor to refuse or accept bail upon the ground of insufficiency. "If it were," says Lord Tenterden, "the shipowner might be deprived of the profit of his ship's employment; the merchant of a market for his goods; both ship and goods might be deteriorated by detention, or overwhelmed with an accumulation of fees of possession, dock-dues, and warehouse charges."*

The cause then, by the old practice, proceeded by libel, allegation, and responsive allegation, and the examination of witnesses. This was the ancient mode of proceeding, called by "plea and proof," as distinguished from what was called "act on petition." The latter has been described by Lord Stowell "as a summary mode of proceeding, in which the parties state their respective cases briefly, and support their statements by affidavits, a form convenient enough in matters of slight interest, and not of very delicate investigation;" but now the new rule provides as follows:—

65. "The mode of pleading hitherto used, as well in causes by act on petition as by plea and proof, are hereby abolished."

66. "There shall be but one mode of pleading in the court. The first pleading shall be called the petition; the second, the answer; the third, the reply; and the fourth, the rejoinder; and the subsequent pleadings, if any, shall be called as they have heretofore been called in causes by act on petition."

67. "Every pleading shall be divided into short paragraphs, numbered consecutively, which shall be called the articles of the pleadings, and shall contain brief statements of the facts material to the issue."

Then as to proofs, the new rules provides as follows:—

78. "Causes may be proved by affidavits, by written depositions, or by the oral examination of witnesses in open court; or partly by one mode, and partly by another."

79. "The proctors in the case may consent to the mode or modes in which the proofs shall be taken; or either proctor may apply to the judge to direct the mode or modes in which the proofs shall be taken."

The present judge, in 1854 and 1855 I think, made rules providing for the printing of the whole of the pleadings and proofs in contested causes, and this is continued by the new rules.

I have already referred to the "preliminary acts" required in collision cases. This provision is continued by the new rules. They are still as heretofore to be sealed up, and not to be opened, save by order of the judge, until the proofs are filed. But the 64th rule contains an excellent provision which will, I should think, in many cases be adopted in practice, and so effect a great saving of expense. It is as follows:—If both proctors consent, the judge may, if he think fit, order the preliminary acts to be opened, and the evidence to be taken thereon, without its being necessary to file any pleadings."

In suits *in personam*, the first step, instead of arresting the ship, was formerly to arrest the person, and the defendant could only be released on gi[illegible]ng bail; but now, as I have already observed, the power [illegible] arrest to compel appearance has fallen into disuse;* and, in fact, until a recent act, 17 & 18 Vic. c. 78, had confirmed it, the jurisdiction to proceed in *personam* was doubted. The first step under the recent rules is a citation against the person. A decree may be obtained by default if no appearance; or if an appearance be entered, the cause then proceeds much the same as in an action *in rem.*

According to Mr. Justice Story,† "the admiralty jurisdiction primarily (originally) acted *in personam*, and now acts *in rem* only as auxiliary to its general authority."

Under the old practice, the judge did not sit in chambers; but the proctors were heard in court on common motions—called assignations which were usually made on court days, after the ordinary business was disposed of. A bell was rung in the Commons to give the proctors notice that the assignations were called on. This would, of course, have been wholly unfitted when the practice was no longer confined to practitioners residing in one locality; and the new rules have, therefore, properly provided for motions and summonses in chambers, on which proctors may be heard, but they can no longer be heard in court—the 141st rule providing that "no motion shall be made to the judge in court save by counsel, or by a party conducting his cause in person."

As I read the new rules, proctors only (and by proctors the new rules mean "any proctor, attorney or solicitor"), and not their clerks, are entitled to appear before the judge at chambers; but at the same time, I hope that that construction will not be put upon the rules, as the effect of it would be to exclude solicitors in large practice, from practising in this court.‡ Solicitors will attend as of course on important summonses;

* Abbott, 10th ed., 540.

* *See The Stephen Wright*. 12 Jur. 732.

† *The Boston, Sumner*, 341.

‡ The Registrar stated to me, after the lecture, that it was not intended, in framing the new rules, to prevent solicitors from being represented at chambers by competent clerks.

but to require them personally to attend on all cases will, I submit, answer no proper purpose. The necessary effect would be, that the practice of this Court would continue in the hands of a class—call them proctors, or what you like. The same facilities ought, I submit, to be given to the ordinary practitioner in this court as he has in the other courts—including, I might remark, the Probate and Divorce Court, which most nearly assimilates to the Admiralty Court.

It was a rule of the old practice, that any act or agreement in a cause, to be binding, should be evidenced by what were called "acts of court;" i.e. should be entered with the minutes in the cause; if not so done, the Court took no notice of it, however distinctly it might be proved† as a fact. This applied particularly to all tenders of money. I assume that the same rule of practice will still prevail, and that the analogous step to acts of court will now be an order at chambers, or an agreement in writing between the proctors, dated and signed in accordance with the provisions of the 155th of the new rules.

I have now drawn your attention to what are, I believe the leading features in the new rules. I have not attempted to go through them seriatim. I have merely selected such portions as appeared to require comment; and if in connection with my remarks you attentively peruse the new rules themselves, you will, I think, obtain a pretty good notion of the proceedure of the Court.

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

We see nothing doing this Session for the Division Courts, and yet the bills last year were numerous enough.

We presume honorable gentlemen find other subjects more interesting, yet the business of the Courts so largely employed by the great bulk of the people is not unworthy of attention.

But if members are indifferent, clerks are supine, and if those who best know what reforms are necessary remain indifferent what can be expected of others?

The fact is nothing effectual will be done without some concerted action, some periodical convention such as we proposed, where well-informed clerks, delegates from each county, could discuss the matters affecting the Courts they are connected with. We have given our mind on this subject, but our advice has met with comparatively little response. We tell officers now that strong interests are at work to *destroy* the courts, and little has been done by those specially interested—nothing as a body—to resist the impending evil.

We shall look anxiously for the returns moved for by the Hon. Mr. Patton, as to the number of increased hearing fees. We have had sad complaints from one county where the increased hearing was charged almost in every case. If true, it was a very great abuse, and most unjust towards suitors.

The fee in such cases should be regulated on the same principle as an arbitrator's fee, according to the nature of the particular case, or the time occupied in hearing it. We would feel obliged to the honorable mover for a copy of the returns.

There is an anxiety to know "what prospect there is of a new set of rules in improved form and suited to the Consolidated Division Court Act."

We are unable to answer the question, but suppose the Board of Judges will not lose sight of the necessity for an early revision. There are now only three on the board, one Judge having resigned, and another, the lamented Judge Campbell, being dead.

The numerous questions that have arisen upon the act since the rules were issued ought to be settled by the Board of Judges, and a further effort be made to secure uniformity in procedure in all the Courts in Upper Canada.

If we might be allowed to suggest, we would recommend that every County Judge should furnish the Board with any points of difficulty that arose in his practice and upon which a rule would be desirable; and also any amendments or improvements that might be desirable in the existing rules.

There are a class of cases termed in England "County Court Curiosities" These are published in a journal like to our own. The English County Courts are similar to our Division Courts, and it has been suggested to us by an old correspondent, that we might give a selection from these cases in our pages. We would be very willing to do so if we thought the proposition would meet with general approval, but as the cases involve quite as much of what is amusing as what is instructive, we prefer asking the opinion of officers. Will they be good enough to give us their views?

We subjoin a case taken at random from the publication before us to let our readers see the description of cases to which we refer:

MALLETT v. THOMPSON.

This was an action brought by the plaintiff, an elderly bed-ridden lady, at East Bergholt, against the defendant, a laborer living at Dedham, to recover £5.

Sarah Mallett, a young woman, proved that the defendant was paying his addresses to her, and they went in company to see the old lady, who thought she was dying. She then expressed her desire to give the defendant £5, to be divided between her grand children after death to purchase mourning, and at a subsequent interview her grandmother told her, in the presence of the defendant, that he had received the money, and he had promised that it should be appropriated in accordance with her wishes. She however got better, and then employed her grand-daughter to try and get the money back, and he said the old lady should have it if she lived and wanted it.

Cross-examined.—She had broken off the acquaintance with defendant twelve months ago next Thursday week, and did not wish to know anything more about him. She had not indulged in writing poetry to the defendant, nor had she ever received articles of dress from defendant exceeding in value the £1 which would have been her share upon the old lady's death. The poetry produced was not her writing, nor had she seen it before. It was as follows:

TO ALL YOUNG MAIDENS BEWARE.

When first I went to service a cook's place I took,
There was the nurse-maid and me, we both had pleasant looks;
A young man came a courting me, and sure it was no joke,
He got from me a five pound note and bought a flash great coat.
Therefore all young maidens,
That have followers after you,
Be sure you do not stuff them out too much,
Or the day you will have to rue.

† *The Saracen.* 10 Jur. 396; see also *The Mellona*, 12 Jur. 274, where Dr. Lushington declined to enter into the question of an alleged compromise, and adhered to the opinion he had expressed in *The Saracen.*

The defendant was called and said the young woman's statement was correct in the main, but asserted that the money was given him by the old lady in consideration of little acts of kindness which he had performed in taking her cakes and spirits and other articles.

This was confirmed by defendant's father, who said the old lady had told him about giving the money to his son whilst the acquaintance between his son and the grand-daughter was being carried on

Philbrick regretted that he could not produce the testimony of the old woman who was bed-ridden, for he was instructed that the story told by defendant and his father was a fabrication, and he argued that it was hardly probable she would have presented the money to defendant when she was at the time receiving parish relief.

Considerable contradiction and cross-swearing took place as to a boy named Silly having been sent by the authority of the father to offer £3 of the money, which he positively denied, and the case was adjourned for the production of other witnesses.

OFFICERS AND SUITORS.

CORRESPONDENCE.

To the Editors of the Law Journal.

Norfolk County, April 9th, 1860.

GENTLEMEN,—I sent a transcript and certificate of judgment, stamped with the seal of my court, to a Division Court clerk of another county, who returned said transcript as being illegal, requesting me to attach a seal: that the stamp of the court was not sufficient.

Now I am under the impression that the stamp of the court to any and every process answers every purpose, and meets the requirements of the law, *vide* 22 Vic. cap. 19, sec. 4. Revised Statute says, "Every court shall have a seal, with which every process of the court shall be sealed *or stamped*" It would appear from the act that a stamp is sufficient. If not, it is a very important matter to know. What is your opinion?

Is a bailiff entitled to two and a half per cent. upon property levied on but not sold by him? I know that some bailiffs take the per centage without selling. All that is said in the act on the subject is in the schedule of bailiff's fees, which says, "That there be allowed to the bailiff, *upon the sale* of property under any execution, the sum of two and a half per cent. upon the sum realized." I do not see how they can take the per centage except they sell. What is your opinion?

Yours truly,
DIVISION COURT CLERK.

[We agree with our correspondent on both points.

The objection to stamping is very absurd. The plan is that in use in nearly all the large courts in Upper Canada, and it is a clearer and more economical method of impressing the seal than in the old way, besides being more difficult to counterfeit.—EDS. L J.]

To the Editors of the Law Journal.

April 9th, 1860.

GENTLEMEN,—An award made by three fence-viewers has been placed in my hands as Clerk of Division Court. See Con. Stats., cap. 57, sec. 16, sub-secs. 10 and 11.

The award commences with style of cause, as if suit commenced. The three arbitrators have signed award, and affixed their seals in the presence of a subscribing witness, and the execution of the instrument is proven by the oath of the witness.

The plaintiff is awarded ten dollars, to be paid in forty days by defendant, and six dollars and eighty-six cents as costs, to be paid in ten days. I have entered it as a suit in court, in the ordinary way, and will send each party a copy. It appears by the last quoted sub-section, that I may issue an execution at the end of forty days.

I do not find that the *Law Journal* has at any time commented upon this branch of division court clerks' duties, and there are no existing forms—at least, that I am aware of. You will confer a favor on the writer, and possibly on other clerks, by giving full information of the law on the matter, as relates to our duties, and suggesting the various forms to be used—especially the execution.

Respectfully yours,
A DIVISION COURT CLERK.

[Our valued correspondent suggests an important point for consideration, and we shall at an early day review the enactment in question. The provisions are by no means as clear as they ought to be, and it is not easy to say what the practice under them ought to be.

Here is a subject on which the Board of Judges would do well to establish a practice, and provide suitable authoritative forms.

The course taken—sending a copy to defendant—seems proper; but what occasion to give the plaintiff one, for we do not see that the clerk should act, unless set in motion by the plaintiff.

In the case mentioned, costs appear to be included in the award; but this seems wrong, for the 18th section provides that the costs disbursed under the act shall, upon the plaintiff making affidavit of their payment, be *added* by the division court clerk *to the execution*. The costs referred to in sub-section eleven of section sixteen, as we understand it, refers to the costs in the division court.

Without the copy of award before us, we cannot venture to give a form of execution; but would suggest, that under a recital of the necessary facts, the "determination" or award should be set out *verbatim*.

We would feel obliged by information from any clerk who has had occasion to act under the clause, and with copies of the forms used; and in treating the subject, we shall of course credit any materials supplied to their proper source, unless directed not to do so.

It would also be of material service, and probably assist to uniformity if some outline of proceedings, *anterior* to the determination, was given in this Journal. Our correspondent has a very thorough acquaintance with municipal matters—will he or others assist in the object proposed?

It is by contributing items in this way, that the *Law Journal* may be made more extensively useful, and our labors rendered more effectual. If those interested would contribute from their experience, the aggregate would form a valuable fund for the information of all.—EDS. L. J.]

To the Editors of the Law Journal.

London, C. W., April 20, 1860.

GENTLEMEN,—My attention has been directed to the April number of your journal, where a Mr. Marcus Gunn details certain grievances supposed by him to have been suffered in the Division Court of which I am Clerk. I would not have noticed a charge emanating from such a source, but as you have expressed an opinion on an untruthful statement, and when charges are made against public officials connected with the Court, I feel it my duty to address you.

Mr. Gunn charges that he was summoned to appear at the Division Court; that the Judge, on hearing his defence, dismissed the case; yet, that it was brought forward at the next court; was then taken out of its turn, and disposed of in his absence; that no person appeared for the plaintiff; and then he states the merits of his defence.

In answer, I say it is untrue that the case was dismissed at first;—on the contrary, it was postponed to the next court for the accommodation of Mr. Gunn, to procure the evidence of Mr. Thomas Gordon, and whose evidence, with strange inconsistency, he impugns, in his letter to your journal, in the following words: "accepting the assignor's absurd affidavit, being interested in the estate assigned." At the following court the Deputy Clerk (I was absent from the country) states, and his statement is confirmed by several others, that the case was put at the foot of the list, to enable Mr. Gunn to procure the evidence of Gordon, and that it was not again taken up until reached in numerical order, as ordered by the Judge; that judgment was then given in favor of the plaintiffs, who were represented by an agent.

The merits of the case are briefly these: Messrs. Hope and McKay, as assignees, sue Mr. Gunn for an open account for groceries, for the sum of 17s. 4d. Gunn defends, stating that he had given a note of one Parks to settle this account; but when judgment was given, as above stated, Gunn applies for a new trial, and Mr. Gordon's (the witness required by Gunn) affidavit is filed to oppose the application. In this he contradicts on oath the whole of Gunn's statement relative to the note, and states it was only taken by them as collateral security, and not paid.

Regretting that your valuable columns should be occupied with this petty matter, the grievance of Mr. Marcus Gunn, which has no existence in fact; and trusting that in justice to me you will give this an insertion,

I have the honor to be, Gentlemen, your obedient servant,

John C. Meredith,
Clerk 1st Division Court Co. Middlesex.

[We think that whenever the conduct of a public official is assailed, that official, or some one on his behalf, should have an opportunity of being heard. Acting in this spirit, we give place to the above. But, while doing so, we must once for all state that our columns shall henceforth be closed as against any further correspondence on the same subject.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—A places an execution in the hands of a bailiff of a Division Court for the sum of $80, who levies, and is notified by B that he holds a chattel mortgage on the goods for $475, and also claims to retain for a year's rent, and serves him with a notice accordingly, the rent claimed being $472, which makes the amount $947, to be made before A can detain the amount of his execution. A, however, tells B that his notification for rent destroys his claim under his chattel mortgage, or that he would sell the goods mentioned in the chattel mortgage to make the rent. B then said, I will allow A the amount of his execution, and go on and sell the goods for my rent and chattel mortgage claim, $947, and pay it out of the same, which he did. In the meantime the bailiff received a notice from one C, that she holds a chattel mortgage against the same goods, filed for $600. A clerk of an adjoining division issued several executions against the same goods, directed them to the bailiff of his own division, and delivered them to one of the plaintiffs, who sends them to the bailiff who first seized. The executions not being directed to him (the latter bailiff), or indorsed to him, by the outer bailiff or any judge, in order to aid the outer bailiff to collect the outer executions, he agrees to hold them. The goods are sold, as first said, to pay the first execution, the rent, and as far as possible the first chattel mortgage. The bailiff then pays the first execution, and the rent, which he knew to be correct; but as there were six months' more rent become due, and as there was a dispute between the two holders of the chattel mortgages, he does not pay either, but retains in his hands the balance of money, to be afterwards appropriated as the law may direct, but offers to pay B if he would indemnify. The outer executions, handed to him to be collected, as a friendly act, from the outer division, the bailiff who levies on the goods returns to the bailiff of the outer division, indorsed on one of them, "Accounts not made up; when accounts made up, if any funds to apply, will remit," or words to that effect. In the meantime B and the tenant or mortgagor against whom the chattel mortgage was, had a settlement, and it was agreed that the mortgage of B ($475), in the bailiff's hands, should be paid to B. Whilst the dispute between C and B about the two mortgages was open, the bailiff was sued for a false return, on one of the executions sent from the outer division, alleging that he should have made the money on the same, the bailiff to whom those executions were directed, and who should have returned the same, not being sued, and judgment was given against the first bailiff.

Now, the question is, could a judgment be legally given by a judge in the face of these facts? Was the first bailiff really obliged to return or act, or could he legally act on those outer executions, not indorsed to him or directed to him, and are the sureties liable for such a judgment? If the bailiff does not pay, can a Division Court thus take the money from the chattel mortgage holder and landlord, without first ordering an interpleader trial — or rather, should not the judge have refused to interfere as against the first bailiff, and told the execution creditor of the outer execution to cause the bailiff of the outer division to interplead? Or is the clerk of the outer division, or the bailiff of the outer division, or the bailiff who first seized, liable?

Your opinion—so impartial in many difficult cases relating to Division Court practice—is respectfully requested.

Yours, &c.,

John Cool,
Bailiff Tenth Div. Court Co. Peel.

Brampton, April, 1860.

[We do not answer Mr. Cool's question, "Could a judgment be legally given by a judge on these facts?"

The conductors of the *Law Journal* do not mean to sit in judgment upon a judge's decision, and cannot further notice the point, on the statement of the losing party. With a full report of the case before us, the evidence *pro* and *con*, and the grounds of the judge's decision, its value might be examined; but at present we can only express an opinion on the general point, that a bailiff to whom a writ is not directed, and who does not undertake to act for the bailiff to whom it is directed, is not liable to the plaintiff in the action; and we think that a recovery against a bailiff in an action in the Division Courts, is not conclusive evidence against his sureties.

The rest of Mr. Cool's letter comes within a class of questions which we do not, as Editors, undertake to answer.]—Eds. L. J.

U. C. REPORTS.

QUEEN'S BENCH.

HILARY TERM, 1860.

In re. Richard Ibson v. The Provisional Corporation of the County of Peel.

Stat. 19 Vic. cap. 66, sec. 4—County Town, County of Peel—By-law—Resolution.

It was enacted by the Provincial statute 19 Vic cap. 66, sec. 4, that the Provisional Council of the County of Peel should, at some meeting to be held after the 1st February, 1857, "proceed to select a place for the county town of the said county," and that "the place so selected shall be the county town of Peel."

Held, 1. That the selection of a place by *resolution* of the Council was a sufficient compliance with the terms of the statute. 2. That it is not in the power of the Council, having once selected the place to alter by by-law or otherwise, the place selected.

R. A. Harrison obtained a rule *nisi* to quash a by-law of the county of Peel for selecting a place for the county town of the county of Peel, passed 26th January, 1860, on the ground that the corporation, having on the 7th December, 1859, selected Malton as

the county town, pursuant to the statute 19 Vic. cap. 66, was disabled afterwards to pass the by-law moved against, for that Malton was then, by their previous appointment, the county town.

The by-law recited that under the statute 19 Vic. cap. 66, the Provisional Council of the County of Peel were authorized and directed, at some meeting of the Council to be held after the 1st February, 1857, to proceed to select a place for the county of Peel, and that the place so selected should be the county town of the said county, and that it was necessary and expedient to make such selection by by-law; and that the village of Brampton be, and the same was thereby selected as the place for the county town of the said county of Peel; and that the said village of Brampton being the place so selected, should be and was thereby declared to be, according to the statute, the county town of the said county of Peel.

It was shown by affidavit that on the 7th December, 1859, the Provisional Municipal Council of the county met, according to the 4th clause of the statute, to select and appoint the site for the county town, and that a resolution appointing Malton the county town was passed by a vote of six to five of the members present.

This resolution, and others passed at the same meeting, making certain arrangements in pursuance of the first resolution, were certified under the corporate seal, with the signature of the clerk. At the time of passing the resolution, the Council had no seal.

It was shown, further, that at a meeting of the Provisional Council, held on the 29th December, 1859, steps were taken respecting the selection of ground upon which to erect a gaol and court-house in the village of Malton, and respecting the providing plans for such buildings.

On the other hand, it was stated in an affidavit that the meeting of the 7th December, at which the resolution was passed selecting Malton for the site of the county town, was a meeting held by adjournment from a meeting that was held on the 5th December (two days before), and was not a meeting called for any special purpose, or with any formality out of the ordinary course; that at the next meeting of the Council the report made by a select committee, which had been appointed to select ground in Malton for a gaol and court-house, was not adopted; that no land for the purpose had been selected or acquired; and that the plans for the public buildings had not been accepted by the Provisional Council.

Adam Wilson, Q.C., showed cause.

M. C. Cameron and *R. A. Harrison* supported the rule.

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

There seems to have been no statute passed that can affect this matter, since the statute 19 Victoria, chapter 66. For the constitution and powers of provisional councils, who are to take the necessary measures for perfecting the separation of a junior county from another to which it has been united, we must refer to the statute 12 Victoria, chapter 78.

Taking that act and the statute 19 Victoria, chap. 66, together, it seems clear that the reeves and deputy reeves for the time being, chosen within the junior county, are to compose the provisional council, which may continue to exist and act as long as may be necessary for carrying out the powers committed to it.

There is nothing in the objection taken, in arguing this case, that the provisional council could not continue after the first year.

The delay in selecting a site for a county town is not accounted for, and does not seem to me to be material, looking at the terms of the special act 19 Victoria, chapter 66.

The first question, then, is, as to the selection made of Malton, at the meeting of the 7th December, 1859, was that done in a sufficient manner? I think there is no ground on which we can determine otherwise. It does not appear in any way before us, when the vote of the municipal electors of the county was taken, which sanctioned the separation from the county of York. For all that appears, it may have been shortly before the selection of the county town; but, however that may be, it is not shown that it was not declared and understood, at the meeting of council previous to the 7th December, that at the meeting to be held on the 7th December the council would proceed to select the site of the county town; nor is it shown that all the members of the provisional council were not attending at that meeting.

The Provisional Council, it is sworn, had then no seal; and if they had one, I am not of opinion that the affixing it to the resolution naming the site of the county town would have been indispensable, or that the act was one which could only be done under seal; for it was not an act divesting the corporation of any interest, or contracting any engagement with a stranger, or for the purpose of creating any legal interest or authority: it was simply an expression of their choice, made in pursuance of an act of Parliament which required them to select. And I do not think that a by-law was necessary, though it would have been more becoming the occasion to have used that formality. (Grant on Corporations, 51-57.)

The statute does speak, in the 5th section, of certain acts to be done by by-law *or otherwise*. In the 2nd section it directs a certain other act to be done by by-law; and in regard to this matter of selecting a county town, it does not prescribe with what formality it shall be done. It required, I think, to be done at least by a resolution properly put and carried, and entered on the minutes of the corporation, but not necessarily by a by-law.

The next question is, whether, if Malton was selected in a manner sufficient under the statute, it was in the power of the corporation to change the selection. In my opinion it was not, for they had no general continuing authority over the matter. They were merely empowered to act *pro hac vice;* for the statute indeed says in express words, that the place selected by them at some (that is to say any) meeting to be held by them after the 1st February following the vote of approval of the separation by the inhabitants, "shall be the county town of Peel." There can be no doubt that the Legislature so intended; for the inconvenience attending the exercise of an unlimited power of altering such a decision, would be very great.

I fear it is but too obvious, from the papers before us, that the case may be found to call for legislative interference; for there is an appearance of its being difficult to carry out the selection which has been made, from the difference of opinion existing in the Council.

Rule absolute to quash the by-law with costs.

CHAMBERS.

GEORGE H. GORDON, JUDGMENT CREDITOR, JACOB BONTER, JUDGMENT DEBTOR, AND DURHAM OCKERMAN, GARNISHEE.

Garnishee—Garnishee order—Setting aside—Direction of execution.

Where the garnishee (a deputy sheriff) after the lapse of ten months, applied to set aside an order ordering him to pay to the judgment creditor the debt alleged to be due by him to the judgment debtor, upon the ground that when the garnishee order was made there was no such debt, and that he the garnishee was ignorant of the nature and effect of the proceedings being taken against him the application was refused.

A writ of execution against the goods and chattels of a deputy sheriff, may be directed to the sheriff of the County in which the deputy resides, and ought not to be directed to a coroner of that County.

In such a case plaintiff was allowed to withdraw his writ of execution and amend it by directing to the sheriff and not the coroner.

The garnishee obtained a summons calling on the judgment creditor to shew cause why the order of Wm. Smart, Esq., Judge of the County Court of the County of Hastings, made in this matter bearing date the first day of February, 1859, ordering the payment of a debt alleged to be due from the garnishee to the judgment debtor, to be made to the judgment creditor by the garnishee, and in default thereof that execution might issue out of the County Court of the County of Hastings, and why the writ of *fieri facias* against goods and chattels issued thereunder, and all subsequent and other proceedings thereupon, and on the said order should not be set aside with costs, and an issue directed to be tried between the said garnishee and the said judgment creditor, or why such other order should not be made as to the court or judge should seem meet on the grounds that there was not at the time of the issuing in this matter of the garnishee order attaching the debt and summons dated the 22nd day of January last past, any debt due or accruing due from the said garnishee to the said judgment debtor; nor has there been at any time such debt, and on the ground of merits—and for irregularity in issuing the said order for payment or execution as shewn in the affidavits and papers filed—and on the ground that the writ of *fieri facias* was directed to the Coroner of the County of Hastings, instead of to the sheriff, and on the other grounds disclosed in the affidavits and papers filed, or why the said writ of *fieri facias* and all subse-

quent and other proceedings thereon, should not be set aside with costs, on the ground of irregularity in this that the same was directed to the Coroner of the County of Hastings, instead of to the sheriff of the same and upon other grounds and affidavits filed

By the papers filed it appeared that an order to attach a debt due by the garnishee to the judgment debtor, was obtained from Sir J. B. Robinson, Chief Justice, in Chambers, on the 22nd January, 1859, and by that order the garnishee was directed to attend before the Judge of the County Court of the County of Hastings, at such time and place as the said judge should appoint to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment creditor.

Upon that order the 195th and 196th section of the Common Law Procedure Act of 1856, were endorsed conveying to the garnishee intimation of the consequences which would follow from omitting to attend before the judge at the time and place appointed by him, and the appointment of the Judge of the County Court for the attendance of the garnishee before him on the 27th day of January, 1859, at 12 o'clock noon, at his Chambers in the Court House, in Belleville, was also endorsed.

The order and appointment were served on the garnishee on the 25th January, but no notice was taken of them, and it was alleged by the garnishee "that at the time he was completely ignorant of the results of non-appearance or a garnishee summons."

The County Court judge on reading the order attaching any debt due to Bonter, in the hands of the garnishee, and calling upon such garnishee to appear and shew cause why the amount of such debt should not be paid to the judgment creditor, and on proof of service of that order and his own appointment in conformity with the statute, made an order on the 1st February, 1859, "that the garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor, or so much thereof as might be sufficient to satisfy the judgment creditor, and that in default thereof execution might issue for the same out of the County Court of the County of Hastings.

On the 14th February, 1859, an affidavit was made by Mr. G. E. Henderson, attorney for the plaintiff, "that the garnishee Ockerman had not paid the debt due from him to the judgment debtor or so much thereof as would satisfy the judgment debt, but made default therein—and that a copy of the judge's order directing such payment to be made was served upon the garnishee on the first day of of February, 1859, by Byron Moffat Britton, as he was informed and believed. On the order for execution to issue in default of payment forthwith, and the affidavit of non-payment the plaintiff's attorney took out execution on the 14th February, 1859, for the sum of forty pounds, being the amount stated in the affidavit filed when the attaching order was obtained.

G. E. Henderson for plaintiff. *J. Bell*, of Belleville, for garnishee.

McLean, J —The garnishee moves after a lapse of ten months, to set aside the order of the County Court Judge *with costs*, on the ground of merits, and on the ground of irregularity, but the summons does not point out the irregularity complained of, it refers to the irregularity "as shown in the affidavits and papers filed."

This is of itself an irregularity on the part of the applicant as the summons ought to point out the specific irregularity complained of—but not being objected to on the merits it is not necessary further to advert to it.

Looking at the affidavits, I find it is alleged that the service of the order of the Judge of the County Court for the payment of the money and the issuing of execution in default, is not made by the person alleged to have served such order, and that in the order for payment the original attaching order of the 22nd January, 1859, made by Sir J. B. Robinson, C. J , is stated as having been made by Wm. H. Draper, C. J., C. P.

As to the first of these alleged irregularities the affidavit merely states that a copy of judge's order was served on the 1st February, by Byron Moffat Britton, as the deponent was informed and verily believed.

The objection to that is not that there was no service or no affidavit of service, but that such affidavit was made by the person who served the order.

It is not attempted to be denied that the order was actually served—and as that was all the garnishee had a right to expect before execution was issued against him, he cannot now upon such an affidavit as he has made, take advantage of any such irregularity as he has stated.

Then as to the order being by mistake alleged to have been made by the Chief Justice of the Common Pleas, instead of by Sir J. B. Robinson, Chief Justice, it is impossible to attach any importance to the objection.

The papers shewed clearly by whom the order was made, and if the Judge of the County Court had in the order made by him, omitted any reference to the attaching order, his order could not on that account have been considered irregular so that it could be set aside.

It is quite clear, I think, that there is no irregularity in the proceeding up to the time of issuing execution, which can require the judgment to be set aside.

Then as to the merits, the defendant in his affidavit, states very unequivocally, that he had not at the time the attaching order was served upon him, any monies in his hand belonging to Bonter, and that he was not at that time indebted to him in any sum whatever—while Mr. Henderson, swears as positively that before the attaching order was applied for, the defendant admitted that he owed Bonter a sum of £40, that the order was applied for with the defendant's knowledge and consent, for the express purpose of attaching that sum, and that the defendant cautioned him not to let Bonter know that the order was applied for on information obtained from him, for fear that he should be annoyed by such information being given.

These statements are not the only ones which are wholly irreconcilable in the affidavits of the defendant, and Mr. Henderson. The defendant swears that he never had such a conversation with Mr. Henderson, as that stated in Mr. Henderson's affidavit—that he never told Mr. Henderson that there was any sum of money coming to Bonter, through him; and that the attaching order was not obtained with his knowledge or concurrence.

It is difficult to suppose that statements so diametrically opposed to each other, can have been made through misapprehension or mistake. If the conversation stated by Mr. Henderson did take place, it seems almost impossible that the defendant could have forgotten it, unless indeed, his mind was at the time under some strange influence. Yet if his affidavit is to be believed, Mr. Henderson must have imagined or fabricated the whole of the conversation with defendant, on which as he alleges his application for an attaching order was founded. These facts are certain and seem strongly to confirm Mr. Henderson's statement, that the attaching order was applied for, and obtained, that it was served on the defendant with the appointment of the County Court Judge, of the time when cause was to be shewn why the money in defendants hands payable to Bonter, should not be paid over to Gordon, his judgment creditor; that no notice was taken or cause shewn by the defendant, that an order on defendant to pay over the amount to Gordon, was made by the County Judge and served on him--but defendant still made no objection, and that when the execution actually issued against him, defendant told the Coroner in whose hands it was placed to hold on or delay a few days and he thought it would be settled, or something to that effect. Of the affect of all their proceedings, the defendant holding the position of deputy sheriff, now professes to have been ignorant—and desires that the judgment shall be set aside in order to give him now an opportunity of doing what he ought to have done when the attaching order was served on him in January, 1859.

I cannot allow ignorance to be a sufficient excuse to the defendant, for allowing the plaintiff to proceed from step to step against him, till a judgment and execution have been obtained. After the delay which has occurred and the total indifference and inattention which the defendant has shewn to his own interests, if his statement be true, I think the defendant is too late in making this application, and that the summons must be discharged.

The execution has been directed to the Coroner and placed in his hands—that is undoubtedly incorrect. The deputy sheriff has authority only from his principal, but cannot be recognized as holding the position of sheriff. Any execution therefore against him must be directed to the principal. In the case of *Letsom* v. *Bickley*, 5 M. & S. 144, it was held that it was irregular to direct a *testatum capias* to the Coroner, where one of the two sheriffs of

Bristol, was party to the suit, for it ought to have gone to the other. Process should be directed to the sheriff or sheriffs of the County where the defendant is supposed to reside, or if one of the sheriffs be a party, to the other, or if both sheriffs are parties, the Coroner and if he also be a party to Elisors named by the master in the Queen's Bench, or prothonotaries in the Common Pleas. *Andrew* v. *Sharp* 2 W. Bl. 9; *Grant* v. *Bagge*, 3 East.

The plaintiff under these circumstances, may withdraw his execution from the Coroner and amend it by directing it to the sheriff of the County of Hastings.

READ, LEITH AND READ v. COTTON AND MANNING.

Attorney—Action on bill—Reference—Consol. Stat. U C p. 420, s 30.

The court has no power to refer a bill to taxation after it has been delivered for twelve months, unless under special circumstances.

The fact that an action is brought by an attorney on a number of bills delivered by him in the course of several years, during all which time defendant was his client, is not a "special circumstance," within the meaning of the act

Qu.: Is an overcharge, in the absence of fraud, a "special circumstance"?

This was an action brought on attorneys' bills, and *Robert A. Harrison* applied for the usual order to refer to taxation, with leave to dispute retainer as to a portion of the business done.

The facts were shortly as follows:

From 1854 down to September 1858, the plaintiffs were the attorneys of the defendants, who, being contractors in large business, were involved in much litigation.

In an important arbitration matter in 1855, some thousands of pounds were received by plaintiffs for defendants. Plaintiffs had then a large claim for costs. Bills with items were given to the defendants, and money retained to pay this claim. Defendants objected to the amount. Plaintiffs were always willing to have the amounts adjusted, and at last a reference to two professional gentlemen was agreed to in writing by the parties. Afterwards the defendants, to avoid the trouble and expense of the reference, came to a settlement with the plaintiffs. The latter made a considerable reduction in their claim, and the matter was closed.

The plaintiffs continued for several years doing business for the defendants, and every half-year rendered full bills of costs to the defendants. Many bills were thus rendered. No dispute whatever, or objection to any of the bills, took place, till within a few months before this action was brought. Many letters were written to the defendants in 1859, asking for a settlement, and offering to have the bills taxed. At last, on the 25th January, 1860, a writ was issued.

The defendants did not point out any overcharges, but merely swore that they considered the plaintiffs' charges excessive, &c.

Read, Q.C., showed cause, and insisted that as more than twelve months had elapsed since all the bills had been delivered, there could not be any reference. He cited *Cowdell* v. *Male*, 1 C.B.N.S. 332; *In re. Whicher*, 13 M. & W. 549. He also relied on the words of cap. 35, Consol. Stat. sec. 30: "No such reference shall be directed, &c., after twelve months from the time such bill was delivered, except under *special circumstances*, to be proved to the satisfaction of the court or judge."

Harrison contended that the fact of the plaintiffs' continuing to be solicitors for the defendants during most of the time while the bills were being delivered, was a "special circumstance" under the act; and the statute, which applied to "a bill," did not apply to an action on several bills. He cited the collection of cases in notes to Chitty's Statutes, vol. 1, "Attorney."

HAGARTY, J.—I am of opinion that the settlement in 1855 cannot now be opened by a reference of the plaintiffs' bills. Everything seems to have been fairly done. No pressure is shown, but a constant readiness to submit to taxation; and the defendants, after the agreement to refer, expressly agree to a compromise—waive the reference, and settle the amount due. I refer on this point to *Ex parte Turner*, before the Lords Justices, 1854, 27 Eng. Rep. 555.

As to the bills subsequently delivered, I have come to the conclusion that the defendants fail to show any special circumstances, within the meaning of the statute, to dispense with the twelve months limitation.

Were it the case of an isolated bill of costs delivered to defendants, the matter would be too clear for argument, and I cannot see how the fact of the bills being delivered annually or semi-annually during the several years that the relation of attorney and client continued, can in this case make any material difference.

There is no allegation that this relation in any case operated to induce the defendants not to have the bills taxed They do not say that the plaintiffs made any representation to them as to the charges, or in any way induced them to abstain from inquiry. To my mind, the fact of the defendants' receiving these bills from time to time, and making no objection, and continuing to employ the plaintiffs, raises the presumption that they considered all to be right, and acquiesced in the charges.

It is a most important feature in the case that the defendants do not point to any overcharge, but content themselves with the general allegation that the charges are excessive.

I find it suggested in some of the cases that the "special circumstances" should be "some new matter which has come to the knowledge of the party," who should show that he has used due diligence in applying to the court on learning it." (See *In re. Whicher*, 18 M. & W. 549.)

Lord Cranworth seems to adopt the same view, *In re. Barnard*, 2 D. G. M. & G 359: "If special circumstances are allowed to be urged after a lapse of time, they must be circumstances which the party must show that he could not reasonably be expected to have urged before." Knight Bruce, L. J., says, "A mere overcharge cannot, in the absence of fraud, be taken to amount to a 'special circumstance,' to tax the bill after all that had been done." In this case judgment had been obtained for the costs.

Most of the cases on this subject are in equity; I have examined the following: *In re. Wells*, 8 Beav. 416; *In re. Shrewsbury* v. *Leicester*, Ry. Coy. 20 L. J. Chy. 325, 5 Eng. Rep. 43; *In re. Bennett*, 8 Beav. 467; *Ex parte Pemberton*, 19 Eng. Rep. 489; *In re. Tyson*, 9 Beav. 117; *In re. Williams*, 21 Eng. Rep. 551; *In re. Harrison*, 10 Beav. 57; *In re. Dickson*, 28 Law Jour. 153, 3 Jur. N.S. 2[illegible]; *In re. Williams*, 15 Beav. 417; *In re. Barnard*, 2 D. G. M. & G. 359, 15 Eng. Rep. 298; *Blagrave* v. *Routh*, 3 Jur. N.S. 39; *In re. Strother*, 30 Law Jour. 633, Jur. N.S. 736. At law, I find, *In re. Deardon*, 9 Ex. J. 10 (dissenting from *In re. Harrison*, 10 Beav. 57), it is said to be a matter for the discretion of the court. The Chief Baron says, "The very object of the statute was to give such a discretion as not to fetter the exercise of it so as to stand in the way of justice being done between the parties in a case newly arising." The late case of *Cowdell* v. *Male*, cited by Mr. Read, seems to assent to the opinion that a general allegation of overcharges does not amount to a "special circumstance."

The defendants here are not shown to be ignorant men, not likely to understand their rights. They do not suggest that any deception was practised, or inducement held out, to prevent them at any time from ascertaining the correctness of the plaintiffs' charges. It is not necessary here to decide whether the bill should be referred to taxation after twelve months, in a case in which some very gross overcharges were pointed out—such overcharges as perhaps (in the language of several of the equity cases) might *amount to fraud.* After the lapse of several years, it is well known how difficult it becomes to prove all the items of account between attorney and client. The statute creates a bar after twelve months, unless special circumstances are shown; and it now seems conceded that the courts cannot act independently of that statute in their common law jurisdiction.

I think the defendants fail to bring their case within the exceptions, and therefore I discharge the summons to refer.

Summons discharged, without costs.

ELECTION CASE.

Before the Hon. Judge ARMSTRONG of Ottawa. *Reported by* W. DUCK, ESQ., *Barrister-at-Law.*

REGINA EX REL. HORNE v. CLARK.

The Municipal Act—Resignation of Candidates.

Where at an annual municipal election one of three candidates, of whom two were to be elected announced on the second day, between 10 and 1 o'clock, his retirement from the contest, whereupon, the returning officer immediately closed the poll, and declared the others elected, one of whom then thanked the electors and delared his acceptance of the office, and afterwards, at the first

meeting of the Council, made the declaration of office, and a writ of summons in the nature of a *quo warranto* was applied for and issued, not within six weeks after the election, or within one month after the declaration at the close of the Poll by the defendant, of his acceptance but within one month after the making of the declaration of office, *Held*, it not being shewn that the relator was present at the close of the poll or had ever learned what then took place, that the application for the writ had been made in time.

Semble that where more persons are proposed than are to be elected, and all afterwards retire but the number to be elected polling having begun, the Returning Officer cannot close the poll, unless under the circumstances stated in the 97 sec. of the Municipal Act.

The facts sufficiently appear in the judgment.

Armstrong, Co. J.—On the 15th February last, the relator applied for a summons in the nature of a *quo warranto* to remove Mr. Sparks from the office of alderman for this city, and filed affidavits alleging that defendant is interested in a contract with the corporation, and therefore disqualified. A writ is ordered, issued and served, and on the 6th, instant, the defendant, by Mr. Ferris, his attorney, appears and files affidavits, shewing that the election complained against, took place on the 2nd and 3rd of last January, and that defendant on the latter day publicly accepted the office, and contends that the application for the writ not having been made until after the lapse of six weeks from the election, the relator is too late in his application.

Mr. Ferris admits that if the application is in time, the relator is entitled to succeed.

The relator admits that his application was not made within six weeks of the election, but as it was made within a month after the defendant took the oaths of office, which he did on the sixteenth day of January, his application is in sufficient time according to the meaning of the 128 sec. of the municipal act, and argues that the poll being closed on the second day of the election before the hour of four o'clock, there could not be such an acceptance of office as would preclude him from objecting to Mr. Sparks' qualification, if his application be made within one month of the defendant's formal acceptance, by taking the necessary oaths.

The question, therefore, for my decision, is narrowed down to one point, and I regret to say, there is no case in the books that distinctly settles the question.

It appears by all the defendant's affidavits, that there were three candidates for the office of alderman, and only two required; on the second day of the election, one of the three, McHenry, between the hours of ten, a.m., and one, p.m., retires from the contest and *immediately* after his doing so, the returning officer closed the poll and declared Mr. Sparks and Mr. Scott, elected aldermen, and that Mr. Sparks then addressed the electors, announcing his acceptance of the office, and on the 16th of January took the oath of office.

The words of the statute are "if within six weeks after election or one month after acceptance of office by the person elected, the relator shews by affidavit to any Judge reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected was not duly elected, the Judge shall order a writ, &c."

It is clear that a qualified relator has in all cases six weeks after the election to commence his proceedings, but in no case which I have yet seen, is it laid down, that he may not have a longer time under certain circumstances.

I am of opinion that cases may arise in which a longer period than six weeks might elapse after an election, before a relator would be in a position to proceed; for instance, a party might be elected in his absence or without his consent, and it is not until he has done some act from which his acceptance of office can be inferred, that a relator would be in a position to sustain a writ of *quo warranto* against him. It cannot be said that a man usurps an office until he has done something from which his acceptance can be inferred. In case a party without his concurrence were elected, the first evidence of his acceptance might be his taking the oath of office, which might possibly be long after the period of six weeks from the election. If such a case were to occur, I cannot see any reason why a relator might not institute proceedings to remove a disqualified individual at any time within a month after he took the oath of office. This is established by the judgment of C. J. Macaulay, in *Regina ex rel Roseburgh* v. *Parker*, 2 U.C. Cham Rep 15, in which he says six weeks are allowed to impeach an election, at all events, although the office may have been accepted for more than a month, but that if the application be not made within six weeks, then the test is whether the office has been accepted more than a month previously, showing that an application may be sustained although made at a time more than six weeks after the election.

In the case of *Regina ex rel Linton* v *Jackson*, 2 U.C. Cham. Rep. 26, to which Mr. Ferris referred, it appears the defendant publicly accepted the office at the close of the poll, on the second day of the election, in the presence of the relator and other electors; and as the affidavits state the relator (who was one of the candidates) acknowledged himself that he was beaten by Jackson. Mr. McKenzie for the defendant urged that the application was too late not having been made within a month from the acceptance of office which, he contended, took place at the time of election, as is contended in this case. In *Reg. ex rel. Linton* v. *Jackson*, the election was held on the 6th and 7th Jan., and application was made on the 11th of February. Mr. McKenzie seems to have urged this point strongly on the occasion, and Mr. Chief Justice Draper, goes into the question at considerable length; he gives no decided judgment upon it, but decides the case upon its merits I however think, that had he been of opinion that Jackson's public acceptance of office when he was elected, was that acceptance which the statute intended that all persons objecting to his election should be governed by, in their proceedings to remove him from the office, the learned Chief Justice would not have gone into the merits of the case as he did, but would have at once dismissed the relators case, for it was clear that proceedings were not commenced until after a month from such acceptance although, within six weeks after the election. He asks, "what is an acceptance of the office?" and says that he does not find in the statute any provision pointing out any distinct form or mode of acceptance, but the section of the act which requires the oath of office to taken before entering upon its duties, would appear, at all events, direct proof of acceptance, but admits that an acceptance may be evidenced otherwise than by taking the oath. Further on in the same case, he says, that in his view of the law, "the acceptance took place on the 7th of January, and the writ moved for on the 11th of February, more than a month after the acceptance, but within six weeks of the election was sufficient;" but in that case there does not appear to have been any other evidence of acceptance, than Jackson's public acceptance when elected. Again, the learned Chief Justice says, "The defendant contends that whenever there is an acceptance, the application must be made within a month from the date thereof, and under any circumstances within six weeks from the election; the relator, on the other hand, contends that he has six weeks from the day of election, at all events, and a further time of one month from the acceptance of office, if that month extends beyond six weeks after election. The opinion I have formed," he says, "on the merits, renders it unnecessary for me to found my judgment on this point, and I therefore abstain from pronouncing a judgment upon it, though I should think it prudent not to delay proceedings to set aside an election, beyond the six weeks;" and further, "If a consent before election, to be put in nomination, may subject a party to costs, should his election be contested and he should disclaim? I do not see why a declaration publicly made immediately the result of the election is promulgated by the returning officer, may not, in the absence of any provision in the statute, be considered as evidence of acceptance;" no doubt it would so far as to render him liable to a penalty for not taking the oath of office, and yet it might not be conclusive evidence of acceptance.

This is the strongest case put by the defendant, and although the Chief Justice by no means decided the point, still were the two cases, this and that of *Reg ex rel. Linton* v. *Jackson*, in all points analogous, I might be inclined to hold that the relator is a day too late in his application. In the case just refered to, the relator himself was a candidate, and present at the regular close of the poll, admitted the defendant's election, and heard his public acceptance of office, and the charge against the defendant was want of property qualification; in this case, the ground of objection to the defendant is, that he has an interest in some contract with the Corporation, which in all the cases is declared to be an insuperable objection to holding a seat in the Council. The slightest ground for believing that a party has a pecuniary interest, which may

possibly become a subject of discussion in the Council, is sufficient to disqualify any man from sitting in the Council; witness the very recent case of *The Queen on the relation of Bland* v. *Figg*, 6 U. C. Law Journal 44.

The manner in which the election in this case was closed, is not free from strong objections to its legality, and therefore leads me to doubt that any declaration made by Mr. Sparks on the occasion, could be considered as an acceptance, even if it were shown that the relator was present at the time, which is not stated in any of the affidavits before me, nor is it shown that the relator was aware of the fact of Mr. Sparks having even addressed the electors at the close of the election, or having in any way concurred in his election, for had he been a consenting party in any way to Mr. Sparks' election, or to the conduct of the returning officer on the occasion, I think he would be debarred from objecting to the election afterwards, unless under very peculiar circumstances; for where one recognizes the official character of another, by treating with him in such character or otherwise, this is at least *prima facie* evidence of his title against the party recognizing it. 10 East 104.

The defendant's affidavits all state that the returning officer on the day of the election, between the hours of ten a.m., and one p.m., immediately closed the poll upon Mr. McHenry's retiring from the contest, in favor of Mr. Sparks and Mr. Scott. The 97th section of the Municipal Act relates to and defines the duty of a returning officer. It says he may close the election in one hour after commencing it, if no more candidates are proposed than the number he is to return, but if polling takes place, he is to keep his poll open until four o'clock p.m., unless between three and four o'clock, free access, &c., to the poll being allowed, no elector gives or tenders his vote, in which case he may close the poll on the first day, and if he do not do so, he shall adjourn until ten o'clock next day, and may at any hour of such day, between ten and four o'clock, close the poll, but always provided no qualified elector gives or tenders his vote for one hour next before his closing. As before remarked, in this case the poll was closed immediately after Mr. Henry's retiring, without any evidence that no elector gave or tendered his vote for an hour before; *non constat*, that there were not many voters waiting to vote for Mr. Henry, and had time been allowed and a majority voted for him, he might have been forced to accept the office or pay the penalty for not doing so. The law declares that a returning officer has no right to take upon himself to close the poll, after a contest is once entered into, until an hour has elapsed without a voter presenting himself, and even if he be aware that all parties have full opportunity of coming to the poll, yet do not come, he cannot exercise any judgment in the matter, but must keep the poll open for the hour prescribed. See the judgment of Chief Justice Draper in *Lawrence* v. *Woodruff et al*, and also *Regina ex rel Smith* v. *Brouse et al*, 1 U. C. Prac. Rep. 180.

Had I, however, any conclusive authority, that such an act or statement as that made by the defendant at the close of his election, constituted the acceptance of office mentioned in the statute, I think I should be bound to consider the election properly closed, as the relator in his statement filed, makes no objection on this point. It is by the defendant's affidavits alone, that the manner in which the poll was closed appears.

May not the 128th section of the act contemplate different cases in which action may be taken by an elector? For instance, may he not object to an election on the ground that it was not held in the proper place, or on the proper days, or that the returning officer did not act legally in some part of his duty, and that for such cause, and without any charge being preferred against those elected, the election is vitiated. In such a case it is clear action must be taken within six weeks after such an election, because the relator has every means of knowing when and were the election took place, but if he proceed against an individual for usurping an office, he cannot know whether he does so or not until he has shown by some act of his, that he has accepted the office. The judgment in *Regina ex rel Roseburgh* v. *Parker* ubi supra, contemplates such cases.

As the only evidence I have of Mr. Sparks having accepted the office before the day of his formally taking the oath of office, is so unsatisfactory to my mind, and no evidence whatever being adduced, that the relator was aware of his having said or done any thing from which his acceptance of office could be inferred, until his oath of office became a public act, I am forced to the conclusion that the application was made in time, and that defendant is not entitled to hold his seat, and should be removed.

The spirit of the Municipal Act, and the solemn judgments of as many as four Judges, are so decidedly opposed to any person having a pecuniary interest in a matter which may become the subject of discussion in the Council, holding a seat in that Council, that I think I am bound to give the relator the benefit of any doubt I may entertain, as to the regularity of his proceedings.

My judgment, therefore, is that the defendant, Nicholas Sparks, is disqualified from holding the office of Alderman for the City of Ottawa; that he be removed from that office; that he pay the relator, Henry Horne, his costs; and that a new writ for the election of an Alderman instead of Mr. Sparks, be issued for Wellington Ward, in that City.

DIVISION COURTS.

In the First Division Court United Counties of Frontenac, Lennox & Addington.

PATRICK HYLAND v. JOHN WARREN.

The jurisdiction of the Division Courts is restricted to forty dollars in actions brought purely and simply to recover uncertain damages depending on matters of opinion, whether the cause of action arose out of tort or breach of agreement.

This action was founded upon the following particulars of claim:—"$100. Patrick Hyland claims from John Warren the sum of one hundred dollars for damages on a breach of contract."

The cause was tried before the Judge of the County Court at the sittings of the First Division Court at Kingston, in the month of January, 1860, when a judgment of non-suit was entered, on the ground that the Division Court had no jurisdiction to try the matter.

The plaintiff moved afterwards to set the non-suit aside and for a new trial, contending that the Division Court had jurisdiction.

MACKENZIE, JUDGE.—The jurisdiction of the Division Courts in Upper Canada is regulated by the 54th, 55th and 59th sections of 19th chapter of the consolidated statutes of Upper Canada By the 55th section it is enacted that the judge of every Division Court may hold a plea of, and may hear and determine in a summary way, for or against any person, bodies corporate or otherwise.

1st. "All personal actions where the debt or damages claimed do not exceed forty dollars, and

2nd. "All claims, 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 dollars.

"And by the 59th section it is enacted that a cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than one hundred dollars, shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds 200 dollars."

It does appear to me when an action is brought in the Division Court purely and simply to recover uncertain damages depending on a matter or matters of opinion that the jurisdiction of the Division Court is restricted to forty dollars, whether the subject matter of the action arouse out of tort or contract. The statute divides cases tryable in the Division Court into two classes. The first into personal actions of debts or damages not exceeding 40 dollars, whether the subject matter of the action arises out of contract or tort. The second into claims and demands of debt, account or breach of contract, covenant or money demand, where the amount or balance claimed does not exceed 100 dollars

The word Damages, which has in law a well understood and defined meaning, is not used at all in the Statute in reference to the second class of cases. It is confined in it to the first class of cases, namely, to personal actions brought for the recovery of debts or damages which do not exceed $40. Damages in reference to actions are, according to general acceptation, the estimated equivalent for detriment, injury, or breach of agreement, or in other words, a

recompense for what a plaintiff hath suffered by means of a wrong done to him by a defendant. In regard to the Division Courts, the word damages I apprehend, means that compensation which is adjudged or given by the Judge or Jury to a plaintiff to repair or make up the loss he sustained by reason of the defendant's wrongful act. The first class of cases enumerated in the statute embraces all personal actions (with a few exceptions specified in the Act) where the debt or the damages claimed do not exceed forty dollars. Whereas on the other hand, the second class is confined to claims and demands of debt, account or breach of covenant, or money demand where the amount or balance claimed does not exceed one hundred dollars. The words "amount" and "balance" regulating the second class of cases are not synonymous with the words debt or damages used in the statute as the regulating expressions of the first class. The word "amount" I conceive to mean the sum total of two or more numbers, or the sum arrived at when several parts or figures are added together, and the word "balance" the difference between two sides of an account. The second class of cases seems to me to be intended for the adjustment of accounts and ordinary transactions carried on by the ordinary agencies of entries and figures, and balances ascertained by the usual process of computation, or for the adjustment of subject matters of dispute, where an amount or balance can be arrived at by a common process of valuation and reckoning, whereas the first class of cases extends to the recovery of unliquidated damage to the extent of forty dollars, that is to say, for the recovery of uncertain damages to that extent, to be ultimately ascertained and estimated by the Judge or a Jury, as the case may be, according to the opinion which he or they may form, in respect of such facts and circumstances as shall be proved at the trial. The present action having been brought to recover uncertain or unliquidated damages to the extent of one hundred dollars, merely for an alleged breach of some agreement, I think the Court had no jurisdiction to try it, its jurisdiction in this respect being limited to forty dollars, consequently a new trial must be refused.

New Trial refused.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Can you inform me if the Courts, on an appeal against an award under the Municipal laws, have power, independently of form, to go into the merits of the arbitration, and in fact sit in the place of the arbitrators?

An answer in your next will oblige.

Inquirer.

Walpole, 15th April, 1860.

[In the cases provided for by sec. 358, sub-sec. 13 (Consol. Stat. U. C. p. 631), of the Municipal Act, the Court, on an application to set aside an award, is to consider, not only the legality of the award, but the merits, as they appear from the proceedings filed, and may call for additional evidence, to be taken in any manner the Court directs, &c.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. Leversidge v. Broadbelt. *June* 15.

Contract—Agreement to pay debt to a person other than the creditor—Consideration.

C a builder, was indebted to L a timber-merchant, in the sum of £113, for which he had given two bills of exchange. B was indebted to C in a larger amount. Upon C being applied to for payment of one of the bills which had become due, he wrote and signed the following document: "I hereby agree to authorize B to pay L or his order the sum of £113, the amount of two acceptances together with the expenses on the bills and interest thereon, towards my account for building the cottages at W—B, to debit my account with the above money; also L's receipt to B I acknowledge shall be binding between myself and B on the contract." This document was taken by L to B who wrote thereon the word "acknowledged" and signed his name thereunder.

Held, that there was no binding agreement by B to pay the money to L, there being no consideration for the promise: and that an action could not be maintained by L against B for recovery of the money.

EX. Goodwin v. Cheveley. *June* 14.

Cattle—"Damage feasant"—Distress of—Whether within a reasonable time—Question for Jury.

Where some out of a large number of cattle, which were being driven along the high road, strayed into a field adjoining the road, the fences of which were in bad repair, and the drovers, instead of immediately getting them out, drove the remainder to a place of safety and then returned for those that had strayed, and in the meantime the owner of the field impounded them.

Upon an action of trespass by the owner of the cattle for impounding them before a reasonable time had elapsed for him to remove them.

Held, that what was a reasonable time should be decided by the jury with reference to the circumstances of the particular case, and the learned Judge having directed a verdict to be entered for defendant, this verdict was set aside and a new trial granted.

EX. C. Bonomi and Wife v. Backhouse.

Statute of Limitations—Mines—Right to support—Cause of Action Excavation of contiguous land more than six years before Action—Consequential damage within six years—Easement.

The right to the support of land rests upon a different footing to that of buildings, the former being *primâ faciæ* a right of property, but the latter being founded upon prescription or grant. In either case where the right exists, no cause of action accrues to an adjoining owner against the owner of the contiguous land; but a cause of action will accrue to an owner adjoining when accident to his land or buildings results from such excavation.

Therefore, where in an action by the plaintiff, as the owner of the reversion of certain messuages and buildings, for negligently working mines without leaving proper support, so that the buildings of the plaintiff and his reversionary interest therein were damaged, it was proved that the plaintiff was the owner of the surface under and on which were an ancient house and other buildings, and that the defendant having worked the mines under and near the plaintiff's premises leaving proper support, afterwards worked other mines 280 yards from the plaintiff's property, and in such a way that the roof and surface fell in and caused a thrust, which gradually extended through the intervening workings to those under the plaintiff's premises, causing the surface to subside so as to damage the foundations and walls of the plaintiff's buildings; and the working which caused the thrust was more than six years before action brought, but the actual damage to the building did not commence till within the six years.

Held, (reversing the judgment of the Queen's Bench) that no cause of action arose until the actual damage, and therefore that the statute of limitations was no bar to the action.

EX. Mylton v. The Midland Railway Co.

Railway Company—Contract to carry passengers over line of other Company—Responsibility for loss of baggage.

Where a railway company undertakes to carry a passenger to a station upon the line of another company, and gives a ticket for one fare for the entire distance, the contract is an entire contract with the company granting the ticket; and they do not act as agents for the other company so as to give the passenger a right of action against the other company in case of loss of baggage while travelling upon their line; but the action must be brought against the company who gave the ticket.

Q. B. LOZANO v. JANSON. June 16.

Policy of Insurance—Capture at Sea—Total loss.

A ship upon which there was a policy of insurance against (*inter alia*) "takings at sea, arrests, and detainers," was captured by a British vessel of war as being engaged in the slave trade, she was condemned by the Court of Admiralty at St. Helena, and notice of abandonment was given to the insurers. Two years afterwards the decree of the Court of Admiralty at St. Helena was reversed by the Privy Council, at which time part of the goods being perishable had been sold, and the remaining part might have been carried to their destination at an expense something less than their value when delivered.

Held, that the capture was within the terms of the policy. That there was a total loss at one time of the goods insured. That the circumstances which supervened did not reduce that total loss to a partial loss only.

EX. STURGIS, *Assignee, &c.*, v. DARRELL, *Administrator.*

Statute of limitations—Specialty—Abatement by death—Commencement of action against Administrator within reasonable time, although more than twenty years from accrual of cause of action.

An action on a bond abated by the death of the obligor. Within a year after letters of administration were taken out the assignee of the plaintiff (who had since the abatement of the action taken the benefit of the Insolvent Debtors' Act) commenced an action against the administrator.

More than twenty years had at the time such second action was brought elapsed since the forfeiture of the bond.

Held, that the statute of limitations afforded no answer since the second action was commenced within a reasonable time after the taking out of letters of administration.

EX. HORTON v. SAYER. June 8.

Arbitration—Covenant for referring disputes, when binding—Ouster of Jurisdiction.

By a covenant in a mining lease the parties covenanted to refer to arbitrators to be chosen by themselves, after any dispute should arise, "any difference, varience, controversy, doubt or question which should arise,—touching and concerning any covenant, clause, proviso, word, matter or thing in the indenture, expressed or contained, or the meaning or construction thereof," and covenanted not to sue in respect of any of these matters.

Held, that the covenant afforded no answer to an action for breach of another covenant contained in the lease, since its operation being to oust the Courts of their jurisdiction, it was therefore void.

CHANCERY.

L. J. TAYLOR v. THE GREAT INDIAN P. R. CO. July 15.

Vendor and Purchaser—Transfer of Shares in Blank—Agency—Fraud.

A., who was the holder of £2 and £20 shares in a railway company, instructs his broker to sell sixty of his £2 shares. The broker brought A. for his signature two deeds of transfer, the numbers and particulars of shares, and the name of the transferee being left in blank.

The transfer deeds, which bore a stamp sufficient to pass upwards of sixty £20 shares were signed in this state by A. in the belief that his £2 shares would be thereby transferred. B. fraudulently offered for sale on the Stock Exchange eighty £20 shares of A. which were purchased by C. at the market price. The blank transfer deeds were handed to C., who filled up the numbers of the shares and the name of the transferee It appeared to be the custom among brokers and jobbers to accept blank transfers in this manner.

Held, that notwithstanding A.'s negligence in executing the deeds in blank and in not taking notice of the stamp upon them, C., who had taken an instrument on the face of it void at law, was not entitled to rely on his purchase, which was accordingly set aside. The Court refused to recognize the alleged custom of accepting transfers in blank, as being contrary to the policy of the law.

L. J. *Ex parte* WOOLASTON RE H. C. & G. L. ASSURANCE CO.

Joint Stock Company—Contributory—Misrepresentation—Forfeiture.

The secretary of a company represented to W. that two medical referees only would be appointed, and that he might be one of them if he would qualify himself by taking 200 shares. W. took 200 shares, and was appointed a medical referee; but soon afterwards finding that four referees had been appointed he resigned his office, and demanded back the sum which he had paid.

Held, that there was no such misrepresentation or breach of contract on the part of the Company as to exonerate W. from his liability as a shareholder.

The deed of settlement of a Joint Stock Company provided, that if any shareholder did not pay his calls the secretary might send him a notice requiring payment within 21 days; and if he did not pay in that time the directors might declare the shares forfeited, and the same should be forfeited accordingly. A shareholder having refused to pay his calls the secretary sent him the required notice, that if he did not pay the calls within 21 days his shares would be forfeited.

The shareholder made default and took no further notice of the matter, and the company made no further declaration of forfeiture, but suffered the shareholders name to remain on the register for more than two years until the company was wound up.

Held, that the shares were absolutely forfeited, and the shareholders name was removed from the list of contributories.

Whether the declaration of forfeiture was made before or after the expiration of the 21 days was a matter of form not of substance.

L. J. THOMPSON v. WEBSTER. July 21.

Voluntary settlement—Consideration—Costs—Stat. 13 *Eliz., ch.* 5.

A. being indebted to the plaintiff, but not insolvent, applied to his mother for a loan of £190. She cosented to advance the money, on condition that A. would settle a certain freehold estate on his children. Two deeds were accordingly executed, by one of which A. mortgaged certain other estates to his mother, to secure the repayment of £400; and by the other he settled the first mentioned estate on himself for life, and after his death, on his children and their issue. Neither deed contained any reference to the other. A. afterwards became insolvent.

Held, that the settlement was made for valuable consideration, and was within the proviso contained in the 6th section of the 13th Eliz., c. 5; and that it was not material whether the whole of the £400 secured by the mortgage, was actually due from A.

The preparation of such a settlement, without disclosing on the face of the deed the true circumstances of the case, was unjustifiable, and led to grave suspicion. And the Court, wishing to encourage complete investigation of similar transactions, dismissed the plaintiff's bill without costs.

M. R. HARTLAND v. MURRELL. July 6.

Will—Construction—Charge of debts.

Under a will containing a direction to the executors, to pay debts, and a devise of all realty to them upon trusts, for the benefit of the widow and family.

Held, that the executors had power to mortgage the real estate for payment of debts.

M. R. ARMSTAGE v. WILLIAMS. July 21.

Will—Construction—Class—Vesting.

Under a direction to trustees of a will, that a trust fund was to be applied to the education of the children of A. and B., in equal shares, and on their attaining to the age of 21, the whole to be sold and divided equally among them.

Held, that all the children took vested interests on their birth, and that the fund was divisible *per capita*.

L. J. PAYNE V. MORTIMER. *June* 30.

Voluntary bond—Subsequent assignment for value.

A. entered into a voluntary bond for the payment of a certain sum, to be divided among his children as therein mentioned. Two of the sons afterwards married, in the lifetime of A., and in consideration of marriage, assigned their shares under the bond, to the trustees of their marriage settlement; A., or his solicitor, having notice in both cases of the intention to do so.

Held, that the shares of the sons were not to be considered in equity, as debts voluntarily incurred; but ranked as specialty debts for value, in the administration of A's. Estate.

M. R. BANK OF LONDON V. TYRRELL. *June* 30.

Solicitor—Sale to client—Extent of relief.

A solicitor while engaged in getting up a bank, but before the Company was formed, arranged with the owner of certain premises —the purchase money of which was for the most part unpaid—to take half his interest, and negotiated a sale of the premises to the Company when it was formed, and he had been appointed solicitor without disclosing his interest in the premises. On the discovery of the fact, the bank filed a bill to make their solicitor and his co-owner, account for their profits on the sale to the bank, but did not rescind the purchase.

Held, that the solicitor was liable to account for his profits, but no decree against his co-owner.

P. C. W. TRICKER V. KINGSBURY. *July* 16.

Will—Construction—Condition in restraint of marriage—Cesser of interest.

W. M. by his will, after devising the fee simple of his real estates to his son and daughter, gave the rents and profits thereof to his wife, until his son should attain twenty-one.

He then bequeathed to her his funded property, in consideration of her maintaining and educating his children, and also gave her his household furniture, &c. But his will was, that if she married again before his son attained twenty-one, all her interest under the will should cease.

Held, that the condition was not merely *in terrorem*, and that the whole of her interest under the will ceased on her second marriage.

L. C. RABBETH V. SQUIRE. *June* 8.

Will—Construction—" Use and occupation "—Conditional gift.

A testator desired that his two sons should, if it were their desire, have the use and occupation of M's. lands, they paying a certain rent, &c. And that in default of payment, &c., they should no longer have possession.

Held, that the gift was not not conditional upon personal use and occupation.

L. C. WILSON V. KEATING. *July* 16.

Specific performance—Sale of shares.

A transfer of shares from W. to K., was negotiated through the intervention of third parties. The deed of transfer recited a contract by K., to purchase 105 shares at £5 per share, and the receipt of the purchase was acknowledged but not endorsed. W. executed the transfer with the understanding that K. was purchasing for himself, and that the money was to be paid within a year, the shares being, in the meantime, deposited as security. K. executed the transfer at the request of S., and upon the representation that the money had been paid, and that K. would be merely a holder in trust for S. W. was not a party to the representations made by S.; and, except by executing the transfer, K. had entered into no contract, and had given no authority for the purchase of the shares. The purchase money was not paid. Upon a bill for specific performance by W.,

Held, confirming the decision of the Master of the Rolls, that K. was bound by the contract, and liable to pay for the shares so transferred to him.

L. C. SQUIRE V. RABBETH. *June* 8.

Will—Implication of cross remainder.

Gift by will of one-fifth share of real and personal estate, for each of testators children for life; and after his or her decease, for his or her children, which he or she should leave at death; and and if he or she should leave none, then, as to *corpus* for grandchildren, *per capita*. One child died, leaving a child who died in the lifetime of others of the testator's children.

Held, that the grandchild did not take any estate during the life of the surviving children of the testator.

Held, also, that cross remainders were not to be implied here.

L. J. THOMPSON V. WHITELOCK. *July* 4.

Will—Construction—Mistake—Legal representatives—Lapse—Exception out of residue.

A testator gave a legacy to each of his brothers and sisters by name, or to their legal representatives, to be paid to them in two years after his death; and he also gave other legacies to his nephews; all of the legacies together amounting to £6,100. He then gave the residue of his property to his widow, absolutely, except £4,100, which she was to have during her life, and after her death, it was to be divided among his relations, "in proportion to the legacies left above, which will just make their legacies double the first bequest." One of his sisters, and two of his nephews, died in his lifetime, after the date of his will.

Held, on the construction of the will, that with respect to the apparent miscalculation as to the £4,100 doubling the previous legacies, it was not sufficiently clear that that sum was written by mistake, to justify the Court in departing from the words of the testator.

That the words "or their legal representatives," did not constitute a substantive gift, but that the share of the deceased legatee, lapsed.

That the sum of £4,100, was not a portion taken out of the residue, but excepted from it; and therefore the share that lapsed, fell into the residue, and did not go to the next of kin.

V. C. S. THIEDEMAN V. GOLDSCHMIDT. *July* 18.

Bill of Exchange—Acceptance obtained by fraud—Forged bill of lading—Right of acceptor to relief in equity against indorsee, for value.

The consignee of goods, who has accepted bills of exchange drawn by the consignor, residing abroad, and which were presented for acceptance by the endorsees for value, accompanied by a document which purported to be, and which they believed to be, a genuine bill of lading of the goods, but which afterwards proves to have been a forgery, is not bound by his acceptance, and is entitled to an injunction restraining the endorsees, though innocent parties to the fraud, from negotiating or enforcing payment of the bills.

M. R. PEARSON V. AMICABLE SOCIETY. *July* 8.

Voluntary assignment—Policy.

A voluntary assignment of a policy on the assignor's life, containing an irrevocable power of attorney, held good against the executors of the assignor.

L. C. & L. L. J. SCHOLEFIELD V. TEMPLER. *June* 24.

Principal and surety—Fraud—Mutual mistake.

B. and T. being indebted as principal and surety to S., upon some promissory notes, false representations were made by B., upon which T. pressed S. to accept, and S. did accept, as a security for the debt, the transfer of a mortgage, and thereupon erased T's. name from the notes. The mortgage proved invalid and worthless.

Held, that although T. was innocent of the fraud, yet he must not be allowed to gain by it, and he, therefore, was still liable as surety, motwithstanding the erasure of his name.

V. C. W. RE SEYMOUR'S TRUST. *June* 30.

Will—Construction—Contingency.

Testator gave a sum of £2,000 to pay the interest, &c., for the support and benefit of his son A. during his life, and after his death to pay and divide the *corpus* between testator's daughter B, and such of her children as should be living at the death of A, and the executors or administrators of such of B's children as should be then dead, leaving any child or children living at the death of A. in equal shares, so that such executors or administrators of any such grandchild (of testator) so dying and leaving a child or children should take the same, share as such grandchild would have taken if he had been living at the death of A.

The testator died in 1846, and A. in 1858. In 1855, C. one of B's children, became bankrupt, and his reversionary interest in the £2,000 was sold by his assignees. C. died in 1856, leaving an infant child, and having appointed his widow his executrix.

Held, that the gift to the "executors and administrators" of the grand-children was not to them beneficially, and that the purchaser of C's reversionary interest from the assignees, was entitled as against C's executrix and infant child.

M. R. SMITH V. EVERELL. *June* 27.

Good will—Banking business—Executors' power to bind each other.

The good-will of a banking business belongs, in the absence of special agreement, to a surviving partner and the executors of a deceased partner, in proportion to the shares of partners. But in apportioning the proceeds of a sale of the business, regard must be had to the circumstances—as, for instance, that the premises belong to the surviving partner, and the right of issuing notes belonged exclusively to the surviving partner.

One or two executors may settle an account so as to bind their co-executors, in the absence of fraud, or possibly, of very gross error.

L. C. & L. L. J. STRINGER V. GARDINER. *July* 2.

Will—Construction "Niece"—Parol evidence.

A testator bequeathed a legacy to his niece E. S. At the time of making his will and of his death, he had not a niece E. S.; but some years before he had one so named, of whose death he was aware.

Held, that E. J. S., a great-great niece then living, was entitled.

L. J. DICKSON V. WILKINSON. *July* 8.

Solicitor—Negligence—Jurisdiction—Receiver.

Where a firm of solicitors act for a plaintiff in a suit, and also for the receiver, remittances made by the receiver to them, are received in the character of solicitors to the receiver, and they are not accountable for them to the plaintiff.

Whether there is any jurisdiction in the Court of Chancery, to make a solicitor answerable to his client for negligence, where there has been no fraud or misconduct, *quære*.

If there be such jurisdiction, it is a matter of discretion whether the Court should exercise it. And in such case, the client must show a clear case of damage, and that the Court of Chancery can alone give complete relief.

L. J. RE CANT'S ESTATE. *July* 8.

Right of pre-emption—Railway Company—Compulsory powers.

A testator gave real estate, including some garden ground, to trustees, in trust for his wife for life, and after her death, upon trust to sell and divide the proceeds among his children, with a proviso that one of his sons should have a right of pre-emption of the garden ground, at a fixed sum. After the testator's death, but before the trust for sale arose, a railway company took the garden ground under their compulsory powers, and paid the compensation money, which was more than the price fixed by the testator, into Court.

Held, that the right of pre-emption was not lost by the compulsory sale, but that the son was entitled to compensation money, subject to the deduction of the price fixed the by testator.

REVIEW.

THE LAW CHRONICLE: Editor, Henry Flowerden; Publisher, David Robertson Clark, High Street, Dundee, Scotland.

We have to thank the proprietor for Vols. II. & III. of this neat and useful publication. The editor is procurator before the Burgh Court of Dundee, and Sheriff and Commissary Courts of Forfarshire. The *Law Chronicle* contains reports of cases decided in different Sheriff's Courts, illustrative of the practice prevailing in the County Courts of Scotland. It contains besides, observations on the constitution of the Sheriff's Courts, and mooted questions of Law Reform, in connexion with the Courts. We are quite surprised to find so complete and so useful a Law serial, published in a Provincial Town of Scotland, and shall often recur to its pages for information. In some respects the administration of Law in Scotland excels that of England, and we have to thank the proprietor of the *Law Chronicle*, for enabling us to some extent, to make the comparison.

HARPERS'S MONTHLY MAGAZINE. Published by J. Harper & Brothers, Franklin Square, New York.

We have to acknowledge the receipt of the May number of this well known Magazine. It completes the *twentieth* volume. The publishers, in referring to its history, say: "With each successive number of the Magazine, the number and value of the original papers offered has increased, and for five years the Magazine has been filled mainly with original papers by American writers especially for its pages." It is also mentioned that the design of the publishers having been to make the Magazine one of art as well as literature, nearly seven thousand illustrations, at a cost of $150,000, have been inserted in its pages.

Terms.—One copy for one year, $3; two copies for one year, $5; three or more copies for one year (each), $2. Clergymen and teachers supplied at $2 per year.

THE UNITED STATES INSURANCE GAZETTE for April, and GODEY'S LADY'S BOOK for May, received.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

HENRY W. DAY, Esquire, M.D., Associate Coroner County of Hastings.—(Gazetted 14th April, 1860.)

HENRY W. DAY, Esquire, M.D., Associate Coroner County of Northumberland, —(Gazetted 14th April, 1860.)

ALEXANDER HAMILTON, Esquire, M D., Associate Coroner of United Counties York and Peel,—(Gazetted 14th April, 1860.)

P. TERTIUS, Esquire, Associate Coroner County of Welland.—(Gazetted 14th April, 1860.)

CHARLES WILLIAM BUCHANAN, Esquire, M.D., Associate Coroner City of Toronto.—(Gazetted 21 t April, 1860.)

ALEXANDER McKENZIE, Esquire, Associate Coroner United Counties Stormont, Dundas and Glengary.—(Gazetted 21st April, 1860.)

NOTARIES PUBLIC.

GEORGE S. McKAY, of Yorkville Esquire, to be a Notary Public in Upper Canada.—(Gazetted 14th April, 1860.)

ALEXANDER LAWSON, of Port Coborne, Esq., to be a Notary Public in Upper Canada.—(Gazetted 14th April, 1860.)

WILLIAM GREY, of Woodstock, Esquire, to be a Notary Public in Upper Canada. —(Gazetted 14th April, 1860.)

HENRY WHITE, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 21st April, 1860.)

GEORGE NEIMEIER, of Newstadt, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 21st April, 1860.)

TO CORRESPONDENTS.

DIVISION COURT CLERK — A DIVISION COURT CLERK — JOHN C. MEREDITH — JOHN COOL—Under "Division Courts."

INQUIRER—Under "General Correspondence."